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BRIEFS
ON THE
LAW OF INSURANCE

W. Cooley
By ROGER W. COOLEY

IN FIVE VOLUMES

VOLUME 2

ST. PAUL, MINN.
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JUN 30 1911

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BRIEF BOOK
ON
INSURANCE
VOLUME 2

U. S. Ins.

(909A)

VIII. PREMIUMS AND ASSESSMENTS.

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1. PREMIUMS AS CONSIDERATION FOR CONTRACT.

(a) Scope of discussion.

The subject of the liability of insured to pay the premiums, dues, or assessments stipulated for in his policy presents three distinct questions—the necessity of the payment of the first premium as a condition precedent to the policy taking effect, the right to and the liability for premiums regarded merely as consideration for the insurance, and the right to forfeit the policy for the nonpayment of premiums or assessments. The necessity of the payment of the first premium to complete the contract has been discussed.¹ The following briefs are intended to cover the more general rules as to the rights and liabilities of the parties in relation to the payment of premiums regarded as consideration for the contract. It is true that many of the questions presented are closely related to similar questions arising where a forfeiture is claimed by reason of nonpayment, and it may be that, logically, the general rights and liabilities and the special rights and liabilities arising under conditions of forfeiture should be considered together. Considerations of a practical nature have, however, made it advisable to treat these phases of the questions separately. The present discussion is general in its scope, covering only the principles on which the general obligation to pay premiums is founded. The special questions which, in practice, arise only when forfeiture is claimed by reason of nonpayment, will be considered in a subsequent series of briefs.

¹ See ante, p. 461.

**2. RIGHT TO AND LIABILITY FOR PREMIUMS IN GENERAL—
INSURANCE OTHER THAN LIFE OR ACCIDENT.**

- (a) Right of insurer to premiums.
- (b) Rights of agents, brokers, etc.
- (c) Persons liable for premiums.
- (d) Amount of premium.
- (e) Same—Employer's liability insurance.
- (f) Payment of premium in general.
- (g) Persons to whom payment may be made.
- (h) Notes for premiums and liability thereon.
- (i) Same—Conditions making whole note payable on failure to pay installments when due.
- (j) Same—Conditions forfeiting or suspending policy on failure to pay note or installment.
- (k) Same—Insolvency of insurer.
- (l) Same—Fraud or false representations on the part of the insurer.
- (m) Assignment or transfer of note.
- (n) Persons liable on notes for premiums.
- (o) Actions for premiums.

(a) Right of insurer to premiums.

It is obvious that a contract of insurance requires the support of a valuable consideration to make it binding. The consideration passing from the insured is usually in the form of a premium, which the insured pays or agrees to pay the insurer for the assumption of the risk; but, as stated in a previous brief,¹ prepayment of the premium is not so strictly required as a condition to the validity of a contract of fire or marine insurance as in the case of life insurance. However, when the policy attaches, the premium, if not paid, becomes an obligation which the insurer is entitled to recover from the insured.

Reference may be made to *Taylor v. Lowell*, 8 Mass. 331, 3 Am. Dec. 141; *Cleveland v. Fettyplace*, 3 Mass. 392; *Homer v. Dorr*, 10 Mass. 26; *Merchants' Ins. Co. v. Clapp*, 11 Pick. (Mass.) 56; *Insurance Co. of North America v. Rogers*, 78 Me. 191, 3 Atl. 283.

On the other hand, if the risk does not attach, the insurer is not entitled to the premium, and has no claim therefor which can be enforced.

Taylor v. Lowell, 8 Mass. 331, 3 Am. Dec. 141; *Cleveland v. Fettyplace*, 3 Mass. 392; *Homer v. Dorr*, 10 Mass. 26; *Merchants' Ins. Co. v. Clapp*, 11 Pick. (Mass.) 56; *Nye v. Ayres*, 1 E. D. Smith (N. Y.) 532.

¹ See ante, vol. 1, p. 461.

Though the insurer's right to the premium accrues on the attaching of the risk, still, whenever the insurance ceases in favor of the insurer, the premium ceases to accrue against the insured, in the absence of an express provision to the contrary (*Matthews v. American Ins. Co.*, 40 Ohio St. 135). But, on cancellation of the contract by the insurer, in accordance with its terms, the insurer is entitled to the premiums earned during the time the risk was carried (*Hibernia Ins. Co. v. Blanks*, 35 La. Ann. 1175); and an insured who seeks to rescind the contract is liable for any part of the premium which may have matured previous to such rescission (*American Ins. Co. v. Garrett*, 71 Iowa, 243, 32 N. W. 356). The fact that an insurance company becomes insolvent does not release the insured from liability for the premium, if the company was solvent when the risk attached and has reinsured the risk in a solvent company (*Equitable Ins. Co. v. Harvey*, 98 Tenn. 636, 40 S. W. 1092). But, if the policy is canceled by the parties on the insolvency of the company, the insured is thereby discharged of his liability (*Merchants' Mut. Ins. Co. v. Underwood*, 3 N. Y. Super. Ct. 474).

A foreign insurance company, which has failed to comply with the laws of the state regulating the business of such companies, is not entitled to recover on premium notes for policies issued.

Reference may be made to *Farmers' & Merchants' Ins. Co. v. Harrah*, 47 Ind. 236; *Cassaday v. American Ins. Co.*, 72 Ind. 95; *Franklin Ins. Co. v. Louisville & A. Packet Co.*, 9 Bush (Ky.) 590; *Williams v. Cheney*, 3 Gray (Mass.) 215; *Id.*, 8 Gray (Mass.) 206; *Lycoming Fire Ins. Co. v. Wright*, 55 Vt. 526; *Ætna Ins. Co. v. Harvey*, 11 Wis. 394; *Madison Mut. Ins. Co. v. Ecker*, 16 Fed. Cas. 365; *Daniels v. Barney*, 22 Ind. 207.

In *Beeber v. Walton*, 7 Houst. (Del.) 471, 32 Atl. 777, it was held that this rule governs, even though the company subsequently complies with the statute. But a contrary doctrine is asserted in *American Ins. Co. v. Wellman*, 69 Ind. 413. If, however, the laws of a state provide that a policy of a foreign insurance company shall not be invalid because of a failure to comply with the law, the company is entitled to recover on a premium note for policies written in the state, notwithstanding a noncompliance with the statutory requirements.

Union Ins. Co. v. Smart, 60 N. H. 458; *Provincial Ins. Co. v. Lapsley*, 15 Gray (Mass.) 262; *Lester v. Webb*, 5 Allen (Mass.) 569.

If insurance in a foreign company is procured through a broker, or an agent merely authorized to solicit insurance, a recovery of the

premium cannot be defeated because the company is not authorized to do business in the state, as in such case the contract is, in fact, made with the company, and thus outside the state; the agent or broker being simply a conduit.

Lamb v. Bowser, 14 Fed. Cas. 982, affirming 14 Fed. Cas. 980; *Ward v. Tucker*, 7 Wash. 399, 35 Pac. 1086.

So, if the laws of a state merely aim to regulate the business of insurance agents, the insurer is entitled to recover on a premium note, though the statute has not been complied with by the agent through whom the policy was procured.

Marshall v. Reading Fire Ins. Co., 78 Hun, 83, 29 N. Y. Supp. 334; *Continental Ins. Co. v. Riggen*, 31 Or. 336, 48 Pac. 476.

With reference to an underwriter's right to a maritime lien for premiums, the weight of authority supports the rule that under the general maritime law there is no lien on a vessel for premiums due on marine policies.

Reference may be made to *The John T. Moore*, 13 Fed. Cas. 897; *Mutual Fire Ins. Co. v. The S. G. Andrews*, 17 Fed. Cas. 1078; *In re Insurance Co. (D. C.)* 22 Fed. 109; *Sun Ins. Co. v. The Hope (D. C.)* 49 Fed. 279; *Learned v. Brown*, 94 Fed. 876, 36 O. C. A. 524; *Tiner v. The Bride*, 5 La. Ann. 756. Contra: *The Illinois*, 12 Fed. Cas. 1178, and *The Dolphin*, 7 Fed. Cas. 862, affirmed 7 Fed. Cas. 866, but disapproved in *Insurance Co. v. Proceeds of the Waubashene (C. C.)* 24 Fed. 559, and *The Daisy Day (D. C.)* 40 Fed. 538.

Under statutory provisions, there may, of course, be a lien; but, to maintain a lien under the Pennsylvania law,² the underwriter must hold a note or other acknowledgment of indebtedness given for the premium (*Srodes v. The Collier*, 22 Fed. Cas. 1019, affirmed *Id.* 1025). And the New York law does not give an underwriter a lien on a foreign vessel for the premium on insurance effected in a foreign country (*In re Insurance Co. [D. C.]* 22 Fed. 109). Under the Maine law, giving materialmen a lien,³ an insurer is not entitled to a lien for the premium on insurance procured on a cargo of timber used in the construction of a vessel by a person other than the vendor of the timber (*The Kearsarge*, 14 Fed. Cas. 165).

(b) Rights of agents, brokers, etc.

If an insurance agent extends credit to an insured, and is charged with and becomes liable to the company for the premium, he

² Act Pa. 1858 (P. L. 363).

³ Rev. St. Me. 1847, c. 125, § 33.

thereby becomes interested in the subject-matter, so that, on paying the premium, he is subrogated to all the rights of his principal in the premium, entitling him to sue therefor (*Waters v. Wandless* [Tex. Civ. App.] 35 S. W. 184), and no assignment is necessary to enable him to recover (*Gillett v. Insurance Co. of North America*, 39 Ill. App. 284). But, if an agent has no right by subrogation or assignment, he is not entitled to bring an action in his own name to recover the premium due on a policy issued by him.

Lounsbury v. Durckrow, 50 N. Y. Supp. 927, 22 Misc. Rep. 434; *Ross v. Rubin*, 54 N. Y. Supp. 1036, 25 Misc. Rep. 479.

The fact that an agent, after commencing suit to compel the payment of premiums on policies procured through him, pays the premiums, without a request by the insured, or by virtue of any obligation, does not entitle him to recover the amount he has thus voluntarily paid (*Ross v. Rubin*, 54 N. Y. Supp. 1036, 25 Misc. Rep. 479). But, if the agent advances the premium on an applicant's promise to pay, he may, on a subsequent cancellation of the policy and return of the unearned portion of the premium, recover from the insured the portion of the premium retained by the insurer (*Cobb v. Keith*, 110 Ala. 614, 18 South. 325). So an agent who advances the premium on a policy covering property conveyed in trust may recover the premium from the cestui que trust on the grantor's failure to pay, if the policy contains a provision making the cestui que trust liable for the premium on the grantor's default (*Boston Safe Deposit & Trust Co. v. Thomas*, 59 Kan. 470, 53 Pac. 472). Even though a policy on which an agent advances the premium, on insured's agreement to pay, is void, the agent may, nevertheless, recover the amount so paid from the insured, if there is a statutory provision requiring the insurance company to return unearned premiums on canceled policies (*De Wolf v. Washington*, 119 Wis. 554, 97 N. W. 220). But, if the policy is void on the ground that it is illegal to insure the subject-matter, the agent cannot recover the premium advanced thereon (*Touro v. Cassin*, 1 Nott & McC. [S. C.] 173, 9 Am. Dec. 680).

If it is the custom for marine insurance brokers to buy insurance and deliver policies to an insured on their own account, a broker can recover of the insured the premiums on policies procured by him, though he has not paid such premiums to the insurer (*Ward v. Tucker*, 7 Wash. 399, 35 Pac. 1086); and, if an insured directs a broker to charge premiums for insurance to the former's account,

the broker is entitled to recover such premiums, as the direction constitutes in itself a contract and promise to pay on the part of insured (*Taylor v. Lowell*, 3 Mass. 331, 3 Am. Dec. 141). But a ship's husband, as such, is not bound to insure a vessel; and neither he nor part owners, who insure the interest of their co-owners in a vessel without express authority, can recover the premium paid by them (*Turner v. Burrows*, 8 Wend. [N. Y.] 144). A mortgagor is entitled to recover from the purchaser on foreclosure the unearned portion of the premium paid by him on a policy assigned to the purchaser by the mortgagee, who had possession of the policy (*Sherman v. Fair*, 2 Speers [S. C.] 647). But a lessor, who has taken out a policy on the lessee's failure to do so, is not entitled to reimbursement by the lessee, where the policy was void ab initio (*Shirk v. Adams*, 130 Fed. 441, 64 C. C. A. 643). *Tannenbaum v. Bloomingdale*, 58 N. Y. Supp. 235, 27 Misc. Rep. 532, involved a contract with a firm to procure insurance for a property owner. The contract provided for yearly renewals at a specified rate, and was to expire three years after date. The policy was procured several months after the execution of the contract, and renewals were made at the expiration of each year. It was held that the insured property owner was liable for the entire premium for the last renewal, notwithstanding it included payment for insurance after the expiration of the contract.

(c) Persons liable for premiums.

A broker who procures insurance is a mere "go-between," and is not liable for a premium on a policy procured by him for another, unless he acts under a *del credere* commission (*Touro v. Cassin*, 1 Nott & McC. [S. C.] 173, 9 Am. Dec. 680); and this rule applies to marine insurance, unless abrogated by a usage, such as prevails in England, that a marine insurance broker, who procures a policy of insurance for a client, is alone liable to the underwriter for payment of the premium thereon, and must himself look to the insured (*Mannheim Ins. Co. v. Hollander* [D. C.] 112 Fed. 549).

If insurance is procured by an agent without disclosing his principal, the underwriter may, nevertheless, sue the principal for any unpaid portion of the premium (*Insurance Co. of Pennsylvania v. Smith*, 3 Whart. [Pa.] 520). But, if the agent discloses that others than himself are interested in the insurance, and the underwriters, having such information, do not request a disclosure of the principals, or have them made parties, but instead accept the note of

the agent for the premiums, the underwriters cannot look to the principals for payment of the premium note on the agent's default.

Patapsco Ins. Co. v. Smith, 6 Har. & J. (Md.) 166, 14 Am. Dec. 268;
Bedford Commercial Ins. Co. v. Covell, 8 Metc. (Mass.) 442.

However, if a partner obtains a policy made to him in his own name upon goods belonging jointly to the partners and payable to whom it may concern, in consideration of premiums to be paid by the parties for whom such insurance is effected, all the partners are liable for the premiums to the underwriter.

Sun Mut. Ins. Co. v. Davis, 24 N. Y. Super. Ct. 602. This rule also seems to find support in *Patapsco Ins. Co. v. Smith*, 6 Har. & J. (Md.) 166, 14 Am. Dec. 268. In *Adams v. Pittsburg Ins. Co.*, 76 Pa. 411, the evidence was held insufficient to show a custom authorizing a captain, in effecting insurance on a vessel, to bind the owners by signing the premium note; but on a subsequent appeal (95 Pa. 348, 40 Am. Rep. 662) it was held that if such a custom existed the owners would be bound.

Where the trustees of a church sign with their own names "as trustees" a premium note for insurance on the church, the church association not being named, they are liable personally (*American Ins. Co. v. Sorter*, 4 Ohio Dec. 226, 1 Cleve. Law Rep. 133). So a stockholder in a steamship company, who has procured insurance in his own name covering shipments on certain vessels of the company for a specified period, "on account of whom it may concern," loss, if any, payable to such stockholder, cannot avoid liability for premiums earned under such policy, on the ground that the insurance was, in fact, effected on behalf of the company, and that he had no insurable interest, as the terms of the policy are sufficiently broad to entitle the company to avail itself of the benefit of the insurance if a loss occurs, and the insured has an insurable interest in the risk covered by reason of the stock held by him (*Mannheim Ins. Co. v. Hollander* [D. C.] 112 Fed. 549). And an heir, procuring a policy on "the estate" of his deceased ancestor, does not escape liability for the premium because the other heirs repudiate the insurance, as the policy still covers his interest in the estate (*Phoenix Ins. Co. v. Hancock*, 123 Cal. 222, 55 Pac. 905).

If a policy delivered to a mortgagee contains a clause providing that no negligence on the part of the mortgagor shall invalidate the insurance, and that, in case the mortgagor refuses or neglects to pay any premium due, the mortgagee shall pay it on demand, this amounts to a contract on the part of a mortgagee to pay the pre-

mium on the mortgagor's default, and not merely a condition, on the performance of which he may, at his option, entitle himself to the benefits of the clause.

Boston Safe Deposit & Trust Co. v. Thomas, 59 Kan. 470, 53 Pac. 472; *St. Paul Fire & Marine Ins. Co. v. Upton*, 2 N. D. 229, 50 N. W. 702. The rule also seems to find support in *Colby v. Thompson*, 18 Colo. App. 271, 64 Pac. 1053; but in that case the mortgagee had promised, on being notified that the policy would be canceled for default in payment, that he would pay the premium, if the mortgagor did not do so.

A condition in a lease by which the lessee agrees to keep the premises insured is an independent agreement, under which he acts as principal, so that the lessor is not liable for the premium on a policy procured by the lessee in the name of the lessor, and delivered to the lessor, if the latter returns the policy when payment is demanded of him (*Northern Assur. Co. v. Golet*, 74 N. Y. Supp. 553, 69 App. Div. 108, affirming 65 N. Y. Supp. 403, 31 Misc. Rep. 361). In the early case of *Washington Ins. Co. v. Grant*, 2 Clark, 308, 4 Pa. Law J. 88, it was held that an agreement in a policy of insurance that, in case of the transfer or assignment of the policy, the assignee shall be responsible for the amount of the unpaid premium thereon, is but a personal contract, and gives the insurer no right of action against an assignee. But in *Cleveland v. Clap*, 5 Mass. 201, the court took the position that if a policy is assigned with the consent of the insurer, so that its benefit inures to the assignee, he is liable to pay the premium note, and the assignor is discharged, even though no security for the premium is given by the assignee; and in *Sherman v. Fair*, 2 Speers (S. C.) 647, it was held that if a policy taken out by a mortgagee and paid for out of funds belonging to the mortgagor is assigned, with the insurer's consent, to a purchaser on foreclosure, the assignee of the policy is liable to the mortgagor for the unexpired portion of the premium.

(d) Amount of premium.

If an insured exercises an option given him to terminate the contract, the rate of premium to be charged for the time insurance has been in force is that fixed by the policy, regardless of the reason for such termination; and the fact that it was induced by the insolvency of the company does not change the rule (*Insurance Commissioner v. People's Fire Ins. Co.*, 68 N. H. 51, 44 Atl. 82). Likewise an insurance company reinsuring risks is liable for the rate of

premium specified in the policy of reinsurance; notwithstanding a prior or contemporaneous parol agreement to abate a certain per cent. of the premium, or a particular custom to that effect (*St. Nicholas Ins. Co. v. Mercantile Mut. Ins. Co.*, 18 N. Y. Super. Ct. 238). So an insurance company, writing an open policy which provides that the premium on each risk is to be fixed at the time of indorsement, subject to additions and deductions on information as to the exact nature of the risk, is only entitled to the premium fixed by the rules of the company on a risk which it refuses to indorse and fix a premium for when reported by the insured, and cannot ascertain the amount thereof in any other manner, as, for instance, by proof of what would be a reasonable rate (*Rolker v. Great Western Ins. Co.*, 32 N. Y. Super. Ct. 275). And on a time policy on a cargo, the goods and merchandise to be valued "as [insured's] interest shall appear," the premium is to be augmented or diminished according to the actual cargo on board from time to time during the term insured (*Pollock v. Donaldson*, 19 Fed. Cas. 945). But under a valued policy on the outfits of a whaling ship, at a fixed premium for two years and pro rata for longer time, in which it was agreed that one-fourth of the catchings should replace the outfits consumed, insured to have the liberty to sell the catchings or ship them home at his risk, the insurer was entitled to a pro rata premium on the whole sum for any period beyond the two years fixed, if less than three-fourths of the catchings had been sold or sent home (*Mutual Marine Ins. Co. v. Swift*, 7 Gray [Mass.] 256). In *J. C. Smith & Wallace Co. v. Prussian Nat. Ins. Co.*, 68 N. J. Law, 674, 54 Atl. 458, it was assumed, at the time an insurance agent delivered a binding slip, that the insurer proposed to charge a rate higher than it had charged for the same insurance for the previous year; but the agent promised to attempt to obtain some concession in rate, which, however, was not done before the property was destroyed. It was held that, as the agent failed to fix the rate, insured was bound to pay a reasonable rate for the protection received.

Where a policy stipulates that, on surrender by insured, the company will retain the customary short rates, the meaning of such stipulation is that, if the insured surrenders his policy during the term, he shall allow the company to retain such premium as would have been payable according to the customary short rates, if he had originally insured for the time during which he has actually been insured (*In re Independence Ins. Co.*, 13 Fed. Cas. 12). And

if a stipulation of this nature provides that on termination of the policy by insured the company shall be entitled to "the customary short rates," together with "the expenses of writing the risk," such expenses are not included in, but payable in addition to, "the customary short rates," and include the commission paid by the company to its agent who wrote the risk (*State Ins. Co. v. Horner*, 14 Colo. 391, 23 Pac. 788). However, if the stipulation reads that the company shall be entitled to "all expenses incurred in taking the risk," in addition to the short rates, the company is not entitled to the reasonable expenses included in the short rates in addition to such rates (*Burlington Ins. Co. v. McLeod*, 34 Kan. 189, 8 Pac. 124). In the *McLeod Case* it was said to be a question of fact for the jury to determine what are reasonable expenses included in the term "short rates." If, however, an insurance company avoids a policy for a default on the part of the insured, the company thereby loses a pro rata proportion of the premium, and is entitled to recover only such portion as bears the same ratio to the full amount of the premium as the period of the risk up to the time of the avoidance of the policy bears to the entire period originally covered by the policy (*Pennsylvania Ins. Co. v. Geraldin*, 31 Mo. 30).

Though agents employed to procure insurance have agreed to give certain rebates, yet if they inform insured that they will no longer give rebates, and insured after such information accepts policies from the agents, his right to a rebate is terminated (*Depew v. Krulewitch* [Sup.] 84 N. Y. Supp. 242).

(e) Same—Employer's liability insurance.

The premium to be paid on an employer's liability policy is usually based on the compensation paid by the assured to his employes. The rate is fixed at a certain per cent., or fraction thereof, of the total compensation paid. As the assured under such policies are generally persons or corporations employing hundreds and thousands of workmen, and paying large and constantly varying sums as compensation to such workmen, it is often difficult to ascertain the actual amount of the premium at the time the policy is written. Hence the general practice appears to be to estimate the average number of persons employed and the average compensation paid, and fix an initial premium in accordance with such estimate, subject to a subsequent adjustment based on the actual number employed and compensation paid. To protect the rights of the insurance company and enable it to make such adjustment, it is generally stipulated in the policies that the company shall have the right to ex-

amine the books of the assured so far as they relate to the compensation paid to his employés. If an assured refuses to permit the inspection stipulated for in a provision of this tenor, the insurer's remedy would ordinarily be to file a bill of discovery in order to secure an examination of the assured's books. But, under a statute giving the court power to compel the production of books containing pertinent evidence,⁴ the insurer is, on proper showing in an action to recover the premium, entitled to an order of court for the examination of the assured's books before proceeding to trial on the action. Such an order does not authorize any unreasonable search or seizure of the assured's books, in violation of the constitutional guaranty against unreasonable searches and seizures; and, even if it does, the assured is by the stipulation in the policy estopped to assert that the order is in violation of the constitutional guaranty. (*Swedish-American Telephone Co. v. Fidelity & Casualty Co.*, 208 Ill. 562, 70 N. E. 768.) If, after the expiration of an indemnity policy on which an estimated initial premium has been paid, a settlement of the actual amount of the premium is made with full knowledge by each party of the number of persons employed by assured and the occupation of each, this amounts to an accord and satisfaction, protecting the assured in an action thereafter for unpaid premiums claimed by the insurer. And the omission of certain employés, which, perhaps, upon a construction of the particular policies, should have been included in the computation, must be treated as a mistake of law, which cannot be reinvestigated in a subsequent action for the premium, both parties having ample means of information of all the facts. (*Fidelity & Casualty Co. v. Gillette-Herzog Mfg. Co.* [Minn.] 99 N. W. 1123.) In *London Guarantee & Accident Co. v. Missouri & Iowa Coal Co.*, 103 Mo. App. 530, 78 S. W. 306, it was held that a mere soliciting agent, who had no authority to pass on applications, countersign or issue policies, or collect accruing premiums, was not authorized to change the rate fixed in a policy negotiated by him, which declared that no provision therein should be waived or altered, except by the general manager of the company.

(f) Payment of premium in general.

An insurance premium need not necessarily be paid in cash. If there is a mutual account between the insurer and insured, so that

⁴ Hurd's Rev. St. Ill. 1901, c. 51, § 9.

the latter holds an offset against the former, this may operate as payment. (*Marsh v. Northwestern Nat. Ins. Co.*, 16 Fed. Cas. 815.) But, unless there is an agreement by an insurer with an insured that the latter's check will be received in satisfaction of the premium due, payment by check is conditional, and the debt is discharged only when the check is paid (*Greenwich Ins. Co. v. Oregon Imp. Co.*, 76 Hun, 194, 27 N. Y. Supp. 794). Hence, if an insured has not at the time a check is drawn, or does not thereafter have, sufficient funds in the bank on which it is drawn to pay it, the mailing of such check is not a payment of a premium due (*Walls v. Home Ins. Co.*, 114 Ky. 611, 71 S. W. 650). But, in *Pennsylvania Lumbermen's Mut. Fire Ins. Co. v. Meyer*, 126 Fed. 352, 61 C. C. A. 254, it was said that, if insured has ample funds in the bank to meet a check sent in payment of a premium before such check can be presented in the ordinary course of the mails, the fact that at the time the check is sent such bank account is overdrawn does not render the check insufficient to constitute an acceptance of insurer's offer to accept payment by check.

If a premium is not required by the policy to be paid in money, it may be paid by the act of insurer's agent in accepting the responsibility of a third person (*Bennett v. Maryland Fire Ins. Co.*, 3 Fed. Cas. 229); and if a policy is by its terms made payable to another than insured, such third party may pay the premium for insured on the latter's default (*Mechler v. Phoenix Ins. Co.*, 38 Wis. 665). So, if an agent pays the insurer a premium in cash, it does not affect insurer's liability that the insured paid the premium to the agent by simply giving him credit on account (*Herring v. American Ins. Co.*, 123 Iowa, 533, 99 N. W. 130). But a transaction between a fire insurance company and its agent, without the knowledge, consent, or subsequent ratification of the insured, whereby the agent is charged with the premium due on a policy, and on its cancellation credited with the unearned portion thereof, is not a payment of the premium which will inure to the benefit of the insured (*Van Wert v. St. Paul Fire & Marine Ins. Co.*, 90 Hun, 465, 36 N. Y. Supp. 54).

If an insurance company's charter is silent as to its power to give credit for premiums, and the company takes notes in payment, the power to do so necessarily results from the power of the company to write insurance (*McIntire v. Preston*, 5 Gilman [Ill.] 48, 48 Am. Dec. 321); and, if an insurance company chooses to extend credit to an insured, it is under no obligation to demand payment at any

particular time during the term, unless it elects to cancel the policy for nonpayment of the premium (*Citizens' Fire Ins. Co. v. Swartz*, 47 N. Y. Supp. 1107, 21 Misc. Rep. 671).

Where the place of payment is not fixed in the policy, nor the name of the person to whom it is to be paid mentioned, the agreement between the insured and the agent of the company as to the manner of payment may be shown by parol evidence, as the rule against such evidence does not apply, where the original contract was verbal and entire and only a part of it subsequently reduced to writing (*Blackerby v. Continental Ins. Co.*, 83 Ky. 574). The policy involved in *Kimbrow v. Continental Ins. Co.*, 101 Tenn. 245, 47 S. W. 413, was taken out on March 10, 1892, to extend to March 10, 1897, premium installments to be paid annually on March 1st. It was held that payments, subsequent to the first, made on March 1st, extended the policy for a year from March 10th, not from March 1st.

(g) Persons to whom payment may be made.

A payment of a premium to one who is the agent of the insurance company or of its general agent for the purpose of effecting insurance and collecting premiums is in effect a payment to the company, and as valid as if made directly to it (*Mauck v. Merchants' & Manufacturers' Fire Ins. Co.* [Del. Super.] 54 Atl. 952). Though a policy provides that the person or persons, other than insured, who procure it, shall be deemed the agent or agents of the insured, one who is employed by the company as a surveyor and solicitor, and who procures another to insure in the company, is the latter's agent within the meaning of the clause, so as to make a payment of the premium to him a payment to the company (*Andes Fire Ins. Co. v. Loehr*, 6 Daly [N. Y.] 105). But the mere authority of an agent to solicit applications, countersign and deliver policies, and receive and transmit premiums does not carry with it authority to receive payments upon a premium note; and a notice to an insured, before a note payable at the home office of the insurer falls due, that no agent or other person has authority to collect it or receive payment thereof, unless he has the note in his possession, is binding on the insured, without necessity of acceptance, so that, if payment is made to an agent not in possession of the note, insured assumes the burden of proving express or implied authority on the part of the agent to receive the money (*Long Creek Bldg. Ass'n v. State Ins. Co.*, 29 Or. 569, 46 Pac. 366). However, an interlocutory decree appointing a

receiver for a company, with power to continue the business of the corporation, and enjoining the corporation and its officers and agents from receiving and disposing of the property, except to deliver to the receiver, does not annul the authority of agents to receive premiums on policies already issued (*Rice v. Barnard*, 127 Mass. 241).

A payment of a premium to a broker authorized to collect and remit the same to the insurance company binds the latter, though it never in fact receives the money from the broker (*American Fire Ins. Co. v. Brooks*, 83 Md. 22, 34 Atl. 373). And if an insurer permits insured to pay monthly premiums on open marine policies to brokers by whom the insurance was effected, and receives such premiums from the brokers without objection, it is estopped from thereafter resorting to insured for premiums paid to the brokers which they have failed to pay over, though the original agreement between the parties did not contemplate collection of premiums by such brokers (*Mannheim Ins. Co. v. Chipman* [D. C.] 124 Fed. 950). So, if a broker has had other transactions with the insurance company and received commissions on policies procured through him, payment to the broker is sufficient (*Globe & Rutgers Fire Ins. Co. v. Robbins & Myers Co.*, 86 N. Y. Supp. 493, 43 Misc. Rep. 65), even though the policy provides that the broker shall be regarded as the agent of the insured, and not of the company, and that payments made to persons other than duly authorized agents of the company shall be at the sole risk of the insured (*Greenwich Ins. Co. v. Union Dredging Co.*, 14 Daly [N. Y.] 237). At least it is a question of fact for the jury to determine whether the prior course or dealing between the company and the broker authorizes him to receive premiums (*Lounsbury v. Duckrow*, 50 N. Y. Supp. 927, 22 Misc. Rep. 434). But if the broker has no indicia of authority, and has never transacted any other business for the company than taking out the policy on which the premium is due, a payment of such premium to the broker subsequent to the delivery of the policy, without the company's knowledge, will not discharge the insured from liability, where the policy contains a clause that no one shall be deemed the company's agent, unless duly authorized in writing; and, where it is questionable whether or not an agent or broker is authorized to receive payment, the party making such payment is required to see that it is made to one authorized to receive it (*Citizens' Fire Ins. Co. v. Swartz*, 47 N. Y. Supp. 1107, 21 Misc. Rep. 671).

Though an insurance premium is paid to one who by the terms of the policy is not authorized to receive it, still, if the company or its duly authorized agent afterwards receives such money, the payment is sufficient, without regard to the channel through which the money reaches the company.

Weisman v. Commercial Fire Ins. Co., 50 Atl. 93, 3 Pennewill, 224;
Mauck v. Merchants' & Manufacturers' Fire Ins. Co. (Del. Super.)
 54 Atl. 952.

If a premium is payable in money, an agent of the insurer does not have authority to take articles of personal property in payment of such premium (*Folb v. Firemen's Ins. Co.*, 133 N. C. 179, 45 S. E. 547).⁵

(h) Notes for premiums and liability thereon.

In a preceding brief ⁶ it has been shown that, in the absence of conditions to the contrary, a note may be given in payment of a premium on a policy of insurance. Such a note becomes a valid and binding obligation when the risk attaches (*Merchants' Ins. Co. v. Clapp*, 11 Pick. [Mass.] 56), as the assumption of the risk by the insurer constitutes a sufficient consideration for the note. And a policy open as to time is, so long as the company is willing and able to insure, a good consideration for the note (*Nelson v. Wellington*, 18 N. Y. Super. Ct. 178); the note becoming valid, as fast as risks are assumed on the policy, to the extent of the premiums thereby earned (*Furniss v. Gilchrist*, 3 N. Y. Super. Ct. 53). On the other hand, if a policy for which a note is given is invalid, or does not attach, there is no consideration for the note; and hence there is no liability on the part of the maker, and the note cannot be enforced against him.

Reference may be made to *Lynn v. Burgoyne*, 18 B. Mon. (Ky.) 400;
Archer v. National Ins. Co., 2 Bush (Ky.) 226; *Russell v. DeGrand*,
 15 Mass. 35; *Commonwealth Ins. Co. v. Whitney*, 1 Metc. (Mass.)
 21; *Rochester Ins. Co. v. Martin*, 18 Minn. 59 (Gil. 54); *Touro v.*
Cassin, 1 Nott & McC. (S. C.) 173, 9 Am. Dec. 680.

But if a policy provides for its cancellation by either party and a return of the unearned premium to the insured, and he never offers to return the policy or demands a return of the premium, he cannot avoid payment of the premium notes by a plea that the policy

⁵ See ante, vol. 1, p. 472, and post, pp. 996 and 2322.

⁶ See ante, vol. 1, p. 486.

was void (*St. Paul Fire & Marine Ins. Co. v. Neidecken*, 6 Dak. 494, 43 N. W. 696). In the same case it was said that if by statute it is provided that the insurer shall return the premium when the policy fails to attach or is voidable, except in case of fraud on the part of insured,¹ it is no defense on a note for premium that the maker has misrepresented his title and that the policy is therefore void and the note without consideration. And an insured cannot escape liability on a note given by him on the ground that the application misdescribes the property, and that he never received the policies, where it appears that he looked over the application at the time he signed it, and made no objection, and that the policies were issued and mailed to him, and that he gave no notice that he did not receive them (*Phenix Ins. Co. v. Still*, 43 Ill. App. 233). The fact that one of four policies for which an insured gave his four notes turns out to be worthless affords him no ground for repudiating the other three notes (*Rockford Ins. Co. v. Warne*, 22 Ill. App. 19). In determining the validity of the policy for which notes have been given, the *lex loci* governs (*Archer v. National Ins. Co.*, 2 Bush [Ky.] 226).

If an insured has the right to terminate the contract, his election to do so will release him from liability on his notes. Thus, if one insured for five years has the right to terminate the contract and gives notice of his election to do so, he cannot, after the expiration of the original term of insurance, be sued on his notes, though his notice is not answered by the insurer. (*Home Ins. Co. v. Burnett*, 26 Mo. App. 175.) But an unexecuted parol agreement to cancel the policy and surrender the note given therefor upon payment of the pro rata portion thereof will not prevent a recovery on the note (*Columbia Ins. Co. v. Stone*, 3 Allen [Mass.] 385). And a surrender of an insurance policy, such as to discharge insured from liability on his note, must be accomplished by a dealing immediately and directly with the company or its agent, and a delivery to a stranger, with notice to the company, is not sufficient (*American Ins. Co. v. Woodruff*, 34 Mich. 6). A statement by the agent that the policy, which is for a certain number of years, is a policy from year to year, and can be terminated by the refusal to pay installments on the note, is a mere opinion, and no defense to an action on the note (*American Ins. Co. v. Sorter*, 4 Ohio Dec. 226, 1 Cleve. Law Rep. 133). However, if an agent clothed with all apparent authority receives a note for the first premium, and agrees in writing with the

¹ Civ. Code Dak. 1883, § 1543.

insured that, if the policy is unsatisfactory, they may reject it and the note will be returned, both note and agreement constitute the contract between the parties, so that, on rejection of the policy, the company cannot sue on the note and claim that their agent had no authority to make the written agreement (*Jacoway v. German Ins. Co.*, 49 Ark. 320, 5 S. W. 339). Under a stipulation in a policy that the "loss shall be paid, * * * the amount of the premium note * * * being first deducted," the insured, when sued upon the note, can set off a loss under the policy (*Columbian Ins. Co. v. Bean*, 113 Mass. 541). So, where an insurance company has become liable for a return of premium on a policy, the insured is entitled to have the amount of the return deducted from the amount of his note, and the company cannot apply the return to the payment of notes on other policies (*Phoenix Ins. Co. v. Fiquet*, 7 Johns. [N. Y.] 383). However, if a total loss is sustained under a valued policy, and notice of abandonment given, insured's loss may be set off against premiums due the company on other policies, though the loss has not been adjusted (*Columbia Ins. Co. v. Black*, 18 Johns. [N. Y.] 149). If a note is expressed to be for the premium on an insurance, the court will take notice of the stipulation in the policy, which provides for reducing the premium, on a hearing for damages (*Lovet v. Johnson*, 2 Root [Conn.] 114). But a particular custom of underwriters to return a part of the premium, when insurance is made on a cargo from one port to another and back again, and no property belonging to the insured is brought back, is no defense to a suit on the note in such case, as it is in conflict with the principles of insured's legal liability (*Homer v. Dorr*, 10 Mass. 26). A provision in a policy that, in the event of a loss, the amount of the note and any other debts due the underwriters by the insured at the time of loss shall be paid or secured to the underwriters before payment for a loss covered by the policy can be demanded, was in *Osgood v. De Groot*, 36 N. Y. 348, deemed to have been intended primarily for the protection of the underwriters, and considered to create a reciprocal obligation on the part of the underwriters that, if a loss occurs before the maturity of the note, they will not demand payment of the note until the loss is paid. In *Osgood v. Maguire*, 61 Barb. (N. Y.) 54, affirmed 61 N. Y. 524, it was held to be no defense to a note for premium that before commencement of the action, but after the company had ceased to have a corporate existence, the claim in suit had been attached in an action pending in another state, where defendant resided, by a creditor of the insurance company, and that

the receivers of the company made themselves parties to that suit, which was still pending. If an insured authorizes an agent to increase the amount of his insurance, he will be estopped to deny the agent's authority to increase the amount of his note (*Merchants' & Manufacturers' Ins. Co. v. Maguire*, 1 Mo. App. 223).

(d) Same—Conditions making whole note payable on failure to pay installments when due.

A stipulation in a note for the premium making the whole amount unpaid on the policy earned, due, and payable in case of nonpayment of any installment when due, unless settlement has been made on the basis of short rates, is a part of the contract, and valid and binding (*Palmer v. Continental Ins. Co.*, 31 Mo. App. 467). So an agreement in a policy that, on default in payment of any installment due, the policy shall become void, but that all the notes of the insured not due shall remain binding on the insured, is valid (*Blackerby v. Continental Ins. Co.*, 83 Ky. 574). And especially if the policy further provides that on default in payment of the installment the risk shall merely be suspended, the insurer can recover the full unpaid balance of a note on default of payment.

Cauffield v. Continental Ins. Co., 47 Mich. 447, 11 N. W. 264; *American Ins. Co. v. Klink*, 65 Mo. 78; *Continental Ins. Co. v. Boykin*, 25 S. C. 323; *Same v. Hoffman*, Id. 327.

But a statement in a note absolute on its face that its consideration was a policy of insurance does not make the policy part of the contract, so as to make binding on the insured a charter provision referred to in the policy that in case of default in payment of an installment subsequent installments shall mature (*American Ins. Co. v. Gallahan*, 75 Ind. 168).

(d) Same—Conditions forfeiting or suspending policy on failure to pay note or installment.

The fact that the failure to pay a note renders a policy void does not affect the consideration for which the note was given (*Kempshall v. Vedder*, 79 Ill. App. 368); nor does the fact that liability under a policy is by its terms suspended while a note given for the premium is overdue prevent collection of the note.

This rule is supported by *Robinson v. German Ins. Co.*, 51 Ark. 441, 11 S. W. 686, 4 L. R. A. 251; *Minnesota Farmers' Mut. Fire Ins. Ass'n v. Olson*, 43 Minn. 21, 44 N. W. 672; *Phenix Ins. Co. v. Rollins*, 44 Neb. 745, 63 N. W. 46; *American Ins. Co. v. Sorter*, 4 Ohio Dec. 226, 1 Cleve. Law Rep. 133; *Equitable Ins. Co. v. Harvey*, 98 Tenn. 636, 40 S. W. 1092.

But a note payable by annual installments in advance, given for a policy that is to be suspended on default in payment, cannot be enforced after default.

Yost v. American Ins. Co., 39 Mich. 531; *American Ins. Co. v. Stoy*, 41 Mich. 385, 1 N. W. 877; *Matthews v. American Ins. Co.*, 40 Ohio St. 135.

However, if installments are not payable in advance, the company can recover on an installment note for any premium earned prior to insured's default (*Limerick v. Gorham*, 37 Kan. 739, 15 Pac. 909). And in *McEvoy v. Nebraska & I. Ins. Co.*, 46 Neb. 782, 65 N. W. 888, it was said that on an insured's failure to pay an installment the company can waive the default and recover on the policy. But the insured is not chargeable with premiums during the period of default (*Matthews v. American Ins. Co.*, 40 Ohio St. 135).

(k) Same—Insolvency of insurer.

In the absence of fraud, a note given for insurance in a company which is insolvent at the time of issuance of the policy is supported by a good consideration, and valid, as there can be no doubt that an executory contract of an insolvent person, who may have the power to perform it when the time of performance shall arrive, is a good consideration for the promise made to him.

Lester v. Webb, 5 Allen (Mass.) 569; *Clark v. Middleton*, 19 Mo. 53.

In order to escape liability on his note, insured must surrender the policy and thus relieve the company from the risk incurred under it.

Graff v. Simmons, 58 Ill. 440; *Alliance Mut. Ins. Co. v. Swift*, 10 Cush. (Mass.) 433.

But an insured in a marine policy on a ship for a year is not entitled to have his note, given for the entire premium, surrendered and his policy canceled on paying pro rata for the time expired, in the event of the insurer's becoming bankrupt while the policy is running (*Home v. Boyd*, 3 N. Y. Super. Ct. 481). However, if the insurance is for a specified time, and the first installment of the premium is paid in cash, the insolvency of the company during the term for which payment has been made renders void the consideration for notes given for the unpaid installment for the premium.

Home Ins. Co. v. Daubenspeck, 115 Ind. 306, 17 N. E. 601; *Farmers' & Merchants' Ins. Co. v. Smith*, 63 Ill. 187.

But the failure of an insurance company is no defense to an action on a note given for a premium and negotiated in good faith before its maturity (*Union Ins. Co. v. Greenleaf*, 64 Me. 123), unless it is by statute provided that whatever defense or set-off the maker may have had before notice of assignment against the assignor or against the original payee he shall also have against the assignees, and the company has recognized the insured's right to the unearned premium before he had notice of the assignment (*Tellon v. City Bank of Columbus*, 9 Ind. 119). And knowledge by an indorsee of a note for premium that the company had sustained a loss is not evidence of the company's insolvency, so as to affect the good faith of the indorsee (*Union Ins. Co. v. Greenleaf*, 64 Me. 123). A loss occurring before the bankruptcy of a company is a credit, within a statute relating to mutual credits, and may be set off against a suit on a note by the receivers of the bankrupt (*Osgood v. DeGroot*, 36 N. Y. 348).

(1) Same—Fraud or false representations on the part of the insurer.

A false representation of an insurance agent that property is not insured, inducing the owner to insure with the agent's company, will be treated as fraudulent, avoiding a note given for the premium, irrespective of the question of the agent's intent to deceive (*Rockford Ins. Co. v. Hildreth*, 45 Ill. App. 428); but fraudulent representations of the officers of an insurance company concerning its solvency and capital stock are no defense to a suit upon the note, and evidence of the company's insolvency is not admissible, unless the representations were made when the note was executed and for the purpose of obtaining it (*Fogg v. Pew*, 10 Gray [Mass.] 409, 71 Am. Dec. 662). If an insured holds his policy for three full years, without any protest or attempt at cancellation on the ground of alleged fraudulent representations, he cannot assert such defense in an action on the notes (*American Ins. Co. v. Kuhlman*, 6 Mo. App. 522); and if he signs a note without reading it his ignorance of its contents will not alone relieve him of liability, for it is his duty to read the note, and in the absence of fraud, deceit, or imposition the law charges him with knowledge of its contents (*Palmer v. Continental Ins. Co.*, 31 Mo. App. 467). In *Leinweber v. Forest City Ins. Co.*, 32 Ill. App. 190, it was held that a misdescription of the property did not tend to show intent to defraud the insured, where the property could have been sufficiently identified in case of loss; and in *Walker v. State Ins. Co.*, 46 Kan. 312, 26

Pac. 718, it was held that, in the absence of fraud, parol evidence was not admissible in an action on a note to vary the statements in an application which insured signed without reading, the insured having retained the policy without objection for several months.

(m) Assignment or transfer of note.

As an insurance company has the power to take a note for the premium on a policy, the power to negotiate such note in the transaction of the company's ordinary business necessarily follows (*McIntire v. Preston*, 5 Gilman [Ill.] 48, 48 Am. Dec. 321), and a note given for a premium is negotiable like other notes (*Furniss v. Gilchrist*, 3 N. Y. Super. Ct. 53), even though it bears on its face the number of the policy for which it was given (*Union Ins. Co. v. Greenleaf*, 64 Me. 123). But, if a note provides that it is not negotiable, the fact that the company goes into liquidation, turning over its assets for that purpose to a trust company, does not constitute such a transfer as is prohibited by the terms of the note and preclude a recovery thereon (*Equitable Ins. Co. v. Harvey*, 98 Tenn. 636, 40 S. W. 1092). If an agent is authorized to settle or compromise claims against the company, and to sign and indorse notes, his indorsement of a note in liquidation of a debt transfers the title to the indorsee (*Union Ins. Co. v. Greenleaf*, 64 Me. 123).

Though an insurance company may not have the power to take a particular note, yet such note is valid in the hands of a bona fide assignee thereof, and enforceable against the maker (*McIntire v. Preston*, 5 Gilman [Ill.] 48, 48 Am. Dec. 321). And it is no defense to an action on a note negotiated before maturity that the company has become insolvent or that the policy has been canceled (*Union Ins. Co. v. Greenleaf*, 64 Me. 123). But, under a statute providing that whatever defense the maker of the note may have had before notice of assignment against the assignor or original payee he shall also have against the assignee,^{*} the maker of a note may set off against the assignee the amount indorsed on a policy as due insured for unearned premiums on cancellation of the policy before insured had notice of the assignment of the note (*Tellon v. City Bank of Columbus*, 9 Ind. 119). And if the maker of a note given to an insurance company for a premium is himself a creditor of the company, he may contest the legality of a transfer of the note by the company when he is sued thereon, in order to avail

^{*} 1 Rev. St. Ind. 1852, p. 378, § 3.

himself by way of set-off of existing equities between himself and the company (*Litchfield v. Dyer*, 46 Me. 31).

In *Lester v. Webb*, 5 Allen (Mass.) 569, it was held that an indorsee of a note, who, as attorney of the insurer, stated to the maker that the company would cancel all policies delivered and surrender the notes on payment of premiums earned, is not thereby estopped to sue for the full amount of the note; he having expressly provided that where the company had parted with notes, so that they could not be delivered up, it would give certificates of indebtedness for the unearned premiums.

(n) Persons liable on notes for premiums.

If it is the custom of captains to insure steamboats in their custody and give notes of the owners, the owners of a boat so insured are liable upon the note so given for the insurance (*Adams v. Pittsburgh Ins. Co.*, 95 Pa. 348, 40 Am. Rep. 662). But if an insurance company accepts the note of an agent of an undisclosed principal, with knowledge sufficient to put it on inquiry as to whether others than the maker are interested in the insurance, the company cannot hold the undisclosed principal liable on the agent's default in payment of the note.

Bedford Commercial Ins. Co. v. Covell, 8 Metc. (Mass.) 442; *Patapsco Ins. Co. v. Smith*, 6 Har. & J. (Md.) 166, 14 Am. Dec. 268. In *American Ins. Co. v. Sorter*, 4 Ohio Dec. 228, 1 Cleve. Law Rep. 133, it was held that the trustees of a church, who signed a note for the premium with their own names "as trustees," were personally liable thereon; the church association not being named.

In *Osgood v. Glover*, 7 Daly (N. Y.) 367, a policy was issued to a firm on representation by the broker presenting the application that the vessel insured belonged to the firm. The firm note, signed by one of the partners, was given for the premium. It was held that the company was not put on inquiry as to the ownership, and that all the partners were bound by the note, whether part owners of the vessel or not. An insurance company's consent to the transfer of a policy to the indorser of a note constitutes a sufficient consideration for the indorsement (*Equitable Marine Ins. Co. v. Adams*, 173 Mass. 436, 53 N. E. 883); and if a policy is assigned with the consent of the insurer, so that its benefit inures to the assignee, he is liable to pay the note on the assignor's discharge.

Cleveland v. Clap, 5 Mass. 201; *New England Marine Ins. Co. v. De Wolf*, 8 Pick. (Mass.) 56.

(o) Actions for premiums.

If a note is payable to "A., agent of E. Insurance Company," a suit thereon is properly brought in the name of the company (*Black v. Enterprise Ins. Co.*, 33 Ind. 223). However, if it is the custom for marine insurance brokers to buy insurance and deliver policies to an insured on their own account, a broker can recover of the insured on policies procured by him, though he has not paid such premiums to the insurer (*Ward v. Tucker*, 7 Wash. 399, 35 Pac. 1086); and if an agent is charged with and is liable to the company for the premium, or has paid it, he may sue therefor in his own name.

Boston Safe Deposit & Trust Co. v. Thomas, 59 Kan. 470, 53 Pac. 472; *Waters v. Wandless* (Tex. Civ. App.) 35 S. W. 184. The agents may maintain an action in the name of the company for their use, without an assignment. *Gillett v. Insurance Co. of North America*, 89 Ill. App. 284.

But if the agent has no right to subrogation, nor assignment of the premium, he is not entitled to bring an action in his own name to recover the premium due on a policy issued by him.

Lounsbury v. Duckrow, 50 N. Y. Supp. 927, 22 Misc. Rep. 484; *Ross v. Rubin*, 54 N. Y. Supp. 1036, 25 Misc. Rep. 479.

A complaint in an action on a note given for a premium need not allege a demand of payment (*Mitchell v. American Ins. Co.*, 51 Ind. 396). Filing copies of the application, the policy as issued, and the laws of a foreign state as exhibits in an action on a note does not make them parts of the complaint (*Cassaday v. American Ins. Co.*, 72 Ind. 95).

A claim by a defendant for damages on the ground that the policies did not satisfy the contract is not available, without an affirmative plea of breach of warranty, by way of set-off or counterclaim (*De Wolf v. Washington*, 119 Wis. 554, 97 N. W. 220). And a plea that the note was given for two policies of insurance, which by agreement between defendant and the agent were to contain certain provisions; that the policies were delivered to him, and that when he examined them, "within a reasonable time afterwards," he found that such provisions were omitted; and that he thereupon returned the policies to the company, and demanded his notes—is demurrable, in that it fails to set out so much of the policies agreed to be issued, and of those actually issued, as to show a material variance between them, and also in failing to show how long he retained the policies before returning them for cancellation (*Carmelich v. Mims*, 88 Ala.

335, 6 South. 913). A verdict for the insurer in an action on a policy, on the ground that the policy did not attach by reason of a breach of warranty, may be set up as a defense in a subsequent action on the note (*Penniman v. Tucker*, 11 Mass. 66).

In order to make out a prima facie case on a note, it is not necessary to show that a foreign company was authorized to do business in the state (*American Ins. Co. v. Smith*, 73 Mo. 368), or that the company's charter does not restrict it from doing business in the usual manner (*McIntire v. Preston*, 5 Gilman [Ill.] 48, 48 Am. Dec. 321). The burden is on defendant to show that the policies were not what they purported to be (*Ward v. Tucker*, 7 Wash. 399, 35 Pac. 1086). And if the power of the company to take a note for the premium is shown, the maker of such note has the burden of proving that such power has been taken away (*McIntire v. Preston*, 5 Gilman [Ill.] 48, 48 Am. Dec. 321). If an answer admits that a policy was issued, that it continued in force until canceled at defendant's request, and that the premium earned was the sum stated in the complaint, but denies that plaintiff ever demanded, or that defendant neglected or refused to pay, or that the sum claimed, or any part thereof, was due and owing, it is inconsistent with a claim that defendants paid the premium before surrender of the policy, as it admits that the premium was due and owing at the time the policy was surrendered (*Greenwich Ins. Co. v. Oregon Imp. Co.*, 76 Hun, 194, 27 N. Y. Supp. 794).

If premiums are payable in English money, a witness may testify as to the result of calculations made by him to find the equivalent in money of the United States (*Ward v. Tucker*, 7 Wash. 399, 35 Pac. 1086). And certificates and licenses from the state commissioner's office, showing compliance by the company with the requirements of the statutes so far as the same can be done by filing the necessary papers, are admissible to show that the company is authorized to do business in the state (*American Ins. Co. v. Woodruff*, 34 Mich. 6). But evidence as to conversations before the organization of a company, in contemplation thereof, between persons who subsequently became officers and stockholders therein, is inadmissible against the company as evidence of an agreement to organize and transact business without paying in the capital required by law (*Fogg v. Pew*, 10 Gray [Mass.] 409, 71 Am. Dec. 662). Where the issue in a suit on a note was that the policies never were issued and delivered to the applicant, and the proofs, which should be in the possession of the plaintiff, are not found in the

record, there will be a judgment of nonsuit (*Eureka Ins. Co. v. Tobin*, 25 La. Ann. 121).

If the defense to an action on the note is fraudulent misrepresentations, it is error for the court to instruct that if the agent of the insurance company made any false statements, whether material or not, they shall find for defendant, since it leaves it for the jury to determine questions of law (*Rockford Ins. Co. v. Warne*, 22 Ill. App. 19). Where there is no averment of the fact in the complaint, it will be presumed on appeal that the company and its agent had complied with the laws of the state at the time the policy was issued and the note executed (*Cassaday v. American Ins. Co.*, 72 Ind. 95).

3. RIGHTS AND LIABILITIES INCIDENT TO PREMIUM OR DEPOSIT NOTES AND ASSESSMENTS THEREON—MUTUAL INSURANCE.

- (a) Form, requisites, and validity of premium or deposit notes.
- (b) Statutory provisions—What law governs.
- (c) Liability of insured in general.
- (d) Necessity of assessment to fix liability.
- (e) Effect of failure to pay assessment.
- (f) Grounds of assessment.
- (g) Power and duty to make assessment.
- (h) Liability to assessment—Membership at time of loss.
- (i) Same—Liability for loss insured on the cash plan.
- (j) Same—Restrictions as to class of risk.
- (k) Effect of termination of membership—Cancellation and withdrawal.
- (l) Same—Forfeiture of policy.
- (m) Same—Transfer of property or policy.
- (n) Same—Expiration of policy and destruction of property.
- (o) Estoppel and waiver of right to deny liability.
- (p) Levy and collection of assessments.
- (q) Form, requisites, and validity of assessment.
- (r) Uniformity of assessments.
- (s) Amount of assessments.
- (t) Notice of assessments.
- (u) Payment of assessments.
- (v) Lien for assessments.
- (w) Enforcement of lien.

(a) Form, requisites, and validity of premium or deposit notes.

A premium note, made payable to the insurance company "or the treasurer for the time being," is a good note to the company (*Gaytes v. Hibbard*, 10 Fed. Cas. 125); and the fact that a member

of a company is not required to furnish security as provided by the rules constitutes no defense to a premium note (*Randall v. Phelps County Mut. Hail Ins. Ass'n*, 89 N. W. 398, 2 Neb. [Unof.] 530). When a premium note is executed in the name of the insurer by the agent procuring a policy, the acceptance of the policy is a ratification of the agent's act in executing the note, though the insured has no actual knowledge thereof (*Monitor Mut. Fire Ins. Co. v. Buffum*, 115 Mass. 343). In *Hyatt v. Whipple* (N. Y.) 37 Barb. 595, the company had in its charter a provision empowering its board of directors to fix the amount of premium notes. By a subsequent law the company was brought under all the conditions of such law. This law limited the amount of premium notes to five times the amount of the cash premiums, but provided that companies brought under the law were entitled to all the privileges granted by their charters. It was held that under this provision the directors might fix their rates of insurance so that the premium note should exceed the limitation of the law, and that a note exceeding such limit was valid.

(b) Statutory provisions—What law governs.

A law declaring that in no case shall a premium note be more than twice the amount of the cash premium¹ does not prohibit a by-law of a mutual insurance company providing that the premium on five-year policies is to be paid for the first year at the beginning of such year, and a note taken for the premiums of the other four years, which are to be paid at the beginning of each of the said years (*Davis v. Oshkosh Upholstery Co.*, 82 Wis. 488, 52 N. W. 771). So a law declaring that "notes received in advance for premiums" are to be considered as part of the capital stock of a mutual insurance company² does not preclude such a company after its organization from taking "premium notes," which are no part of its capital stock (*Toll v. Whitney*, 18 How. Prac. [N. Y.] 161). Where a section in a chapter providing for the incorporation of mutual insurance companies provides that the other provisions of the chapter shall not be applicable to such companies,³ another section, requiring all notes taken for insurance to state on their face that they were so taken,⁴ does not apply to deposit notes of mem-

¹ Rev. St. Wis. 1898, § 1907.

² Laws N. Y. 1849, p. 442, § 5.

³ See Code Iowa 1873, § 1160.

⁴ Code Iowa 1873, § 1146.

bers and holders of policies of a mutual company (*Corey v. Sherman*, 96 Iowa, 114, 64 N. W. 828, 32 L. R. A. 514). A company organized under the Nebraska law regulating companies insuring hogs⁵ cannot by contract limit the number or amount of assessments for which its members are liable, and hence a contract seeking to limit an insured's liability in this respect cannot be sustained (*Morgan v. Hog Raisers' Mut. Ins. Co.*, 62 Neb. 446, 87 N. W. 145).

A contract by a resident of one state with a mutual company of another state, whereby the former becomes a member of the company and agrees to pay assessments pursuant to its charter, by-laws, etc., is a contract of the state where the company is incorporated, and the validity of assessments is determined by the laws of that state (*Warner v. Delbridge & Cameron Co.*, 110 Mich. 590, 68 N. W. 283, 34 L. R. A. 701, 64 Am. St. Rep. 367); and if a member of a company agrees to pay assessments pursuant to the laws of another state, he is bound by the judicial determination of the assessments in the latter state pursuant to the laws thereof, though he was not a party to the proceedings therein (*Stevens v. Hein*, 55 N. Y. Supp. 491, 37 App. Div. 542). But the remedy in an action on a premium note delivered in the state where the action is brought to an agent of a foreign company is governed by the laws of the forum, and not by those of the state where the company is located (*Thornton v. Western Reserve Farmers' Ins. Co.*, 31 Pa. 529).

(c) Liability of insured in general.

A member of a mutual fire insurance company is liable to assessments while his policy remains in force, and a premium note given by a person insuring in such company is chargeable with all liabilities justly attaching during the existence of the policy, and may be assessed to its full amount, if necessary; but it is chargeable only for the pro rata share of such liabilities in common with all the other available premium notes held by the company.

Reference may be made to *New England Mut. Fire Ins. Co. v. Belknap*, 9 Cush. (Mass.) 140; *Citizens' Mut. Fire Ins. Co. v. Sortwell*, 10 Allen (Mass.) 110; *Taylor v. North Star Mut. Ins. Co.*, 46 Minn. 198, 48 N. W. 772; *Merchants' & Manufacturers' Ins. Co. v. Linchey*, 8 Mo. App. 588; *Dana v. Munro*, 38 Barb. (N. Y.) 528; *Davis v. Oshkosh Upholstery Co.*, 82 Wis. 488, 52 N. W. 771.

⁵ Laws Neb. 1890, p. 202, c. 46.

This liability to assessments continues so long as the insurance remains in force and the insured remains a member of the company.

Planters' Ins. Co. v. Comfort, 50 Miss. 662; *Morgan v. Hog Raisers' Mut. Ins. Co.*, 62 Neb. 446, 87 N. W. 145; *New Hampshire Mut. Fire Ins. Co. v. Rand*, 24 N. H. 428.

The liability of a member to assessments is not according to the proportion of the expired or unexpired term of the policy, but is in accordance with the liabilities of the company (*Commonwealth v. Massachusetts Mut. Fire Ins. Co.*, 112 Mass. 116), and is for losses only to the face value of the premium note (*Davis v. Oshkosh Upholstery Co.*, 82 Wis. 488, 52 N. W. 771). However, there is no liability on a premium note or for assessments, unless a contract of insurance is consummated by which the company may be bound. Hence, if the contract is never consummated, but is void for want of insurable interest, breach of warranty, or other reasons, there is no liability on the premium note or for assessments to cover losses.

Bersch v. Sinnissippi Ins. Co., 28 Ind. 64; *Real Estate Mut. Fire Ins. Co. v. Roessle*, 1 Gray (Mass.) 336; *Mound City Mut. Fire & Marine Ins. Co. v. Curran*, 42 Mo. 374; *Montgomery v. Whitbeck*, 12 N. D. 385, 96 N. W. 327; *Frost v. Saratoga Mut. Ins. Co.*, 5 Denio (N. Y.) 154, 49 Am. Dec. 234. A contrary doctrine governs if the policy is merely voidable and the company elects to regard it as in force. *Beeber v. Thomas*, 4 Pa. Co. Ct. R. 192.

Still, one who has given a premium note for an open policy, which the company has the right to negotiate in the course of its business, is liable thereon, though no insurance has in fact been effected under the policy (*Howard v. Palmer*, 64 Me. 86); but the maker of a note for the nominal premium upon an open policy to cover such risks as may be afterwards indorsed thereon is liable only to the amount of the actual premiums upon risks assumed by the company and indorsed thereon (*Maine Mut. Marine Ins. Co. v. Stockwell*, 67 Me. 382). Where a contract to renew is executed as of the date of the original executory contract, the insurer is liable to assessments for losses occurring in the meantime (*Commonwealth v. Mechanics' Mut. Fire Ins. Co.*, 120 Mass. 495). If an application makes the by-laws of the company a part of the contract, and they provide for assessments and make them obligatory on members, the liability of a member to an assessment does not rest alone on a contract implied from mere membership, but upon an express agreement (*Schofield v. Hayes*, 17 Pa. Super. Ct. 110). And though a certificate of

membership in a mutual live stock insurance company provided that only four assessments were to be made in one year, such provision was no defense as against the receiver of such company (*Detra v. Simon*, 5 Pa. Dist. R. 342).

A provision in the articles of association of a mutual company which allows an insured to pay his whole insurance in cash, and so relieve himself from liability for further assessments, is not contrary to the principle of mutual insurance, but is equivalent to an assessment to the full amount of the note at its inception (*Davis v. Oshkosh Upholstery Co.*, 82 Wis. 488, 52 N. W. 771); but, if a provision that insured shall pay certain assessments in addition to his cash premium is made a part of the consideration for the policy and a condition of it, the acceptance of the policy is tantamount to an agreement to make such payments (*Whipple v. United States Fire Ins. Co.*, 20 R. I. 260, 38 Atl. 498). The mere fact that a cash premium is paid will not prevent the insured from being further liable to assessment (*Buckley v. Columbia Ins. Co.*, 83 Pa. 298).

Though a policy issued by a mutual company is according to the standard form, yet, if it contains express provisions authorizing assessments equal to the cash premium paid, the insured is subject to assessments, even if the contract represents that it is a mere stock policy (*Dwinnell v. Felt*, 95 N. W. 579, 90 Minn. 9); but the mere reference to the laws relating to mutual companies in a similar policy, and a declaration that such losses are a part of the contract, does not make the insured liable for assessments in addition to the cash premium (*Dwinnell v. Kramer*, 92 N. W. 227, 87 Minn. 392). The exemption of the private property of members from corporate debts provided for in the articles of incorporation of the company does not apply to assessments against members for losses under policies (*Montgomery County Farmers' Mut. Ins. Co. v. Milner*, 90 Iowa, 685, 57 N. W. 612). And a note subject to the payment of annual interest, which is not to be assessed until other classes of notes have been assessed an amount equal to the interest on notes of this class, is nevertheless subject to assessment in the first instance, if default is made in the payment of interest.

Crawford v. Susquehanna Mut. Fire Ins. Co. (Pa.) 12 Atl. 844; *Susquehanna Mut. Fire Ins. Co. v. Leavy*, 136 Pa. 499, 20 Atl. 502, 505.

Generally an insurance company is prohibited by law from doing business without a certificate from the proper authority. But where the securing of a specified number of applications is a condition pre-

cedent to the formation of a company, the procuring of the required number of applications is not a violation of a statute prohibiting the doing of insurance business without such certificates, and therefore an assessment on a policy issued pursuant to such an application can be enforced (*Montgomery v. Harker*, 84 N. W. 369, 9 N. D. 527). But if a company does business illegally, it cannot enforce premium notes given for policies (*Hockage Mut. Ins. Co. v. Becker*, 1 Wkly. Notes Cas. [Pa.] 100). Generally there is no liability on premium notes for policies executed by a foreign company which has not complied with the laws of the state, so as to be authorized to do business therein.

Lamb v. Lamb, 14 Fed. Cas. 1016; *Parker v. Lamb & Sons*, 99 Iowa, 285, 68 N. W. 686, 84 L. R. A. 704; *Jones v. Smith*, 8 Gray (Mass.) 500; *Washington County Mut. Ins. Co. v. Hastings*, 2 Allen (Mass.) 398; *Reliance Mut. Ins. Co. v. Sawyer*, 160 Mass. 413, 86 N. E. 59; *Haverhill Ins. Co. v. Prescott*, 42 N. H. 547, 80 Am. Dec. 123.

However, if the laws prohibit only the making and renewing of contracts by agents of foreign companies without authority, and not the receiving of applications, a premium note given to a foreign company in consideration of a policy issued in the state of the company's domicile is valid, and assessments may be levied thereon, though the application was made to an agent in the state where the property is located (*Thornton v. Western Reserve Farmers' Ins. Co.*, 31 Pa. 529, 1 Grant, Cas. 472). So if a policy issued on an application to a mere soliciting agent is not sent to the agent for delivery, and the premium thereon is forwarded direct to the home office, the contract is a contract of the state of the company's domicile, and an assessment thereon can be recovered, though the company is not authorized to do business in the state where the application was made (*State Mut. Fire Ins. Ass'n v. Brinkley Stave & Heading Co.*, 61 Ark. 1, 31 S. W. 157, 29 L. R. A. 712, 54 Am. St. Rep. 191). But if the law prohibits unauthorized foreign companies to take risks or transact business of insurance in the state, "directly or indirectly," assessments on a policy holder cannot be recovered, though the contract was executed outside the state (*Rose v. Kimberly & Clark Co.*, 89 Wis. 545, 62 N. W. 526, 27 L. R. A. 556, 46 Am. St. Rep. 855). But if a policy is valid, though issued by an unauthorized foreign company, the insured is liable on his premium note given for the policy.

Connecticut River Mut. Fire Ins. Co. v. Whipple, 61 N. H. 61; *Connecticut River Mut. Fire Ins. Co. v. Way*, 62 N. H. 622. See, also,

State Mut. Fire Ins. Ass'n v. Brinkley Stave & Heading Co., 61 Ark. 1, 81 S. W. 157, 29 L. R. A. 712, 54 Am. St. Rep. 191.

An insured is not entitled to any deduction from his premium note or assessments thereon because the charter of the company expired before the expiration of the policy, as this still continues in force (*Huntley v. Beecher*, 30 Barb. [N. Y.] 580); and the fact that a company has been refused a certificate to continue to do business is no defense to an action for assessments, nor is it a defense that the directors of the company have contracted with another company to influence its members to insure in such other company (*Burmood v. Farmers' Union Ins. Co.*, 42 Neb. 598, 60 N. W. 905). The insolvency of a company at the time a person became a member is no defense to an action for an assessment, where the rights of third persons are concerned (*People's Mut. Fire Ins. Co. v. Bergstresser*, 11 Pa. Co. Ct. R. 646, 1 Pa. Dist. R. 771). So the insolvency of a company does not release an insured from liability on his premium note, and constitutes no defense to assessments levied to pay losses accruing prior to the insolvency.

Reference may be made to *Carey v. Nagle*, 5 Fed. Cas. 60; *Corey v. Sherman*, 96 Iowa, 114, 64 N. W. 828, 32 L. R. A. 514; *Howard v. Palmer*, 64 Me. 86; *Commonwealth v. Massachusetts Mut. Fire Ins. Co.*, 112 Mass. 116; *Vanatta v. New Jersey Mut. Life Ins. Co.*, 81 N. J. Eq. 15; *Conigland v. North Carolina Mut. Life Ins. Co.*, 62 N. C. 341, 93 Am. Dec. 89; *People's Mut. Fire Ins. Co. v. Bergstresser*, 1 Pa. Dist. R. 771; *Standard Mut. Live Stock Ins. Co. v. Madara*, 18 Pa. Co. Ct. R. 555; *Standard Mut. Live Stock Ins. Co. v. Madara*, 2 Pa. Dist. R. 600; *Sterling v. Mercantile Mut. Ins. Co. of Philadelphia*, 32 Pa. 75, 72 Am. Dec. 773.

But insolvency does not increase the liability of members on their premium notes (*Shaughnessy v. Rensselaer Ins. Co.*, 21 Barb. [N. Y.] 605), unless it is by statute provided that on the insolvency of a company members shall be liable for assessments sufficient to pay losses and liabilities (*Russell v. Berry*, 51 Mich. 287, 16 N. W. 651; *Macklem v. Bacon*, 57 Mich. 334, 24 N. W. 91). In the *Russell* Case it was held that this liability could not be limited by an arrangement with the company; but in the *Macklem* Case it was said that if all the members, including those who had suffered loss, understood when they took the insurance that they were liable only to the extent of their notes, they were entitled to relief from the statutory liability on the ground of mistake of law.

Though a property owner assigns a policy held by him to a mortgagee as security, and the transfer is recorded on the company's

books, he is nevertheless liable for assessments (*Cumings v. Hildreth*, 117 Mass. 309); but if an assignee of a policy gives the company a written promise to pay subsequent assessments, he is liable, though the deposit note given by the assignor is surrendered by the company (*New Hampshire Mut. Fire Ins. Co. v. Hunt*, 30 N. H. 219). On the transfer of property with the consent of the company, the purchaser becomes liable to assessments (*Cumings v. Hildreth*, 117 Mass. 309). So, on the death of a member of a mutual company, the heirs become liable for assessments (*Columbia Ins. Co. v. Mullin's Adm'r*, 4 Leg. Op. [Pa.] 572), and the widow becomes liable as soon as her dower is assigned (*Shirley v. Mutual Assur. Soc.*, 2 Rob. [Va.] 705). But a contrary rule is asserted in *Pinckneyville Mut. Fire Ins. Co. v. Kimmel*, 59 Ill. App. 532.

If a premium note, given as a contingent fund to meet losses and not as present capital, is used to assist in supplying the necessary capital to obtain an extension of the company's charter, this amounts to a diversion which releases the maker from liability, except for the meeting of such losses as the notes were contemplated to provide for originally.

People v. Rensselaer Ins. Co., 88 Barb. (N. Y.) 823. But see *Hyatt v. Esmond*, 87 Barb. (N. Y.) 601

If a premium note has been assigned to a third person for value, (*Clark v. Brown*, 12 Gray [Mass.] 355), the cancellation of the policy without the assignee's knowledge and consent (*Williams v. Cheney*, 3 Gray [Mass.] 215) does not relieve the insured from liability as against the assignee.

(d) Necessity of assessment to fix liability.

Premium notes given mutual insurance companies for insurance are generally payable in such proportions and at such times as the company may require. The liability on such notes is not absolute, but conditional. It is dependent on the necessities of the company and the demands of its officers. Hence an assessment is necessary to fix the liability on the makers of such notes, and a condition precedent to a recovery thereon.

Reference may be made to *Gaytes v. Hibbard*, 10 Fed. Cas. 125; *Hagan v. Merchants' & Bankers' Ins. Co.*, 81 Iowa, 821. 46 N. W. 1114, 25 Am. St. Rep. 493; *Devendorf v. Beardsley*, 23 Barb. (N. Y.) 656; *Howland v. Cuykendall*, 40 Barb. (N. Y.) 320.

Even where the collection of deposit notes is sought to be enforced by a receiver, an assessment is necessary to fix the liability of the makers, and a condition precedent to recovery.

Shaughnessy v. Rensselaer Ins. Co., 21 Barb. (N. Y.) 605; *Devendorf v. Beardsley*, 23 Barb. (N. Y.) 656; *Williams v. Lakey*, 15 How. Prac. (N. Y.) 206; *Savage v. Medbury*, 19 N. Y. 32.

But installment notes, payable absolutely at specified times, do not require the levy of an assessment to fix the liability of the makers thereon (*Davenport Fire Ins. Co. v. Moore*, 50 Iowa, 619). And, if deposit notes are by the charter of a company considered as an absolute fund for the payment of expenses and losses, they may be collected without assessment (*Nashua Fire Ins. Co. v. Moore*, 55 N. H. 48).

In *Dana v. Munro*, 38 Barb. (N. Y.) 528, a note given by an applicant on the organization of a company, not knowing or intending that any other obligation was assumed than that incurred by members of mutual companies, was considered as collectible only on assessment by the company. And in *Bell v. Shibley*, 33 Barb. (N. Y.) 610, it was held that where the note is delivered to a company as a premium note, and not as an original stock note, and on the understanding that it shall be appropriated for no other purpose, neither the company nor a receiver can recover on it as a stock note.

(e) Effect of failure to pay assessment.

It is competent for a mutual insurance company to provide that, in case of default in payment of an assessment on a premium note, the whole note shall become due and collectible (*German Mut. Fire Ins. Co. v. Franck*, 22 Ind. 364). Under such provision a member is liable for the full amount of his premium note, if he defaults in paying an assessment.

Jones v. Sisson, 6 Gray (Mass.) 288; *St. Louis Mut. Fire & Marine Ins. Co. v. Boeckler*, 19 Mo. 135; *American Ins. Co. v. Klink*, 65 Mo. 78.

This doctrine applies to defaults in payment of assessments after the termination of a contract. *Hyatt v. Esmond*, 37 Barb. (N. Y.) 601. But a refusal to pay an invalid assessment gives no right of action on the premium note. *Mississippi Ins. Co. v. Taft*, 26 Ind. 240.

A provision of this nature in the charter of a company, which also provided that the money collected on the note should remain in the treasury, and that the balance remaining after the payment of losses should be returned on the expiration of the policy, was, in *Jones v. Sisson*, 6 Gray (Mass.) 288, said not to be a penal statute. But, in *Bangs v. McIntosh*, 23 Barb. (N. Y.) 591, it was held that, in an action brought, on the default of a maker of a note to pay as-

sessments, by a receiver of an insurance company to recover the entire amount of the note, interest could not be recovered on the face of the note, as the amount of the note was in the nature of a penalty. And, in *Bangs v. Bailey*, 37 Barb. (N. Y.) 630, it was said that in a suit on the premium note for default in payment of an assessment interest upon the note cannot be recovered. It was held, in *Rand, McNally & Co. v. Mutual Fire Ins. Co.*, 58 Ill. App. 528, that, though an insurance company might sue for the whole note on default, execution could only issue for assessments and costs as they accrued; and a similar doctrine appears to be asserted in *Farmers' Union Ins. Co. v. Wilder*, 35 Neb. 572, 53 N. W. 587. Under the provision the company may sue for the delinquent assessments, instead of on the note, though it provides that on default the directors "shall sue for and recover the whole amount of said deposit note, with costs of suit" (*Atlantic Mut. Fire Ins. Co. v. Sanders*, 36 N. H. 252). The "whole amount" of a deposit note which is collectible on default means only the whole amount of the note as it stands reduced by all payments of assessments which have at any previous time been made thereon (*Bangs v. Bailey*, 37 Barb. [N. Y.] 630).

(f) Grounds of assessment.

In the early case of *Kelly v. Troy Fire Ins. Co.*, 3 Wis. 254, the court took the position that it was not essential that a loss should happen before an assessment on the premium note could be made. As a reason for this doctrine the court said: "No company could transact business successfully if, after a loss had happened, provision must be made by an assessment upon premium notes to pay it. So much delay would unavoidably arise in paying losses that the company would be unable to fulfill its contracts." But the doctrine of the Kelly Case is not followed in later cases. On the contrary, it is clearly intimated in the leading case of *Farmers' Mut. Fire Ins. Co. v. Knight*, 162 Ill. 470, 44 N. E. 834, affirming *Palmyra Ins. Co. v. Same*, 59 Ill. App. 274, that unless a mutual insurance company is by its charter or by-laws authorized to levy assessments with which to pay anticipated losses, such a company cannot make assessments for such purpose.

This doctrine is also supported by *Vandalla Mut. County Fire Ins. Co. v. Peasley*, 84 Ill. App. 138; *Stnnissippi Ins. Co. v. Taft*, 26 Ind. 240; *Same v. Wheeler*, Id. 336; *Same v. Farris*, Id. 342; *Commonwealth v. Massachusetts Mut. Fire Ins. Co.*, 119 Mass. 45; *Rosenberger v. Washington Fire Ins. Co.*, 87 Pa. 208. The principle announced in these cases is also inferentially approved in *Bradford*

v. Mutual Fire Ins. Co., 112 Iowa, 495, 84 N. W. 693, wherein the court held that a statute prohibiting mutual insurance companies from receiving premiums * was violated by requiring an insured to pay a certain amount immediately on the issuance of his policy, and before any liabilities for losses had been incurred, where no funds were needed to meet outstanding obligations.

The purpose for which assessments may be levied by mutual companies is largely dependent on the charter provisions and by-laws of each individual company. **The primary object of such companies is to raise funds with which to pay losses suffered by members, and assessments may, of course, be levied to pay losses incurred during the membership of a person insured. But whether or not other items than those for losses may be included in an assessment is a question which for its answer often requires a construction of the particular contract and the laws governing the company writing it. Generally, as assessment levied on a premium note to raise funds with which to pay losses may also include a reasonable amount for expenses (Hyatt v. Esmond, 37 Barb. [N. Y.] 601), and a member of a mutual company cannot object to assessments on the ground that the amount paid in salaries is greater than the value of the services rendered (Koehler v. Beeber, 122 Pa. 291, 16 Atl. 354). But if the laws under which a company is organized only authorize assessments for losses, an amount for expenses of the company cannot be included in an assessment.**

Bersch v. Sinnissippi Ins. Co., 28 Ind. 64; Embree v. Shideler, 36 Ind. 423; Gilman v. Druse, 111 Wis. 400, 87 N. W. 557.

But even in the cases cited it was conceded that the expenses of collection might be included in an assessment, and this is particularly true where assessments are levied by a receiver in winding up the affairs of an insolvent company (Sands v. Boutwell, 26 N. Y. 233). Furthermore, assessments on premium notes by a receiver of an insolvent company may properly include the expenses of winding up the company's affairs.

Langworthy v. C. C. Washburn Flouring Mills Co., 77 Minn. 256, 79 N. W. 974; Davis v. Shearer, 90 Wis. 250, 62 N. W. 1050; Seaman v. Millers' Mut. Ins. Co., 90 Wis. 490, 63 N. W. 1059.

If a company is unable to collect a portion of an assessment, a new one may be levied to cover the deficiency, or such discrepancy

* Code Iowa 1873, tit. 9, c. 4, § 1160.

may be included in an assessment for subsequent losses, as a member's liability is not limited to his proportion of the amount of notes assessable, whether collectible or not.

Davis v. Sharp, 2 West. Law Month. 40, 2 Ohio Dec. 197; *Rockland & Hardenburgh Town Fire Ins. Co. v. Bussey*, 63 N. Y. Supp. 86, 48 App. Div. 359; *Bangs v. Gray*, 12 N. Y. 477, reversing *In re Bangs*, 15 Barb. (N. Y.) 284. An assessment by a receiver may be large enough to cover shrinkage and loss by uncollectible assessments. *Seamans v. Millers' Mut. Ins. Co.*, 90 Wis. 490, 63 N. W. 1059; *Davis v. Shearer*, 90 Wis. 250, 62 N. W. 1050.

Where, as in Michigan, a person cannot be assessed for deficiencies after the termination of his membership (*Ionia, E. & B. Farmers' Mut. Fire Ins. Co. v. Otto*, 96 Mich. 558, 56 N. W. 88; *Id.*, 97 Mich. 522, 56 N. W. 755), an assessment by a mutual insurance company may, within the discretion of the directors, include a liberal sum for contingencies (*Ionia, E. & B. Farmers' Mut. Fire Ins. Co. v. Ionia Circuit Judge*, 100 Mich. 606, 59 N. W. 250, 32 L. R. A. 481). In this case it was held that an assessment of 30 per cent. additional was not excessive, in view of probable litigation of claims. But, in *York Co. Mut. Fire Ins. Co. v. Bowden*, 57 Me. 286, it was held that an assessment of 95 per cent. additional to the actual losses in a certain class, "to meet estimated bad debts, interest, expenses, and costs of collection," was void, under a charter authorizing assessments to pay losses and other expenses.

The fact that a company borrows money to pay losses when the funds on hand are insufficient does not relieve the policy holders from liability to assessments for such losses (*Knipe v. Scholl*, 16 Montg. Co. Law Rep'r [Pa.] 209), even if the directors are individually liable for such borrowed money (*Eichman v. Hersker*, 170 Pa. 402, 33 Atl. 229), and the assessments are not levied for several years after the losses have occurred (*New Hanover Mut. Fire Ins. Co. v. Scholl*, 12 Montg. Co. Law Rep'r [Pa.] 78). So the directors of a company have power to order assessments, though losses have been paid by guarantors provided for by law (*American Guaranty Fund Mutual Ins. Co. v. Mattson*, 100 Mo. App. 316, 73 S. W. 365).

A member of a mutual company, who contracts only to pay assessments for losses, cannot, as a general rule, be assessed to pay unearned or returned premiums on policies issued on the cash plan.

Commonwealth v. Massachusetts Mut. Fire Ins. Co., 112 Mass. 116;
Commonwealth v. Mechanics' Mut. Fire Ins. Co., 112 Mass. 192;

Id., 120 Mass. 495; *Detroit Manufacturers' Mut. Fire Ins. Co. v. Merrill*, 101 Mich. 393, 59 N. W. 661; *Warner v. Delbridge & Cameron Co.*, 110 Mich. 590, 68 N. W. 283, 34 L. R. A. 701, 64 Am. St. Rep. 367; *Dewey v. Davis*, 82 Wis. 500, 52 N. W. 774; *Atlas Paper Co. v. Seamans*, 82 Wis. 504, 52 N. W. 775. But see *In re Minneapolis Mut. Fire Ins. Co.*, 49 Minn. 291, 51 N. W. 921; *Solly v. Potts*, 6 Montg. Co. Law Rep'r (Pa.) 209. And if the by-laws provide for a return of unearned premiums on the cancellation of a policy, unearned premiums on canceled policies may be included in an assessment. *Fayette Mut. Fire Ins. Co. v. Fuller*, 8 Allen (Mass.) 27. In *Warner v. Delbridge & Cameron Co.*, 110 Mich. 590, 68 N. W. 283, 34 L. R. A. 701, 64 Am. St. Rep. 367, it was held that, since an assessment for unearned premiums could be levied in Minnesota, such an assessment levied in Michigan on a contract made with a Minnesota company was valid.

An assessment may be made to pay back sums voluntarily paid under a prior assessment which has been adjudged invalid, together with interest thereon (*In re People's Mut. Equitable Fire Ins. Co.*, 9 Allen [Mass.] 319). So, if an assessment for any cause fails to be effectual, a second assessment may be made in place thereof to accomplish the same purpose.

People's Mut. Ins. Co. v. Allen, 10 Gray (Mass.) 297; *Sands v. Sweet*, 44 Barb. (N. Y.) 108, overruling *Campbell v. Adams*, 38 Barb. (N. Y.) 132; *Jackson v. Van Slyke*, 44 Barb. (N. Y.) 116. Members who have paid the first assessment may be credited therewith on the second one. *Ionia, E. & B. Farmers' Mut. Fire Ins. Co. v. Ionia Circuit Judge*, 100 Mich. 606, 59 N. W. 250, 32 L. R. A. 481.

But a mutual company cannot include in an assessment losses which have been paid by a prior assessment.

Cooper v. Shaver, 41 Barb. (N. Y.) 151. See, also, *Snyder v. Groff*, 8 Pa. Dist. R. 291. But members assessable for losses paid from money raised on account of other losses may be assessed by a receiver for its reimbursement: *Tobey v. Russell*, 9 R. I. 58.

Where the exhaustion of a fund by payment of losses is a condition precedent to an assessment, the exhaustion of the fund through misappropriations by the directors does not authorize an assessment (*Ohio Mut. Ins. Co. v. Marietta Woolen Factory*, 1 Ohio Dec. 577, 10 West. Law J. 466). But an assessment is not invalid because made to cover losses occasioned by bad investments (*People's Mut. Ins. Co. v. Allen*, 10 Gray [Mass.] 297); and assessments may be levied for losses barred by a provision or statute of limita-

tions, as the limitations are for the benefit of the company and may be waived.

Sands v. Hill, 42 Barb. (N. Y.) 651; *Susquehanna Mut. Fire Ins. Co. v. Sprenkle*, 18 York Leg. Rec. (Pa.) 121; *Kramer v. Boggs*, 5 Pa. Super. Ct. 394, 41 Wkly. Notes Cas. 13. See, also, *Capital City Mut. Fire Ins. Co. v. Boggs*, 172 Pa. 91, 33 Atl. 349.

(g) Power and duty to make assessment.

The deposit notes of a mutual insurance company are part of its capital, and the directors are bound to call in a sufficient amount on them to pay the insured who are losers by fire (*Rhinehart v. Alleghany County Mut. Ins. Co.*, 1 Pa. 359); and if a company refuses to make an assessment on its members to pay a judgment obtained on a policy, mandamus will in some jurisdictions lie to compel the levy of an assessment (*Perry v. Farmers' Mut. Fire Ins. Ass'n*, 132 N. C. 283, 43 S. E. 837). But assessments cannot be made upon premium notes, unless the necessity therefor properly and legally arises (*Pacific Mut. Ins. Co. v. Guse*, 49 Mo. 329, 8 Am. Rep. 132). Thus a contested claim for a loss does not become such a liability of a company as to require an assessment until the same is allowed by the company or established by a court of competent jurisdiction (*Decker v. Righter*, 9 Kan. App. 431, 58 Pac. 1009), and amounts due by delinquents on prior assessments should be collected by suit, if necessary, before an assessment is made.

Planters' Ins. Co. v. Comfort, 50 Miss. 662; *Sands v. Lillenthal*, 46 N. Y. 541.

Where a committee of the directors of a company has made a report recommending an assessment and stating the amount and the details, the acceptance and adoption of the report by a vote of the directors is a sufficient authority for the assessment (*Citizens' Mut. Fire Ins. Co. v. Sortwell*, 10 Allen [Mass.] 110).

If the laws of a company provide that losses are payable out of a fund derived from cash premiums, and, if that be exhausted, out of an assessment to be levied on the members, the exhaustion of the fund by payment of the losses is a condition precedent to levying an assessment. *Ohio Mut. Ins. Co. v. Marietta Woolen Factory*, 1 Ohio Dec. 577, 10 West. Law J. 466, affirmed in 3 Ohio St. 348. See, also, *Slater Mut. Fire Ins. Co. v. Barstow*, 8 R. I. 343. So, if the laws make deposit notes an absolute fund for the payment of losses and provide for the levying of assessments on the exhaustion of this fund, an assessment cannot be made until the fund is exhausted. *Appleton Mut. Fire Ins. Co. v. Jesser*, 5 Allen (Mass.) 446. But if the laws do not provide that deposit notes shall be deemed to be absolute funds of the company, an assessment may be laid before

the collection of them has been made or ordered. *Fayette Mut. Fire Ins. Co. v. Fuller*, 8 Allen (Mass.) 27. And even if earned premiums are required to be "used up" before an assessment is levied, uncollectible and worthless earned premiums may be regarded as used up. *Maine Mut. Marine Ins. Co. v. Neal*, 50 Me. 301.

Where a law vests in the directors of a company the right of deciding what amount or portion of a premium note shall be paid, the directors may make assessments when and as they shall deem necessary (*St. Lawrence Mut. Ins. Co. v. Paige*, 1 Hilt. [N. Y.] 430). And a law authorizing the directors to make two assessments, between which the policy holders may elect, is permissive only (*Commonwealth v. Massachusetts Mut. Fire Ins. Co.*, 112 Mass. 116). Where the laws of a company prescribe no method of calling meetings of the directors, except that notice thereof shall be given by the secretary, and do not require the object of such meetings to be stated in the notices, an assessment may be levied at a meeting notified by the secretary by order of the president, though it is not attended by the president, and though the object of the meeting was not stated in the notices (*Fayette Mut. Fire Ins. Co. v. Fuller*, 8 Allen [Mass.] 27).

The authority to levy assessments is generally vested in the directors of a mutual company, and, if it is so vested, the maker of a note given for a policy cannot raise the objection that the directors had no authority to levy assessments, as he is bound to take notice of the company's by-laws (*Farmers' Ins. Co. v. Borders*, 60 N. E. 174, 26 Ind. App. 491). Where the authority thus conferred on the directors requires the exercise of discretion on their part in its execution, as, for instance, the determination of the exact amount to be assessed, the directors cannot delegate the power of making assessments to an officer of the company (*Farmers' Mut. Fire Ins. Co. v. Chase*, 56 N. H. 341), and they cannot delegate to a minority the power to fix the exact amount of an assessment voted not to exceed a specified sum (*Monmouth Mut. Fire Ins. Co. v. Lowell*, 59 Me. 504). However, if the directors fail to perform their duty in regard to making an assessment, their powers may be exercised by a court of equity at its discretion (*Western Manufacturers' Mut. Ins. Co. v. Hutchinson Cooperage Co.*, 92 Ill. App. 1); and a court appointing a receiver of an insolvent company has power to direct the levying by such receiver of an assessment to pay losses (*Schofield v. Lafferty*, 17 Pa. Super. Ct. 8). Likewise, a receiver of a company has implied authority to levy assessments (*Embree v. Shideler*, 36 Ind. 423). But, as in the case of assessments by the

company or its directors, a receiver can levy an assessment only when the facts warrant such levy.

Thomas v. Whallon, 31 Barb. (N. Y.) 172; Embree v. Shideler, 36 Ind. 423. This principle is also supported by, and the necessity of an assessment considered in, Cooper v. Shaver, 41 Barb. (N. Y.) 151; Sands v. Shoemaker, 4 Abb. Dec. (N. Y.) 149; Sands v. Graves, 1 Thomp. & C. (N. Y.) Addenda, 18.

(h) Liability to assessment—Membership at time of loss.

A member of a mutual fire insurance company cannot be assessed for losses sustained before he became a member.

Mutual Fire Ins. Co. v. Jean, 96 Md. 252, 53 Atl. 950, 94 Am. St. Rep. 570; Detroit Manufacturers' Mut. Fire Ins. Co. v. Merrill, 101 Mich. 393, 59 N. W. 661; Swing v. Akeley Lumber Co., 62 Minn. 169, 64 N. W. 97; Sands v. Lillienthal, 46 N. Y. 541; Peoples' Fire Ins. Co. v. Hartshorne, 90 Pa. 465; Mutual Valley Fire Ins. Co. v. Rausch, 1 Leg. Rec. Rep. (Pa.) 250; Koehler v. Beeber, 122 Pa. 291, 16 Atl. 354; Farmers' Mut. Fire Ins. Co. v. Chase, 56 N. H. 341.

Where the charter of a company made losses payable out of a fund created by the premiums paid by members, and, on its exhaustion, by an assessment on the members, the company could not pay losses with premiums accrued and collected subsequent to occurrence of such losses (Ohio Mut. Ins. Co. v. Marietta Woolen Factory, 1 Ohio Dec. 577, 10 West. Law J. 466).

As a general rule a policy holder in a mutual company can be assessed only for liabilities incurred while his insurance is in force.

Planters' Ins. Co. v. Comfort, 50 Miss. 662; Manlove v. Naw, 39 Ind. 289; Manlove v. Bender, 39 Ind. 371, 13 Am. Rep. 280. In Thompson Lumber Co. v. Mutual Fire Ins. Co., 66 Ill. App. 254, it was said that a person who was at no time a policy holder in a company was not bound by an assessment levied by the court in appointing a receiver.

But, if the deposit notes given by a member insuring in a mutual company are to constitute an absolute fund for the payment of losses, such notes may be collected to pay losses and expenses incurred before the makers became members of the corporation.

Nashua Fire Ins. Co. v. Moore, 55 N. H. 48; Long Pond Mut. Fire Ins. Co. v. Houghton, 6 Gray (Mass.) 77; Same v. Hunt, Id. In Susquehanna Mut. Fire Ins. Co. v. Stauffer, 125 Pa. 416, 17 Atl. 471, and Same v. Leavy, 136 Pa. 499, 20 Atl. 502, a by-law was construed to require assessments to be levied, first, on policies in force at the time of loss, and, second, on those in force subsequent thereto.

An assessment laid on all the members of a mutual company to pay liabilities for losses and expenses, part of which accrued before

some of them became members, is void as to them, but valid as to the others (*Long Pond Mut. Fire Ins. Co. v. Houghton*, 6 Gray [Mass.] 77). But, under a statute providing that if the amount of premiums received for insurance by any mutual hail insurance company in any one year shall be insufficient to pay the losses, such corporation may levy an assessment on each member thereof in proportion to the amount insured to cover the deficiency,⁷ an assessment levied on all policy holders of a mutual hail insurance company is not void for not being confined to the members who were such when the losses occurred (*Gilman v. Druse*, 87 N. W. 557, 111 Wis. 400).

(d) Same—Liability for loss insured on the cash plan.

A mutual insurance company may be authorized by law to write insurance on the cash plan, as well as on the mutual plan. A law granting such privilege to a mutual company is not a departure from the original object of the company (*Lycoming Fire Ins. Co. v. Ruch*, 1 Leg. Chron. [Pa.] 235), and is binding on persons becoming members of a company subsequent thereto (*Lycoming Fire Ins. Co. v. Newcomb*, 1 Leg. Chron. [Pa.] 9). Where a company is authorized to do business on the cash plan, as well as on the mutual plan, premium notes given by members insuring on the latter plan may be assessed to pay losses sustained on policies written on the cash plan.

Reference may be made to *White v. Havens*, 4 Abb. Dec. (N. Y.) 582, 20 How. Prac. 177; *Jackson v. Roberts*, 31 N. Y. 304; *Sands v. Son*, 1 Thomp. & C. (N. Y.) Addenda, 13; *Sands v. Graves*, 58 N. Y. 94; *Lycoming Fire Ins. Co. v. Ruch*, 1 Leg. Chron. (Pa.) 235; *Lycoming Fire Ins. Co. v. Buck*, 1 Luz. Leg. Reg. (Pa.) 351; *Lycoming Fire Ins. Co. v. Newcomb*, 1 Leg. Chron. (Pa.) 9; *Appeal of Hummel*, 78 Pa. 320; *Schimpf v. Lehigh Valley Mut. Ins. Co.*, 86 Pa. 373, affirming *Lehigh Valley Fire Ins. Co. v. Shimpf*, 13 Phila. 515; *Hays v. Lycoming Fire Ins. Co.*, 98 Pa. 184. In *George v. Lawrence*, 1 Pears. (Pa.) 159, it was held that under the charter of the company in that case persons insured for a marine loss on the cash plan had no claim, in case of loss, on the premium notes given by those insured on the mutual plan.

In *Shaughnessy v. Rensselaer Ins. Co.*, 21 Barb. (N. Y.) 605, it was said that, though the appropriation of money received on the cash plan to the payment of losses relieved early members on the

⁷ Rev. St. Wis. 1898, § 1962.

mutual plan from assessments on their notes and left others to be assessed for subsequent losses, there was no remedy for this inequality. Subsequent losses must be borne by those whose notes were in force at the time they occurred. If a mutual company has no authority to issue policies on the stock or cash plan, the holders of mutual policies cannot be assessed on their obligations to pay losses under cash policies (*Corey v. Sherman*, 96 Iowa, 114, 64 N. W. 828, 32 L. R. A. 514).

(j) Same—Restrictions as to class of risk.

In an early Massachusetts case (*People's Equitable Mut. Fire Ins. Co. v. Arthur*, 7 Gray [Mass.] 267) the court took the position that a mutual fire insurance company could not divide its risks into classes and restrict the liability of policy holders to the class in which the policies were written, unless it had adopted a statute which authorized a division of risks into classes.⁸ Similarly it was held in an early New York case (*Thomas v. Achilles*, 16 Barb. 491) that a company organized under the law of 1849⁹ could not divide its risks into classes and restrict the liability on premium notes to losses occurring in the class to which such notes belonged. This decision was followed by the United States Circuit Court for Wisconsin (*Fitzpatrick v. Troy Ins. Co.*, 9 Fed. Cas. 199) with reference to a Wisconsin statute similar to the New York law. But in a subsequent case (*White v. Ross*, 4 Abb. Dec. [N. Y.] 589, 15 Abb. Prac. 66) the New York Court of Appeals held that, inasmuch as the law of 1849 empowered companies organized thereunder to determine "the mode and manner" in which they were to exercise their powers, such companies had the power to divide their risks into classes. This doctrine was reiterated by the same court in another case (*Sands v. Boutwell*, 26 N. Y. 233), and it is to be noted that the Wisconsin Supreme Court in an early case (*Kelly v. Troy Fire Ins. Co.*, 3 Wis. 254), inferentially, at least, upholds the division of risks into classes by deciding that, though a general assessment could be levied, the application of proceeds of notes belonging to one class must be restricted to losses occurring in that class. This position is further fortified by a more recent Wisconsin case (*Allen v. Winne*, 15 Wis. 113).

Where a charter of a company provides that deposit notes given for insurance shall be paid at such times and in such manner as the by-laws may determine, and the deposit notes given promise to pay

⁸ St. Mass. 1849, c. 104.

⁹ Act N. Y. April 10, 1849.

in such proportions and at such times as the directors might agreeably to their charter require, a by-law of the company providing that deposit notes given for marine insurance are assessable only in proportion to the losses by sea, and deposit notes given for fire insurance are assessable only in proportion to the losses by fire, is expressly included as a term of the contract of insurance, and is binding on the corporation (*Doane v. Millville Mut. Marine & Fire Ins. Co.*, 45 N. J. Eq. 274, 17 Atl. 625).

Though there is a division of risks into classes, it is said, in *Kelly v. Troy Fire Ins. Co.*, 3 Wis. 254, that a general assessment may be levied. But even in that case the court held that the proceeds from the notes in one class could not be applied to the payment of losses occurring in another class. And in a subsequent case (*Allen v. Winne*, 15 Wis. 113) the same court holds that a receiver of a company cannot levy an assessment on notes in one department to pay losses due in another. Similarly it was held, in *Atlantic Mut. Fire Ins. Co. v. Moody*, 74 Me. 385, that an assessment which was levied generally without reference to classes was invalid and could not be enforced.

In New York it is held that, where there is a division of risks into classes and a limitation of liability, premium notes are primarily liable to assessment for losses only in the department to which the notes belong.

White v. Ross, 4 Abb. Dec. 589, 15 Abb. Prac. 66; *Sands v. Boutwell*, 26 N. Y. 233; *Sands v. Sanders*, 28 N. Y. 416, 25 How. Prac. 82; *Sands v. Shoemaker*, 4 Abb. Dec. 153.

But if the notes in one department are insufficient to pay the losses occurring therein, the notes of other departments may be assessed to make up the deficiency.

White v. Ross, 4 Abb. Dec. 589, 15 Abb. Prac. 66; *Sands v. Boutwell*, 26 N. Y. 233; *Sands v. Sanders*, 28 N. Y. 239; *Id.*, 28 N. Y. 416, 25 How. Prac. 82. But see *Sands v. Shoemaker*, 4 Abb. Dec. 153.

(k) Effect of termination of membership — Cancellation and withdrawal.

Where a member of a mutual company withdraws from the association, he is, nevertheless, liable for assessments for all losses which occurred prior thereto.

Peake v. Yule, 123 Mich. 675, 82 N. W. 514; *Stockley v. Schwerdfeger*, 19 Pa. Super. Ct. 289; *Atlantic Ins. Co. v. Goodall*, 35 N. H. 328.

This liability attaches as to assessments not levied at the time of withdrawal (*Sparks v. Flaccus Glass Co.*, 16 Pa. Super. Ct. 119),

and assessments for losses, the determination of which is in litigation.

Ionia, E. & B. Farmers' Mut. Fire Ins. Co. v. Otto, 96 Mich. 558, 56 N. W. 88; *Id.*, 97 Mich. 522, 56 N. W. 755; *Ionia, E. & B. Farmers' Mut. Fire Ins. Co. v. Ionia Circuit Judge*, 100 Mich. 606, 59 N. W. 250, 32 L. R. A. 481.

But after a member has withdrawn, on the payment of all charges against him existing at the date of withdrawal, he cannot be held liable on assessments levied to make good a deficiency caused by the default of other members of the company.

Union Mut. Fire Ins. Co. v. Spaulding, 61 Mich. 77, 27 N. W. 880; *Tolford v. Church*, 66 Mich. 431, 33 N. W. 913.

It has also been held in Michigan that the company cannot release the insured from his liability in this regard (*Detroit Manufacturers' Mut. Fire Ins. Co. v. Merrill*, 101 Mich. 393, 59 N. W. 661) by giving a receipt in full (*Peake v. Yule*, 123 Mich. 675, 82 N. W. 514). If the company uses part of the amount paid by the member on withdrawal to defray losses subsequent thereto, the member is not liable for further assessments to pay off the deficiency on the prior losses (*Patrons of Industry Fire Ins. Co. v. Harwood*, 72 N. Y. Supp. 8, 64 App. Div. 248).

Persons whose policies have been canceled are not liable on assessments levied thereafter by receivers under orders of court in proceedings to which they were not parties. *Parker v. Lamb & Sons*, 99 Iowa, 265, 68 N. W. 686, 34 L. R. A. 704; *Langworthy v. Saxony Mills*, 72 Mo. App. 363.

When a company cancels the policy on its own motion, the insured is not liable for assessments to defray losses occurring thereafter.

Reference may be made to *Tolford v. Church*, 66 Mich. 431, 33 N. W. 913; *Campbell v. Adams*, 38 Barb. (N. Y.) 132; *Mansfield v. Franklin Furniture Co.*, 12 Ohio Cir. Ct. R. 222, affirmed without opinion 54 Ohio St. 653, 47 N. E. 1114; *Columbia Ins. Co. v. Masonheimer*, 76 Pa. 138; *Matten v. Lichtenwalner*, 6 Pa. Super. Ct. 575; *Knipe v. Scholl*, 16 Montg. Co. Law Rep'r (Pa.) 209; *Davis v. Shearer*, 90 Wis. 250, 62 N. W. 1050.

As to losses which have already occurred, the cancellation of the policy by the company does not relieve the insured from liability for assessments.

It is deemed sufficient to refer to *Farwell v. Parker*, 59 Ill. App. 43; *Mallen v. Langworthy*, 70 Ill. App. 376; *Pioneer Furniture Co. v.*

Langworthy, 84 Ill. App. 594; Commonwealth v. Mechanics' Mut. Fire Ins. Co., 112 Mass. 192; Swing v. Wurst, 76 Minn. 198, 79 N. W. 94; Doane v. Millville Mut. Marine & Fire Ins. Co., 48 N. J. Eq. 522, 11 Atl. 739; Doane v. Millville Mut. Marine & Fire Ins. Co., 45 N. J. Eq. 274, 17 Atl. 625; Campbell v. Adams, 38 Barb. (N. Y.) 132; Knipe v. Scholl, 16 Montg. Co. Law Rep'r (Pa.) 209; Matten v. Lichtenwalner, 6 Pa. Super. Ct. 575; Stockley v. Schwerdfeger, 19 Pa. Super. Ct. 289.

The company may, however, by compromise and settlement with the insured, relieve him from further liability on the premium note, even for losses prior to such settlement.

Hyde v. Lynde, 4 N. Y. 387; Sands v. Hill, 55 N. Y. 18; Wadsworth v. Davis, 18 Ohio St. 123.

(l) Same—Forfeiture of policy.

Though it was formerly held (Korn v. Mutual Assur. Soc., 6 Cranch, 192, 3 L. Ed. 195) that the obligation of the insured to contribute did not cease in consequence of his forfeiting his insurance by his own neglect, the present rule is that a forfeiture which will relieve a mutual insurance company from liability on the policy will ordinarily relieve the insured member from his liability on his premium notes.

Reference may be made to Keenan v. Missouri State Mut. Ins. Co., 12 Iowa, 126; Stockley v. Benedict, 92 Md. 325, 48 Atl. 59; Tuckerman v. Bigler, 46 Barb. (N. Y.) 375; Columbia Ins. Co. v. Buckley, 83 Pa. 293, 24 Am. Rep. 172; Mutual Assur. Soc. v. Holt, 29 Grat. (Va.) 612.

The rule has, however, been modified in Pennsylvania, and, in view of the right of the insurer to waive a forfeiture, it has been held that the insured cannot, when the company elects to consider the policy in force, insist upon the forfeiture to escape liability.

Columbia Ins. Co. v. Buckley, 83 Pa. 293, 24 Am. Rep. 172; Dettra v. Sax, 3 Lack. Jur. (Pa.) 198; Kramer v. Boggs, 5 Pa. Super. Ct. 394, 41 Wkly. Notes Cas. 13; Capital City Mutual Fire Ins. Co. v. Boggs, 172 Pa. 91, 33 Atl. 349.

A forfeiture of the policy will not, of course, release the insured from liability for assessments already due.

Iowa State Ins. Co. v. Prossee, 11 Iowa, 115; Stockley v. Hartley, 12 Pa. Super. Ct. 628.

(m) Same—Transfer of property or policy.

The rule as to termination of liability by forfeiture of the policy has been applied where the policy is forfeited by an alienation of

the property, and it has been held that after a transfer of the property the insured is not liable for assessments for losses occurring thereafter.

Miner v. Judson, 5 *Thomp. & C.* (N. Y.) 46, 2 *Hun*, 441; *Wilson v. Trumbull Mut. Fire Ins. Co.*, 19 *Pa.* 372. And his liability does not revive on a reassignment of the policy to him as security for a debt. *Miner v. Judson*, 2 *Lans.* (N. Y.) 300.

If, however, the laws of the company or conditions of the contract call for a surrender of the policy on alienation, the insured is not released from his liability for assessments until the policy is surrendered.

York County Mut. Fire Ins. Co. v. Turner, 53 *Me.* 225; *Cummings v. Sawyer*, 117 *Mass.* 80; *Thropp v. Susquehanna Mut. Fire Ins. Co.*, 125 *Pa.* 427, 17 *Atl.* 473, 11 *Am. St. Rep.* 909; *State Mut. Fire Ins. Co. v. Keefer*, 9 *Pa. Super. Ct.* 186, 43 *Wkly. Notes Cas.* 449.

So, too, a transfer of the property will not release the insured, when the policy provides that, to effect a release, the policy must be surrendered and the insured's proper proportion of all losses and expenses that have accrued be paid (*Hyatt v. Wait*, 37 *Barb.* [N. Y.] 29).

The surrender of the policy may be dispensed with by resolution of the board of directors. *Huntley v. Beecher*, 30 *Barb.* (N. Y.) 580.

It was held in *Indiana Mut. Fire Ins. Co. v. Coquillard*, 2 *Ind.* 645, that the insured is not released from liability by a transfer of the insured property until an actual surrender of the policy and the payment of all assessments against him for losses sustained prior to the surrender. As this decision was based on a mere dictum in *McCulloch v. Indiana Mut. Fire Ins. Co.*, 8 *Blackf. (Ind.)* 50, the rule was rejected in *Indiana Mut. Fire Ins. Co. v. Conner*, 5 *Ind.* 170, and the court held that although the company's charter provided that, when an insured building should be alienated by sale, the policy thereon should be void and surrendered for cancellation, the release of the member was not dependent on the actual physical surrender of the policy to the company, but his liability for assessments ceased upon the alienation of property.

It has been held in *Illinois (Pinckneyville Mut. Fire Ins. Co. v. Kimmel*, 59 *Ill. App.* 532) that on the devolution of the insured property by the death of the member liability for assessment on the premium note ceases. But the rule in *Pennsylvania* is that the heirs of the insured become liable, as such a devolution of the

property is not an alienation which terminates the insurance (*Columbia Ins. Co. v. Mullin's Adm'r*, 4 Leg. Op. [Pa.] 572). If the insured property is assigned as dower, the widow becomes liable from the time of such assignment (*Shirley v. Mutual Assur. Soc.*, 2 Rob. [Va.] 705).

(n) Same—Expiration of policy and destruction of property.

A member of a mutual company is liable for all losses occurring during the term of the policy (*Raegener v. Willard*, 60 N. Y. Supp. 478, 44 App. Div. 41). Consequently, though his policy has expired, the insured is still liable for losses which occurred prior thereto, though the assessment is not levied until after such expiration.

St. Louis Mut. Fire & Marine Ins. Co. v. Boeckler, 19 Mo. 135; *Boone County Home Mut. Ins. Co. v. Anthony*, 68 Mo. App. 424; *Hyatt v. Wait*, 37 Barb. (N. Y.) 29; *Billmeyer v. People's Fire Ins. Co.*, 1 Walk. (Pa.) 530; *Susquehanna Mut. Fire Ins. Co. v. Sprengle*, 18 York Leg. Rec. (Pa.) 121.

The fact that suit is brought after the expiration of the policy to recover an assessment for losses then adjusted does not preclude the bringing of another suit to recover for losses not then adjusted, but still occurring in the life of the policy (*Susquehanna Mut. Fire Ins. Co. v. Mardorf*, 152 Pa. 22, 25 Atl. 234). The company is entitled to retain the note after expiration of the insurance, to secure the payment of its proportionate part of all losses and expenses incurred during the life of the insurance (*St. Louis Mut. Fire & Marine Ins. Co. v. Boeckler*, 19 Mo. 135); and, if an assessment is not paid within the prescribed time, the maker of the premium note will be liable for its full amount (*Hyatt v. Esmond*, 37 Barb. [N. Y.] 601).

In Massachusetts the right to recover assessments on policies which have expired is limited to such as are duly levied and notice of which is given within two years. *Hamilton Mut. Ins. Co. v. Parker*, 11 Allen (Mass.) 574; *Sanford v. Hampden Paint & Chemical Co.*, 179 Mass. 10, 60 N. E. 399.

As the insured is liable for assessments for all losses occurring during the term of the policy, he is not released from liability by a total destruction of the property covered within the term; such destruction not effecting a termination of the policy.

Boot & Shoe Manufacturers' Mut. Fire Ins. Co. v. Melrose Orthodox Congregational Soc., 117 Mass. 199; *Swamscot Mach. Co. v. Partidge*, 25 N. H. 369; *Bangs v. Skidmore*, 21 N. Y. 186, affirming

Bangs v. Scidmore, 24 Barb. 29; *Thropp v. Susquehanna Mut. Fire Ins. Co.*, 125 Pa. 427, 17 Atl. 473, 11 Am. St. Rep. 909. And the rule is not changed by the fact that the company had been accustomed to surrender the premium notes and cancel the policies on the happening of a loss. *New Hampshire Mut. Fire Ins. Co. v. Rand*, 24 N. H. 428.

(c) Estoppel and waiver of right to deny liability.

A person insuring in a mutual company, who consents to be bound, so far as rates, premiums, and payments are concerned, by the terms and provisions of the constitution and by-laws of the society, cannot be heard to say that he has paid a cash premium, and therefore is not liable for assessments, where the constitution and by-laws in express terms provide that losses shall be paid by assessments, and that any person applying for membership must agree to pay all assessments made for losses and expenses (*Schofield v. Hayes*, 17 Pa. Super. Ct. 110). So a person to whom a policy is issued in good faith, and who receives the benefit of the same, is estopped to assert as a defense to the assessment that the company's act in issuing the policy was ultra vires (*Thompson Lumber Co. v. Mutual Fire Ins. Co.*, 66 Ill. App. 254); and such person is also estopped to assert that the notes given by him were not such as were contemplated by the statute under which the company was organized (*Hill v. Reed*, 16 Barb. [N. Y.] 280). Likewise members of a mutual company, who are entitled to vote for directors, cannot set up as a defense to an assessment dereliction of duty on the part of the company's officers. The officers can be called to account for any dereliction on their part, or they can be restrained by injunction. If the members fail to avail themselves of these remedies, they must be held to have acquiesced in the acts of the officers (*Lycoming Fire Ins. Co. v. Newcomb*, 1 Leg. Chron. [Pa.] 9). Similarly, members who have taken their chances of the gains accruing from policies issued on the cash plan cannot object to assessments for the payment of losses occurring in the cash department (*Lycoming Fire Ins. Co. v. Buck*, 1 Luz. Leg. Reg. [Pa.] 351). But, if the members have no knowledge that policies are issued on the cash plan, they are not estopped by their laches from questioning the authority of the company to issue such policies (*Corey v. Sherman* [Iowa] 60 N. W. 232, 32 L. R. A. 490). Still, where the articles of incorporation and the by-laws of a hail insurance company are printed on the face of its policies, and state that the company insures tobacco against loss, a member of the company cannot, when sued

for an assessment, question the acts of the company in insuring tobacco, though the same were ultra vires (*Gilman v. Druse*, 87 N. W. 557, 111 Wis. 400). However, a member of a mutual company is not estopped from claiming as a defense to an assessment that his contract is void because of the company's failure to comply with the state laws, as no estoppel will operate in favor of or against either party on this account, they being in *pari delicto* (*Montgomery v. Whitbeck*, 12 N. D. 385, 96 N. W. 327).

An insured, who holds a policy and accepts the benefits thereof for 20 months, cannot escape liability for assessments on the ground that the application was not properly executed (*Interstate Mut. Fire Ins. Co. v. Brownback*, 1 Pa. Super. Ct. 183). So a person, who receives and holds a policy issued on an application therefor signed by him during the time it was in force by its terms, is estopped to deny his knowledge and acceptance thereof (*Richards v. Hale*, 24 Ohio Cir. Ct. R. 468). Similarly one who accepts and retains a policy issued by a mutual company cannot avoid payment of an assessment on the ground that, having failed to sign the constitution, he is not a member of the company.

Richards v. Swalm, 7 Ohio N. P. 68, 9 Ohio S. & C. P. Dec. 70; *Richards v. American Fire Brick & Clay Co.*, 69 Ohio St. 359, 69 N. E. 616, 100 Am. St. Rep. 679; *Same v. Louis Lipp Co.*, Id.

A person who retains a policy obtained from a mutual company, and enjoys the benefits thereof until the company becomes insolvent, is estopped to set up fraud or misrepresentations by the company as a defense to an assessment.

Sherman v. Frasier, 112 Iowa, 236, 83 N. W. 886; *Dwinnell v. Felt*, 90 Minn. 9, 95 N. W. 579.

So it is doubtful whether a person who retains a policy until the rights of third persons intervene can avoid payment of an assessment on the ground of fraud (*Swing v. Wurst*, 76 Minn. 198, 79 N. W. 94), or want of ownership of the property insured (*Beeber v. Thomas*, 4 Pa. Co. Ct. R. 192). And where a member pays assessments after discovery of the insurer's fraud, and the rights of third parties then intervene, he is estopped to rely on the fraud as a defense to the assessments (*Eichman v. Hersker*, 170 Pa. 402, 33 Atl. 229). But payment of an invalid assessment will not estop a member from denying the validity of subsequent similar assessments (*Farmers' Mut. Fire Ins. Co. v. Knight*, 44 N. E. 834, 162 Ill. 470, affirming 59 Ill. App. 274). And there is no waiver or estoppel on

the part of a policy holder, by reason of the payment of an assessment after the surrender of his policy, to claim exemption for subsequent losses, where he only paid what the company claimed prior to the surrender of his policy, and for which he supposed himself liable (*Tolford v. Church*, 66 Mich. 431, 33 N. W. 913).

(p) Levy and collection of assessments.

In the absence of a showing to the contrary, it will be presumed that the proceedings for the levying of an assessment and the manner of its levy were regular.

People's Mut. Fire Ins. Co. v. Bergstresser, 11 Pa. Co. Ct. R. 646, 1 Pa. Dist. R. 771; *Sparks v. Vitale* (Pa. Super. Ct.) 44 Wkly. Notes Cas. 150. In *Citizens' Mut. Fire Ins. Co. v. Sortwell*, 10 Allen (Mass.) 110, it was said that where a statement required by law of the directors is signed by part of them, and it does not appear that others voted for the assessment, the presumption is that all who voted for the assessment signed the statement.

Where the charter of the company lays down rules by which the amount of an assessment and its apportionment is to be determined, so that the directors have no discretion in this matter, all that is necessary is that the directors determine by vote that an assessment be made (*Atlantic Mut. Fire Ins. Co. v. Sanders*, 36 N. H. 252). Where the secretary is authorized to assess for a loss sustained, the fact that he calls to his counsel the board of directors and acts on their advice will not invalidate an assessment (*Phelps County Farmers' Mut. Ins. Co. v. Johnston*, 66 Neb. 599, 92 N. W. 576). So the fact that no quorum of the directors was present when losses were allowed did not invalidate an assessment voted by a quorum of the directors, as this constituted a ratification of the allowance (*Atlantic Mut. Fire Ins. Co. v. Sanders*, 36 N. H. 252). But, where an assessment made by the treasurer of a company is invalid for want of power in the directors to delegate authority to him, a subsequent resolution authorizing the treasurer to surrender premium notes when the maker has paid all assessments and dues is not a ratification of such assessment (*Farmers' Mut. Fire Ins. Co. v. Chase*, 56 N. H. 341). So, where an assessment made by the secretary in accordance with a resolution of the directors that such assessment was necessary was invalid for want of the formal approval of the directors, it was not validated by the fact that the assessment roll was signed by the directors individually (*Johnson v. Farmers' Mut. Fire Ins. Co. of Kent County*, 110 Mich. 488, 68

N. W. 299, 64 Am. St. Rep. 360). An assessment made by an illegally elected board of directors is invalid (*People's Mut. Ins. Co. v. Westcott*, 14 Gray [Mass.] 440). But the legality of their election cannot be collaterally questioned in an action to recover an assessment (*Nashua Fire Ins. Co. v. Moore*, 55 N. H. 48).

The assignment of a premium note in trust for collection amounts to a requirement by the board of directors that the entire amount shall be paid within a reasonable time (*Hill v. Reed*, 16 Barb. [N. Y.] 280). But an order of court directing a receiver to prosecute and collect the whole amount unpaid on deposit and premium notes by any and all legal and proper ways and means will not authorize the receiver to collect the same by suit before assessment (*Devendorf v. Beardsley*, 23 Barb. [N. Y.] 656).

A decree directing a receiver to levy and collect an assessment on outstanding policies, which contains a schedule of policies liable to pay losses, but provides that it shall not be construed to prevent any member from setting up defenses he may have, is not conclusive as to what policies are subject to assessment (*Annan v. Hill Union Brewery Co.*, 59 N. J. Eq. 414, 46 Atl. 563); and a decree of a court in one state directing a receiver to assess members of a company a certain per cent. of their premium notes is not binding on the courts of another state as to a maker of a note who was not a party to the proceedings (*Parker v. Lamb & Sons*, 99 Iowa, 265, 68 N. W. 686, 34 L. R. A. 704).

Though a by-law of a company provides that, in case an assessment is needed, "the directors shall have power to order such assessment at any meeting called for that purpose," an assessment levied at a regular meeting is valid, without affirmative proof that notice was given to the directors that an assessment would be laid at such meeting (*Bay State Mut. Fire Ins. Co. v. Sawyer*, 12 Cush. [Mass.] 64); and it is wholly immaterial in what way the day of the regular meeting was fixed (*Atlantic Mut. Fire Ins. Co. v. Sanders*, 36 N. H. 252). Where notice to the directors of an assessment meeting was required to be given by mail or in other ways, a written or verbal notice by the secretary, left at the director's place of business with his brother, was sufficient (*Williams v. German Mut. Fire Ins. Co.*, 68 Ill. 387).

In the absence of statute or contract provision, one insured under a mutual policy is not entitled to notice of an intention to make an assessment (*Dwinnell v. Felt*, 90 Minn. 9, 95 N. W. 579); and, even under a law requiring personal notice as far as possible to

members of a hearing on an assessment,¹⁰ the action of a company in making an assessment is not void, as against one to whom notice was mailed, but who did not receive it (*Commonwealth Mut. Fire Ins. Co. v. Wood*, 171 Mass. 484, 51 N. E. 19). In *Commonwealth v. Dorchester Mut. Fire Ins. Co.*, 112 Mass. 142, it was held that the Massachusetts law, which provided for petitions to ratify assessments or calls made by mutual fire insurance companies,¹¹ applied only to calls made by authority of statute, and not to those made by virtue of contracts contained in deposit notes.

A delay in an assessment, occasioned through the fact that an absolute assessment failed to be effectual through an irregularity in making it, not at the time known, does not render the assessment invalid (*People's Mut. Ins. Co. v. Allen*, 10 Gray [Mass.] 297). So a delay of a mutual company for a time not unreasonable to make an assessment does not invalidate the assessment, notwithstanding a requirement that assessments shall be levied forthwith, on exhaustion of the funds on hand (*Marblehead Mut. Fire Ins. Co. v. Underwood*, 3 Gray [Mass.] 210). But, where assessments are required to be made as soon as a loss occurs, a delay of several years, during which losses are paid by loans and many persons insured cease to be members, invalidates an assessment (*Mutual Fire Ins. Co. v. Jean*, 53 Atl. 950, 96 Md. 252, 94 Am. St. Rep. 570).

An assessment by a company located within the enemy's lines during the War of 1861-65, to pay losses incurred during the war, created no liability on property insured in the company prior to the war, but located in loyal territory. *Mutual Assur. Soc. v. Berkeley County Sup'rs*, 4 W. Va. 348.

A receiver of a company must comply with the conditions precedent prescribed by statute in making an assessment (*Swing v. Wurst*, 76 Minn. 198, 79 N. W. 94). In *Re Campbell*, 13 How. Prac. (N. Y.) 481, it was held that a reference was necessary to ascertain the condition of the company and its liabilities, and that notice of the proceedings on such reference should be given members of the company. But in *Ross v. Knapp, Stout & Co.*, 77 Ill. App. 424, the court held that an assessment by the court in a receivership bound the members of the company, though they were not personally parties to the proceedings; and the same rule was asserted in *Parker v. Central Ohio Paper Co.*, 4 Ohio S. & C. P. Dec. 250. Mere irregularities in the levying of an assessment by a

¹⁰ St. Mass. 1894, c. 522, § 49.

¹¹ St. Mass. 1862, c. 181.

receiver will not constitute a defense thereto (*Richards v. Hale*, 24 Ohio Cir. Ct. R. 468).

(g) Form, requisites, and validity of assessment.

An assessment made by a mutual insurance company in good faith and substantially correct is binding (*Lycoming Fire Ins. Co. v. Buck* [Pa. Com. Pl.] 1 Luz. Leg. Reg. 351), notwithstanding small errors, upon a member who is not affected to a perceptible amount by the errors (*Marblehead Mut. Fire Ins. Co. v. Underwood*, 3 Gray [Mass.] 210). An assessment need not specify the name of the party bound to contribute, nor the amount of the note. A general assessment is good, by which a receiver declares that each premium note is assessed to the full amount thereof. (*Sands v. Sanders*, 28 N. Y. 416.) So a resolution by a board of directors of a company, levying a certain percentage on the premium notes of all the members of said company, but without specifying the names of all said members and the precise sum required to be paid by each, constitutes a good and valid assessment upon each and every one of them (*Lycoming Fire Ins. Co. v. Rought*, 97 Pa. 415). But an assessment which does not specify the amount or per cent. assessed is invalid (*St. Lawrence Mut. Ins. Co. v. Paige*, 1 Hilt. [N. Y.] 430). Where several losses have occurred so nearly together that the same notes are liable to be assessed for the payment of them all, only one assessment is necessary (*Shaughnessy v. Rensselaer Ins. Co.*, 21 Barb. [N. Y.] 605).

If the laws of a company require assessments to be signed by the secretary and a majority of the board, and placed on file, a paper prepared by the secretary, which is not signed by himself or any one else, and which contains no heading showing what is meant by the various columns in which entries are made, in pursuance of a resolution of the board, is not a sufficient assessment (*Baker v. Citizens' Mut. Fire Ins. Co.*, 51 Mich. 243, 16 N. W. 391). But a statement of the condition of a company, which shows all the separate items of liabilities for which the assessment is made, is sufficient, under a law which requires a statement of assessment showing the amount of cash on hand, deposit notes, and liabilities subject to assessment,¹² though other items for estimated expenses, returned premiums, and losses are included in the summary (*Fayette Mut. Fire Ins. Co. v. Fuller*, 8 Allen [Mass.] 27).

If the laws of a company provide that the decision of the board

¹² Gen. St. Mass. c. 58, § 54.

of directors shall be final and conclusive on all parties interested, a court cannot set aside an assessment by the board, unless made in bad faith or through fraud, accident, or mistake (*Hallman v. Gilbertsville Live Stock Ins. Co.* [Pa. Com. Pl.] 13 Montg. Co. Law Rep'r, 59); and the validity of an assessment by a receiver cannot be questioned in an action by him to recover the assessment.

Eichman v. Hersker, 170 Pa. 402, 33 Atl. 229; *Capital City Mut. Fire Ins. Co. v. Boggs*, 172 Pa. 91, 33 Atl. 349. See, also, *Hamilton Mut. Ins. Co. v. Parker*, 11 Allen (Mass.) 574; *Lycoming Fire Ins. Co. v. Langley*, 62 Md. 196.

If an assessment is levied for an improper purpose, and is thus invalid, an injunction will lie to restrain the company from enforcing it (*Lycoming Fire Ins. Co. v. Newcomb*, 1 Leg. Chron. [Pa.] 9).

(r) Uniformity of assessments.

An assessment by a mutual company must be made on all the members under a duty to contribute (*Planters' Ins. Co. v. Comfort*, 50 Miss. 662), and in the absence of any provision to the contrary must be made against all who are members at the time a loss occurs (*New Hanover Mut. Fire Ins. Co. v. Scholl* [Pa. Com. Pl.] 12 Montg. Co. Law Rep'r, 78). An omission of some who are liable for their proportion of the share will invalidate the assessment.

Marblehead Mut. Fire Ins. Co. v. Hayward, 3 Gray (Mass.) 208; *Swing v. H. C. Akeley Lumber Co.*, 62 Minn. 169, 64 N. W. 97; *Herkimer County Mut. Ins. Co. v. Fuller*, 14 Barb. (N. Y.) 373; *Susquehanna Mutual Ins. Co. v. Gackenbach*, 115 Pa. 492, 9 Atl. 90.

But an omission of a few notes, which have been adjusted and canceled before making the assessment, and which are of so small amount as not materially to increase the assessment on the remainder, will not prevent the collection of the assessment (*Fayette Mut. Fire Ins. Co. v. Fuller*, 8 Allen [Mass.] 27). So an omission, by a receiver, of certain notes which have been illegally surrendered to the makers without payment of their proportionate share of the losses, does not render the assessment invalid, where objection to the surrender was not made by the members of the company (*Davis v. Oshkosh Upholstery Co.*, 82 Wis. 488, 52 N. W. 771). In making an assessment, it is proper to include canceled policies which have not paid their share of losses which occurred during the life of such policies (*Knipe v. Scholl*, 16 Montg. Co. Law Rep'r [Pa.] 209), and to omit policies written subsequent to the time the liability assessed for accrued (*Greenhow v. Buck*, 5 Munf. [Va.] 263).

An assessment must be made ratably on members liable therefor (*Planters' Ins. Co. v. Comfort*, 50 Miss. 662). And when a member has paid toward losses or expenses the proportion of the amount which his deposit note bears to the other deposit notes legally assessable, his liability to assessment for such losses or expenses is discharged, unless a deficiency arises by reason of the inability of other members to pay the proportion assessed on their notes, in which case he is liable to a further assessment to make up the deficiency (*Bangs v. Gray*, 12 N. Y. 477, reversing *In re Bangs*, 15 Barb. 264). Assessments cannot be graduated by the age of the policy (*Commonwealth v. Mechanics' Mut. Fire Ins. Co.*, 112 Mass. 192), but must be made on a member in the proportion which the amount of his deposit note bears to the aggregate amount of all the deposit notes (*Herkimer County Mut. Ins. Co. v. Fuller*, 14 Barb. [N. Y.] 373). But in a Wisconsin case (*Davis v. Oshkosh Upholstery Co.*, 82 Wis. 488, 52 N. W. 771) it was held that an assessment of a certain per cent. on all the notes, without regard to the just proportion of loss incurred during the life of the policy, and without regard to the amount which had been already paid thereon, though not, perhaps, requiring more than the face of the note in any case, violated, in its inequality, a cardinal rule of mutual insurance. However, the rule announced in the Massachusetts and New York cases appears to find support in *Connecticut River Mut. Fire Ins. Co. v. Whipple*, 61 N. H. 61, wherein it was held that an assessment made on the face of the premium note, though payments had been made thereon, was proportional, when made in the same manner on all notes of the same class. And in *Shaughnessy v. Rensselaer Ins. Co.*, 21 Barb. 605, it was said that a receiver cannot discriminate between notes given when higher rates of insurance existed and notes given after the adoption of lower rates.

An assessment is not rendered invalid by the fact that the proportion between the cash premiums and the deposit notes taken by the company varied at different times, as against a member who suffered no damage thereby (*Marblehead Mut. Fire Ins. Co. v. Underwood*, 3 Gray [Mass.] 210). Nor is a premium note given a company, which in its discretion has issued policies for less than one year on deposit notes of less amount than the cash premium, though, as to other policies, deposit notes were required to be double the amount of the cash premium, invalidated by a slight disproportion occasioned by laying an assessment on the deposit notes only, instead of the amount of the premiums and deposit notes (*People's Mut. Ins. Co. v. Allen*, 10 Gray [Mass.] 297). Where

the basis used in computing an assessment by a company which had issued policies for one, three, and five years, respectively, the premiums for three years being twice, and those for five years three times, the rate charged for one year, was to take the whole of the premium for each one-year policy, one-third of that for each three-year policy and one-fifth of that for each five-year policy, and such method was found by the trial court to be just and equitable, the Supreme Court would not, on exceptions, declare the assessment void for inequality.

Citizens' Mut. Fire Ins. Co. v. Sortwell, 10 Allen (Mass.) 110; *Fayette Mut. Fire Ins. Co. v. Fuller*, 8 Allen (Mass.) 27.

(s) Amount of assessments.

A mutual company is not required, after every loss, to compute the assessments necessary to meet such loss, but may approximate it as nearly as possible.

New England Mut. Fire Ins. Co. v. Belknap, 9 Cush. (Mass.) 140; *Lycoming Fire Ins. Co. v. Buck* (Pa. Com. Pl.) 1 Luz. Leg. Reg. 351.

So the company may exercise reasonable discretion in fixing the amount of an assessment.

Vandalla Mut. County Fire Ins. Co. v. Peasley, 84 Ill. App. 138; *Stone v. Lorentz*, 19 Pa. Co. Ct. R. 51, 6 Pa. Dist. R. 17; *Fidelity Mut. Fire Ins. Co. v. Hancock*, 9 Pa. Super. Ct. 480, 43 Wkly. Notes Cas. 551. The same rule applies to an assessment by the court on the insolvency of a company. *Wood v. Standard Mut. Live Stock Ins. Co.*, 154 Pa. 157, 26 Atl. 103.

The presumption is in favor of the propriety of an assessment, and liability on it can be avoided only by a showing of fraud or gross mistake.

Stone v. Lorentz (Com. Pl.) 19 Pa. Co. Ct. R. 51, 6 Pa. Dist. R. 17; *Fidelity Mut. Fire Ins. Co. v. Hancock*, 9 Pa. Super. Ct. 480, 43 Wkly. Notes Cas. 551; *Susquehanna Mut. Fire Ins. Co. v. Gackebach*, 115 Pa. 492, 9 Atl. 90; *Raegener v. Willard*, 60 N. Y. Supp. 478, 44 App. Div. 41.

It is, of course, true that an assessment which is for an excessive amount is invalid (*People's Equitable Mut. Fire Ins. Co. v. Babbitt*, 7 Allen [Mass.] 235; *Raegener v. Willard*, 60 N. Y. Supp. 478, 44 App. Div. 41). But it is no defense to an action for an assessment levied by the directors of a company that it is excessive, as a member is bound by the directors' acts (*People's Mut. Fire Ins. Co. v. Groff*, 154 Pa. 200, 26 Atl. 63). An assessment made by a

court or receiver, on the insolvency of the company, is valid, if substantially correct, and will not be disturbed, unless grossly excessive.

Howard v. Whitman, 29 Ind. 557; *Wood v. Standard Mut. Live Stock Ins. Co. of Reading*, 154 Pa. 157, 28 Atl. 103; *Tobey v. Russell*, 9 R. I. 58. But see *Embree v. Shideler*, 36 Ind. 423.

In Massachusetts, it is by statute provided that the decree of the Supreme Judicial Court, confirming an assessment of a mutual fire insurance company, shall be conclusive on all members liable to the assessment as to the amount thereof.¹⁸ Hence a member cannot complain that the amount of an assessment so confirmed is larger than necessary.

Commonwealth Mut. Fire Ins. Co. v. Wood, 171 Mass. 484, 51 N. E. 19. See, also, *Hamilton Mut. Ins. Co. v. Parker*, 11 Allen (Mass.) 574, with reference to a similar statute.

An assessment by a mutual insurance company for an amount 150 per cent. greater than its debts will not be sustained (*Traders' Mut. Fire Ins. Co. v. Stone*, 9 Allen [Mass.] 483). So an assessment that will yield \$56,000 to meet a loss of less than \$21,000 is excessive (*Pencille v. State Farmers' Mut. Hail Ins. Co.*, 74 Minn. 67, 76 N. W. 1026, 73 Am. St. Rep. 326); but an assessment by a receiver of \$50,000 to meet a liability of \$25,000 (*Wardle v. Townsend*, 75 Mich. 385, 42 N. W. 950, 4 L. R. A. 511), or one of \$98,000 to yield \$47,000 (*Sands v. Son*, 1 Thomp. & C. [N. Y.] Addenda, 13), cannot be said to be unreasonably excessive. And in *Re People's Mut. Equitable Fire Ins. Co.*, 9 Allen (Mass.) 319, it was held that an assessment of \$23,146 by a company would not be set aside because \$7,336 of the sum was for overlay, notwithstanding the amount to be raised by such assessment was to be applied in part to the repayment of sums paid on a previous invalid assessment. Likewise it was said, in *Lycoming Fire Ins. Co. v. Newcomb*, 1 Leg. Chron. (Pa.) 9, that when the risks taken by a mutual fire insurance company are so great that the premium notes held by it exceed \$5,000,000, and the monthly losses average about \$40,000, the court in which judgment on a premium note is entered will not feel called upon to direct an issue to ascertain whether the per cent. of the assessment might not be reduced a fraction below that laid.

An assessment levied by a mutual company is presumed to em-

¹⁸ St. Mass. 1894, c. 522, § 49.

brace all losses down to the time it is made (*Columbia Fire Ins. Co. v. Bolton*, 2 Pears. [Pa.] 222). It may include a reasonable amount for expenses of collection and insolvency of members.

Vandalla Mut. County Fire Ins. Co. v. Peasley, 84 Ill. App. 188; *Jones v. Slisson*, 6 Gray (Mass.) 288; *Buckley v. Columbia Ins. Co.*, 92 Pa. 501; *Susquehanna Mut. Fire Ins. Co. v. Gackenbach*, 115 Pa. 492, 9 Atl. 90.

So an assessment by a receiver of an insolvent company may properly include the expenses of winding up the affairs of the company.

Reference may be made to *Langworthy v. C. C. Washburn Flouring Mills Co.*, 77 Minn. 256, 79 N. W. 974; *Swing v. Wurst*, 76 Minn. 198, 79 N. W. 94; *Howard v. Whitman*, 29 Ind. 557; *Lycoming Fire Ins. Co. v. Buck* (Pa. Com. Pl.) 1 Luz. Leg. Reg. 351; *Davis v. Shearer*, 90 Wis. 250, 62 N. W. 1050.

But an assessment cannot include the amount of a previous assessment, from the payment of which the parties assessed have been released (*Herkimer County Mut. Ins. Co. v. Fuller*, 14 Barb. [N. Y.] 373), and an order of court authorizing a receiver of a mutual company to make an assessment equal to the sum of prior assessments does not authorize him to include a penalty for the nonpayment of a previous assessment by an individual member of the company (*Capital City Mut. Fire Ins. Co. v. Boggs*, 172 Pa. 91, 33 Atl. 349).

Assessments on the members of a mutual company are to be made on the basis that, as the total contingent liability of all the members is to the contingent liability of a single member, so is the total loss and expense to be enforced by the assessment to the sum each member is to pay thereon, not exceeding, of course, his total contingent liability.

Western Mfrs.' Mut. Ins. Co. v. Hutchinson Cooperage Co., 92 Ill. App. 1; *Sands v. Graves*, 58 N. Y. 94; *Susquehanna Mut. Fire Ins. Co. v. Leavy*, 186 Pa. 490, 20 Atl. 502, 505.

But where the amount of a necessary assessment, if based on the face value of the notes, would, as to some members, exceed the amount of the notes, it is proper for the company to base the assessment on the unpaid balance of all premium notes (*New Boston Fire Ins. Co. v. Saunders*, 67 N. H. 249, 34 Atl. 670). An assessment may be based on a computation of losses from month to month (*Lycoming Fire Ins. Co. v. Buck* [Pa. Com. Pl.] 1 Luz. Leg. Reg.

351), and may include in the losses chargeable upon each policy all those of the entire month in which it expires, excluding those of the month in which it began (*People's Mut. Ins. Co. v. Allen*, 10 Gray [Mass.] 297). So a company, making an assessment for a period within two years after a former assessment had been adjudged invalid, may ascertain the sum to be raised each month in a year by dividing the aggregate of the whole net expenses of that year, and the sums received under the invalid assessment, by 12, and adding to the quotient the amount of losses in each month when losses occurred, and assess such sum upon all policies existing for more than a half month in proportion to the premiums (*In re People's Mut. Equitable Fire Ins. Co.*, 9 Allen [Mass.] 319). Though there is an error in the amount of an assessment, as stated in a notice, arising from miscalculation, this will not prevent a recovery of the amount actually due (*Thropp v. Susquehanna Mut. Fire Ins. Co.*, 125 Pa. 427, 17 Atl. 473, 11 Am. St. Rep. 909).

(t) Notice of assessments.

As a general proposition it may be said that a person insured in a mutual company is entitled to notice of an assessment on his premium note before an action is brought thereon (*Buckley v. Columbia Ins. Co.*, 83 Pa. 298); but a mortgagee, to whom a policy issued to a mortgagor is merely payable in case of loss, is not entitled to notice of assessments, though the policy is delivered to him, as he is not liable to pay assessments levied on the policy (*Darlington v. Insurance Co.*, 8 Pa. Dist. R. 211). Usually the manner in which a notice of an assessment shall be given is prescribed by law, or by the charter or by-laws of a company; but, in the absence of such provision, notice may be given by mail, and a demand for payment of an assessment is sufficient notice (*Stevens v. Hein*, 55 N. Y. Supp. 491, 37 App. Div. 542). So the sending of a bill for an assessment is sufficient notice thereof (*Shuman v. Juniata Farmers' Mut. Fire Ins. Co.*, 206 Pa. 417, 55 Atl. 1069).

Where the laws of a company simply require notice of an assessment to be published, it is said, in *Jones v. Sisson*, 6 Gray (Mass.) 288, that a personal notice is sufficient; but in *Swing v. Wurst*, 76 Minn. 198, 79 N. W. 94, it was held that under a law requiring the directors, in making an assessment, to determine the sum to be paid by the several members, and to publish notice thereof,¹⁴ notice by mail was insufficient. And where the manner in which a notice is

¹⁴ Rev. St. Ohio, § 3650.

to be published is specified, as, for instance, that it be by advertisement, this requirement must be complied with, and a defect therein is not cured by personal notice.

Swing v. Wurst, 76 Minn. 198, 79 N. W. 95; *Northampton Mut. Live Stock Ins. Co. v. Stewart*, 39 N. J. Law, 486; *Sands v. Sanders*, 26 N. Y. 239; *Sands v. Shoemaker*, 4 Abb. Dec. (N. Y.) 149. But in *Cooper v. Shaver*, 41 Barb. (N. Y.) 151, it was held that a statutory provision requiring notices to be published for a certain number of weeks by the secretary was at most discretionary, and a compliance therewith was not a condition precedent to a recovery by a receiver.

If notice by publication in a newspaper is not required, no such notice need be given (*Boone County Home Mut. Ins. Co. v. Anthony*, 68 Mo. App. 424).¹⁸ Where, however, notice is required to be given by publication in three newspapers, publication in two is insufficient (*Sands v. Graves*, 58 N. Y. 94). Still, if the laws of a company merely require notice of an assessment to be given in one newspaper in a county, "and in such other newspapers as the directors may deem necessary," it seems that publication in the one newspaper is sufficient, unless further notice is ordered (*Sands v. Boutwell*, 26 N. Y. 233). Where a notice is required to be given by registered mail, the service of the notice is not completed by delivering a letter containing the notice to the registry clerk of the post office. The sender's duty in this regard is not performed until he has obtained his receipt for the letter, which is the evidence that the letter has been registered and mailed. (*Holbrook v. Mill Owners' Mut. Ins. Co.*, 86 Iowa, 255, 53 N. W. 229.)

A notice which contained no information as to the amount the member was to pay was, in *Bangs v. McIntosh*, 23 Barb. (N. Y.) 591, said to be irregular and defective. So it was held, in *Bangs v. Duckinfield*, 18 N. Y. 592, that a notice of an assessment by a receiver, which specified different rates for small notes and large notes, but did not in any way show to which class a given note belonged, there being no evidence of any rule on that subject in the charter or by-laws, was inoperative for uncertainty. And in *Swing v. Wurst*, 76 Minn. 198, 79 N. W. 94, the court took the position that, under a statute requiring the directors in making an assess-

¹⁸ In this case it was held that Laws Mo. 1874, p. 90, governing local insurance companies, was not repealed by Rev. St. Mo. 1880, p. 1867, c. 89, con-

taining the general insurance laws, and hence the requirement of the latter law as to notice by publication did not apply to local companies.

ment to determine the sum to be paid by the several members and to publish the same in such manner as they chose, it was necessary to publish the whole assessment list to make the notice effective. But in *Atlantic Mut. Fire Ins. Co. v. Sanders*, 36 N. H. 252, it was said that, under a by-law requiring the notice published to designate the class of property assessed, it was not necessary to specify the amount payable on each note. So it was held, in *American Guaranty Fund Mut. Ins. Co. v. Mattson*, 100 Mo. App. 316, 73 S. W. 365, that an order and notice of assessment made by the directors of a company, reciting the gross amount of notes subject to assessment, and the amount of adjusted losses and of unpaid expenses, were sufficient, without specifying such matter in a detailed schedule.

Where there is no agreement in a contract that a change in the by-laws shall ipso facto become a part thereof, though the by-laws are made a part of the contract, and one of them authorizes changes therein, an amendment to a by-law, omitting a provision requiring a statement of losses to be inclosed with a notice of assessments, is ineffectual as to a person who is a member of the company prior to the adoption of the amendment (*Annan v. Hill Union Brewery Co.*, 59 N. J. Eq. 414, 46 Atl. 563). The fact that a notice of an assessment shows that the assessment was made by the company, when the directors alone were authorized to make it, is no objection to the assessment, as in legal effect it is the same thing (*Williams v. German Mut. Fire Ins. Co.*, 68 Ill. 387).

A particular published notice was considered sufficient in *York County Mut. Fire Ins. Co. v. Knight*, 48 Me. 75, and the evidence was held sufficient to show notice in *Jones v. Sisson*, 6 Gray (Mass.) 288.

(a) Payment of assessments.

If a member of a mutual company, who has obligated himself to pay such annual assessments as shall be made, not to exceed a specified sum each year, pays to the treasurer the amount of an anticipated annual assessment in advance, and such assessment is not in fact made, the sum so paid stands to his credit, and he has a right to apply the same on an assessment for a succeeding year (*Montgomery v. Harker*, 84 N. W. 369, 9 N. D. 527). So a member who has voluntarily paid a void assessment may be credited therewith on a reassessment (*Ionia, E. & B. Farmers' Mut. Fire Ins. Co. v. Ionia Circuit Judge*, 100 Mich. 606, 59 N. W. 250, 32 L. R. A. 481),

but the amount thus voluntarily paid cannot be recovered (*Wilde v. Baker*, 14 Allen [Mass.] 349). Where some of the members of an unincorporated insurance company paid the sums assessed upon them severally for a loss to the treasurer of the company, who became insolvent before paying over the money to the insured, the loss fell on those members alone who had paid the money (*Shubrick v. Fisher*, 2 Desaus. [S. C.] 148).

(v) Lien for assessments.

Liens for premiums and premium notes are generally provided for by statutory or charter provisions in the case of mutual insurance. But, of course, no liens exist unless specially provided for. Thus it was held, in *Farmers' Mut. Fire Ins. Ass'n of Florence Co. v. Bunch*, 46 S. C. 550, 24 S. E. 503, that a company acquired no lien on the property of a member for his pro rata share of losses and expenses under its charter and the contract of insurance with such member, where the act of incorporating the company was not approved until after the contract of insurance was made.

The nature and extent of the lien is dependent on the particular provision by which it is created. The charter provision of the *People's Fire Ins. Co. of Pennsylvania*, authorizing the company to file a statement for a lien against a member, provided that, when so filed, the lien was to be in the nature of a judgment "upon all property so insured," and required the lien to be filed in the county "where such real estate shall be." This provision, it has been held, confined the lien to real property insured, and did not give the insurer a lien on any personal property, or on real estate other than that insured.

The lien was held confined to the property insured in *People's Fire Ins. Co. v. Coppel*, 8 Leg. Gaz. (Pa.) 118; *People's Fire Ins. Co. v. Levi*, 1 Leg. Rec. Rep. (Pa.) 220; *Halfpenny v. People's Fire Ins. Co.*, 85 Pa. 48. It was considered limited to real property in *People's Fire Ins. Co. v. Levi*, 1 Leg. Rec. Rep. (Pa.) 220, and *People's Fire Ins. Co. v. Hartshorne*, 84 Pa. 453.

But the company's lien on the real property insured was not defeated by the fact that the policy covered personal, as well as real, property (*People's Fire Ins. Co. v. Hartshorne*, 84 Pa. 453); nor did the company lose its lien because it contested the claim on a policy in the courts and paid the money claimed into court pending the termination of the suit (*Appeal of Susquehanna Mut. Fire Ins.*

Co., 105 Pa. 615); nor by the fact that it was filed after the policy had expired.

Hageman v. People's Ins. Co., 1 Walk. (Pa.) 509; *People's Fire Ins. Co. v. Hartshorne*, 84 Pa. 458.

The lien given by a charter which provided that the company should have a lien on the buildings insured and the interest of the insured in the lands on which they stood against "the assessed during the continuance of his, her, or their policies" could not be enforced against a mortgagee by an assignee of an assessment (*Shaw v. Shaw*, 2 Ohio Dec. 609, 4 West. Law Month. 158). And a charter providing that all buildings insured, together with the right, title, and interest of the insured to the lands on which they stood, should be pledged to the company, and that the company should have a lien thereon against the insured during the continuance of his policy, did not give the company a lien which was enforceable against a bona fide purchaser of property insured by the company (*Kentucky Farmers' Mut. Ins. Co. v. Mathers*, 7 Bush [Ky.] 23, 3 Am. Rep. 286).

The lien of the Indiana Mutual Fire Insurance Company did not continue on the property in the hands of an alienee (*McCulloch v. Indiana Mut. Fire Ins. Co.*, 8 Blackf. [Ind.] 50); nor could it be enforced against the heirs of a deceased member, unless they had confirmed the policy (*Indiana Mut. Fire Ins. Co. v. Chamberlain*, 8 Blackf. [Ind.] 150). But the lien of the Mutual Assurance Society of Virginia was, in *Mutual Assur. Soc. v. Byrd*, 1 Va. Cas. 170, *Mutual Assur. Soc. v. Watts*, 1 Wheat. 279, 4 L. Ed. 91, and *Mutual Assur. Soc. v. Stone*, 8 Leigh (Va.) 218, held enforceable as to quotas against bona fide purchasers without notice. However, it was held, in *Mutual Assur. Soc. v. Faxon*, 6 Wheat. 606, 5 L. Ed. 342, that this was not the case in regard to premiums. But see *Shirley v. Mutual Assur. Soc.*, 2 Rob. (Va.) 705.

(w) Enforcement of lien.

Generally a suit to foreclose must be brought to enforce a lien for assessments. Such suit is equitable in its nature, and the issues raised are triable by the court, with the right to refer issues to a jury as allowed in equity cases (*South Carolina Mut. Ins. Co. v. Price*, 34 S. E. 696, 56 S. C. 407). But the law under which the Lycoming Fire Insurance Company of Pennsylvania was incorporated¹⁶ provided for the entering of a judgment as if by confession, and the issuing of execution thereon for sums due and demandable, on

¹⁶ Act July 28, 1842.

the company's filing a statement of its receipts and disbursements, accompanied by an affidavit of its treasurer. A judgment entered under this law was valid (*Lycoming Fire Ins. Co. v. Ruch*, 1 Leg. Chron. [Pa.] 235; *Lycoming Fire Ins. Co. v. Buck* [Pa. Com. Pl.] 1 Luz. Leg. Reg. 351), and the company could enter a lien against a married woman (*Lycoming Fire Ins. Co. v. Morrell*, 15 Phila. 649, 38 Leg. Int. 453); but in entering a judgment under the statute the company had to strictly follow the provisions of the law (*Lycoming Fire Ins. Co. v. Bixby*, 15 Phila. 647, 38 Leg. Int. 452). Thus the description of the property in the statements had to be sufficiently specific to designate it with reasonable certainty (*Lycoming Ins. Co. v. Lewis*, 13 Lanc. Bar [Pa.] 87), and the statement had to be sworn to by the treasurer (*Barker v. Beeber*, 112 Pa. 216, 5 Atl. 1; *Seidler v. Beebe* [Pa.] 5 Atl. 612). It also had to show how much of the receipts was from premium and how much from other sources, the amount of premiums received after the notes were given, and had to give the dates of the various claims to which payments were appropriated. Furthermore, it had to show that the amount of premiums received after the notes were given was paid on losses arising after that time (*Koehler v. Beeber*, 122 Pa. 291, 18 Atl. 354, 23 Wkly. Notes Cas. 558). But it was not necessary that the statement should itemize the accounts in detail (*Lycoming Fire Ins. Co. v. Sensenig*, 16 Phila. 601, 39 Leg. Int. 33), and, if enough of the manner in which the money of the company had been expended was shown to enable a member to judge of the necessity for an assessment, it was sufficient (*Lycoming Ins. Co. v. Bixby*, 15 Wkly. Notes Cas. 109). This statement was, under the law, *prima facie* evidence of the facts it contained, and it could not be overthrown by an affidavit that it was "false and untrue," without giving particulars, so that the court could direct an investigation regarding it (*Lycoming Fire Ins. Co. v. Newcomb*, 1 Leg. Chron. [Pa.] 9).

4. ACTIONS TO ENFORCE PREMIUM NOTES AND ASSESSMENTS.

- (a) Right of action in general.
- (b) Defenses.
- (c) Same—Fraud and misrepresentation.
- (d) Limitations.
- (e) Jurisdiction and parties.
- (f) Pleading—Declaration or complaint.
- (g) Same—Plea, answer, or affidavit of defense.
- (h) Evidence.
- (i) Same—Admissibility and sufficiency.
- (j) Trial, judgment, and review.

(a) Right of action in general.

To entitle an insurance company to recover on a premium note payable on assessment, it must be shown that assessments have been properly levied to pay losses for which the note is liable.

American Ins. Co. v. Schmidt, 19 Iowa, 502; *Warner v. Beem*, 86 Iowa, 385; *Stewart v. Northampton Mut. Live Stock Ins. Co.*, 38 N. J. Law, 436; *Columbia Fire Ins. Co. v. Bolton*, 2 Pears. (Pa.) 222.

If the laws of the company require notice of an assessment to be given, such notice is a condition precedent to an action on an assessment (*Susquehanna Mut. Fire Ins. Co. v. Staats*, 4 Penny. [Pa.] 313). So, if a statement of losses is required to be sent with each assessment, the sending of such statement with the notice of an assessment is a condition precedent (*Annan v. Hill Union Brewery Co.*, 59 N. J. Eq. 414, 46 Atl. 563). And if a personal demand of the amount of an assessment is made necessary before suit, such demand must be made before an action can be brought against the maker of a premium note.

Sands v. Annesley, 56 Barb. (N. Y.) 598; *York County Mut. Fire Ins. Co. v. Knight*, 48 Me. 75. But the fact that a receiver, in making a demand for an assessment, demands too much, does not make the demand void. *Taylor v. Port Jefferson Milling Co.*, 84 Hun, 610, 32 N. Y. Supp. 307.

Before a trustee or receiver of a company can recover an assessment on a premium note, he must show that the conditions precedent to such recovery have been fully satisfied (*Swing v. Bentley & Gerwig Furniture Co.*, 45 W. Va. 283, 31 S. E. 925; *Same v. Parkersburg Veneer & Panel Co.*, 31 S. E. 926, 45 W. Va. 288). It must appear that the claims for which the assessment was made

were passed on and their validity determined by the court or the receiver.

Embree v. Shideler, 36 Ind. 423; *Heller v. McCormick*, 38 Ind. 30;
Hashagan v. Manlove, 42 Ind. 330.

But it is not necessary to show all the facts upon which the losses for which the assessment was made were allowed, but only that sufficient claims had been presented and allowed to make up the sum for which the premium notes were assessed (*Sands v. Hill*, 42 Barb. [N. Y.] 651). The failure of a mutual insurance company to enforce payment of an assessment of a member when due will not, of itself, prevent the company from recovering such assessment (*Dettra v. Murray*, 5 Pa. Dist. R. 201).

The fact that the charter of a company prescribes a special remedy for the recovery of an assessment does not preclude it from suing at law (*Freeland v. Pennsylvania Cent. Ins. Co.*, 94 Pa. 504); and a foreign insurance company, bringing an action for an assessment, is not required to follow the forms of remedy prescribed by its act of incorporation (*Thornton v. Western Reserve Farmers' Ins. Co.*, 1 Grant, Cas. [Pa.] 472).

(b) Defenses.

As a defense to an action on a premium note, or for an assessment, a policy holder in a mutual company cannot set up secret limitations of his liability where the rights of third persons have intervened (*Lycoming Fire Ins. Co. v. Lauffer*, 4 Leg. Gaz. [Pa.] 153), or the company's release of claims against others (*Crawford v. Susquehanna Mut. Fire Ins. Co.* [Pa.] 12 Atl. 844), or a champertous contract for the collection of assessments made by the treasurer of the company with a person not a party to the suit (*Connecticut River Mut. Fire Ins. Co. v. Way*, 62 N. H. 622), or the company's noncompliance with the provisions of its charter (*Trumbull County Mut. Fire Ins. Co. v. Horner*, 17 Ohio, 407), or the forfeiture or misuser of the company's franchise (*Lycoming Fire Ins. Co. v. Newcomb*, 1 Leg. Chron. [Pa.] 9), or unreasonable delay in levying the assessment (*Susquehanna Mut. Fire Ins. Co. v. Sprenkle*, 13 York Leg. Rec. [Pa.] 121), or violation of a statute prohibiting a mutual insurance company to employ solicitors (*Randall v. Phelps County Mut. Hail Ins. Ass'n*, 2 Neb. [Unof.] 530, 89 N. W. 398), or forfeiture of the policy for nonpayment of the assessment (*Susquehanna Mut. Fire Ins. Co. v. Leavy*, 136 Pa. 499,

20 Atl. 502, 505), or his own misrepresentations (*Huntley v. Perry*, 38 Barb. [N. Y.] 569). So a policy holder cannot set up the official delinquency of the company's officers as a defense.

Davis v. Sharp, 2 West. Law Month. 40, 2 Ohio Dec. 197; *Lycoming Fire Ins. Co. v. Newcomb*, 4 Leg. Gaz. (Pa.) 409; *Id.*, 1 Leg. Chron. (Pa.) 9.

In an action to recover assessments, the policy holder cannot question the legality of the company's organization (*Nashua Fire Ins. Co. v. Moore*, 55 N. H. 48), or the constitutionality of the act conferring on the company power to insure (*Freeland v. Pennsylvania Cent. Ins. Co.*, 94 Pa. 504), or the company's exercise of its discretion in making the assessment (*Lycoming Fire Ins. Co. v. Lauffer*, 4 Leg. Gaz. [Pa.] 153). So a policy holder cannot in such suit question the propriety of an assessment made by order of court on the members of an insolvent company.

Rand, McNally & Co. v. Mutual Fire Ins. Co., 58 Ill. App. 528; *Knipe v. Scholl*, 16 Montg. Co. Law Rep'r (Pa.) 209.

When a member of a mutual company has given a warrant of attorney to confess judgment upon a deposit note, and judgment has been entered thereon, he cannot, in the absence of any other fact than that stated in his affidavit, that the assessment raises a "large surplus," without showing that he is thereby injured, seek relief at the hands of either a court of law or equity (*Lycoming Fire Ins. Co. v. Newcomb*, 1 Leg. Chron. [Pa.] 9); and a defense to an action on a note that a suit was brought without notice required by the company's charter having first been given can only be pleaded in abatement (*Thornton v. Western Reserve Farmers' Ins. Co.*, 31 Pa. 529).

Though a policy provides that in case of loss the amount of the premium note shall be first deducted, the policy holder cannot set off a claim for a partial loss against an action on the note, since the amount due on a partial loss is not liquidated and cannot be ascertained by calculation (*Union Mut. Marine Ins. Co. v. Howes*, 124 Mass. 470). And though a renewal policy, issued after the forfeiture of a policy for nonpayment of an assessment, but without payment of such assessment, has the same number as the old policy and practically covers the same property, the insured cannot, in an action to recover the assessment, set off a loss sustained after the renewal (*Patrons' Mut. Fire Ins. Co. v. Coble*, 20 Pa. Super. Ct. 533).

If a company is insolvent, a policy holder cannot set off debts due, claims for losses, etc., against an action by the receiver to recover an assessment, but must pay his assessment and look to the dividends for reimbursement.

Lawrence v. Nelson, 17 N. Y. Super. Ct. 240, affirmed 21 N. Y. 158; **Same v. McCready**, 19 N. Y. Super. Ct. 329; **Conigland v. N. C. Mut. Ins. Co.**, 62 N. C. 341, 98 Am. Dec. 89; **Hillier v. Allegheny Co. Ins. Co.**, 8 Pa. 470, 45 Am. Dec. 656; **Care v. Brown** (Pa. Com. Pl.) 81 Wkly. Notes Cas. 501; **Standard Mut. Live-Stock Ins. Co. v. Crawford** (Com. Pl.) 2 Pa. Dist. R. 601; **In re Gain's Estate**, 5 Pa. Dist. R. 350; **Dettra v. Spielberger**, 5 Pa. Dist. R. 262; **Schofield v. Lafferty**, 17 Pa. Super. Ct. 8. In **Solley v. Sheetz**, 6 Montg. Co. Law Rep'r (Pa.) 112, it was held that, in an action by a receiver of a company to recover an assessment, defendant may set off a demand due from plaintiff company, if such demand was payable prior to the appointment of a receiver, and there is no allegation of the company's insolvency. See, also, **Berry v. Brett**, 19 N. Y. Super. Ct. 627.

(c) Same—Fraud and misrepresentation.

Fraudulent representations by the officers or authorized agents of a mutual company may be set up as a defense to an action on a premium given by one who was induced to take out a policy by such representations.

Boland v. Whitman, 83 Ind. 64; **Whitman v. Meissner**, 84 Ind. 487; **Brown v. Donnell**, 49 Me. 421, 77 Am. Dec. 266; **Sunbury Fire Ins. Co. v. Humble**, 100 Pa. 495; **Lycoming Fire Ins. Co. v. Wright**, 55 Vt. 528.

But in Massachusetts (**Shawmut Mut. Fire Ins. Co. v. Stevens**, 9 Allen, 332) and Pennsylvania (**Jacobs v. Susquehanna Mut. Fire Ins. Co.**, 42 Leg. Int. 227) it is held that, when an application contains a provision that the company shall not be bound by statements of an agent not contained therein, fraudulent misrepresentations cannot be relied on to relieve the insured of his liability for his deposit or assessment. And generally innocent or unauthorized misrepresentations by an agent are not available as a defense to a premium note.

Hackney v. Alleghany Mut. Ins. Co., 4 Pa. 185; **Pennsylvania Cent. Ins. Co. v. Kniley**, 2 Pears. (Pa.) 229; **Kelly v. Troy Fire Ins. Co.**, 3 Wis. 254.

Misrepresentations plainly contradictory to the terms of a premium note do not constitute a defense thereto (**Farmers' Mut. Fire Ins. Co. v. Marshall**, 29 Vt. 23). So misrepresentations in adver-

tisements as to the capital stock (*Swing v. Wurst*, 76 Minn. 198, 79 N. W. 94) or the guaranty fund (*Corey v. Sherman*, 96 Iowa, 114, 64 N. W. 828, 32 L. R. A. 514) of a mutual company have been held not to constitute such fraud as to relieve policy holders from liability on their premium notes.

False representations by an agent as to the amount and frequency of future assessments, though relied on by a member of a mutual company, are insufficient to constitute a defense to subsequent assessments, as a member must be presumed to know that the frequency and amount of assessments depend entirely on the frequency and extent of losses sustained by the company.

Boland v. Whitman, 83 Ind. 64; *Lycoming Fire Ins. Co. v. Lauffer*, 4 Leg. Gaz. (Pa.) 153; *Kramer v. Boggs*, 5 Pa. Super. Ct. 394, 41 Wkly. Notes Cas. 18; *Capital City Mutual Fire Ins. Co. v. Boggs*, 172 Pa. 91, 33 Atl. 849; *Mansfield v. Cincinnati Ice Co.*, 11 Ohio Dec. 617, 28 Wkly. Law Bul. 118; *Farmers' Mut. Fire Ins. Co. v. Marshall*, 29 Vt. 23.

Though a policy holder in a mutual company was induced by fraudulent representations to become a member, still, if he retains the policy after discovery of the fraud and makes no attempt to cancel it, he is liable for assessments (*State Mut. Fire Ins. Co. v. Smith*, 1 Pa. Super. Ct. 470). And one who signs an application for a policy without reading it, and who fails to read the policy, cannot, after having the benefit thereof for 16 months, repudiate his liability for assessments on the ground that he supposed the policy to be on another plan (*Susquehanna Mut. Fire Ins. Co. v. Swank*, 102 Pa. 17). But if a policy holder is illiterate, and can read only with labor and difficulty, and does not know until he receives notice of an assessment that the representations by an agent as to the non-assessability of his policy were false, he has a good defense to the assessment (*Keller v. Equitable Fire Ins. Co.*, 28 Ind. 170).

In Pennsylvania the rule obtains that fraudulent representations by the officers of a mutual company are no defense to a suit by a receiver of the company to recover an unpaid assessment, where the rights of innocent third persons have intervened, as by the issuance of policies subsequent in date to that on which recovery is sought.

Dettra v. Lock (Com. Pl.) 5 Pa. Dist. R. 200; *Sparks v. Vitale*, 44 Wkly. Notes Cas. 150; *Sparks v. Flaccus Glass Co.*, 16 Pa. Super. Ct. 119; *Schofield v. Hayes*, 17 Pa. Super. Ct. 110.

Where a member of a mutual company signed notes, agreeing to pay their amount for the better security of those concerned, in accord-

ance with the charter of the company, without reading such notes, on representation by plaintiff's agent that the notes were to be given for an open policy, to be surrendered when payable on payment of premiums, he is not entitled to defend on such ground, as against the collection of the notes by receivers of the company (*Maine Mut. Ins. Co. v. Hodgkins*, 66 Me. 109).

(d) Limitations.

The statute of limitations does not commence to run against a cause of action on a premium note, given by a member of a mutual insurance company and payable in installments as ordered by the company, until an assessment is levied.

Bigelow v. Libby, 117 Mass. 359; *Langworthy v. Garding*, 74 Minn. 325, 77 N. W. 207; *Swing v. Wurst*, 76 Minn. 198, 79 N. W. 94; *Solly v. Moore*, 11 Pa. Co. Ct. R. 833, 1 Pa. Dist. R. 688; *Eichman v. Hersker*, 170 Pa. 402, 33 Atl. 229; *In re Slater Mut. Fire Ins. Co.*, 10 R. I. 42. Statute commences to run when notice of assessment is given. *Howland v. Cuykendall*, 40 Barb. (N. Y.) 320; *Hope Mut. Life Ins. Co. v. Taylor*, 25 N. Y. Super. Ct. 278.

But in *Wyman v. Kimberly Clark Co.*, 93 Wis. 554, 67 N. W. 932, it was held that Laws Wis. 1893, c. 293, which provided that all foreign mutual fire insurance companies that had been declared insolvent should collect "all claims due" from policy holders within the state for premiums or assessments within six months after the passage of said act, was not restricted to claims actually payable at that time, so as to become the proper subject of an action, but included claims on then existing premium notes for assessments made and notified after such enactment.

If a demand of the amount of an assessment is required, the statute does not commence to run until such demand is made (*Sands v. Annesley*, 56 Barb. [N. Y.] 598). And the fact that a company is dilatory in levying an assessment does not start the running of the statute (*Eichman v. Hersker*, 170 Pa. 402, 33 Atl. 229) until an assessment is actually levied (*Smith v. Bell*, 107 Pa. 352); but the levying of an assessment starts the running of a statute, even as against a receiver, who makes a levy pursuant to an order of court.

Wardle v. Hudson, 96 Mich. 432, 55 N. W. 992; *Mills v. Whitmore*, 12 O. C. D. 338, 22 Ohio Cir. Ct. R. 467.

If the whole premium note becomes due and payable on default in payment of an assessment, a default starts the running of the statute against a cause of action on the note.

Sands v. Idlenthal, 46 N. Y. 541; *Lycoming Fire Ins. Co. v. Batcheller*, 62 Vt. 148, 19 Atl. 982.

(e) Jurisdiction and parties.

Though a cause of action by a mutual insurance company to compel a policy holder to pay his pro rata share of expenses and to enforce a lien given therefor is solely of equitable cognizance (*Farmers' Mut. Ins. Ass'n v. Berry*, 53 S. C. 129, 31 S. E. 53), the personal liability of the policy holder on his note is a matter of common-law jurisdiction (*McCulloch v. Indiana Mut. Fire Ins. Co.*, 8 Blackf. [Ind.] 50).

A premium note given to a mutual company is within the statute limiting the jurisdiction of justices. *Farmers' Mut. Fire Ins. Co. v. Marshall*, 29 Vt. 23.

A provision in a charter of a mutual company that, in case of default to pay an assessment, the directors may sue for and recover the full amount of the deposit note, does not prevent the bringing of such an action in the name of the treasurer of the company, if the note is made payable to the company or the treasurer for the time being (*Jones v. Sisson*, 6 Gray [Mass.] 288). A foreign receiver of an insolvent company may sue for assessments in Vermont, if no creditor intervenes to prevent the prosecution of the action (*Lycoming Fire Ins. Co. v. Wright*, 55 Vt. 526); and it has been held in West Virginia that a receiver or assignee of a foreign mutual company with general powers has the right, by virtue of the comity existing between the various states, to sue for an assessment on a premium note.

Swing v. Bentley & Gerwig Furniture Co., 45 W. Va. 283, 31 S. E. 925;
Same v. Parkersburg Veneer & P. Co., 45 W. Va. 283, 31 S. E. 926.

(f) Pleading—Declaration or complaint.

The plaintiff in an action on a premium note for assessments must allege its right to sue. If the action is brought by a foreign company, it must be alleged that the company's license to do business in the state was in force when the note was taken, and the failure to so allege is not cured by a plea not directly admitting the fact (*Lycoming Fire Ins. Co. v. Wright*, 55 Vt. 526). If the action is by a receiver, though it is not necessary that the complaint should be accompanied by a transcript of the decree appointing plaintiff receiver (*Boland v. Whitman*, 33 Ind. 64), the complaint must show on its face that the court from which the receiver derives his authority has determined on the validity of the claims for the payment of which the assessment is made (*Downs v. Hammond*, 47 Ind. 131). Though an express promise to pay assessments must be

alleged (*People's Mut. Fire Ins. Co. v. Groff* [Com. Pl.] 1 Pa. Dist. R. 685), demand for payment need not be alleged, if none is stipulated for or reasonably implied (*Atlantic Mut. Fire Ins. Co. v. Sanders*, 36 N. H. 252). And even where the charter of a mutual company requires the directors to publish a notice of the assessments laid upon the premium notes, it is not necessary specially to aver such notice and neglect to pay, but it is sufficient to say that the defendant, though often requested, refused to pay, etc. (*Missouri State Mut. Fire & Marine Ins. Co. v. Spore*, 23 Mo. 26).

As a general rule it may be said that it is sufficient if the declaration states a cause of action, and it need not contain matters of evidence that may become necessary on the trial (*Fidelity Mut. Fire Ins. Co. v. Vitale*, 10 Pa. Super. Ct. 157); but all the facts necessary to show a liability on the premium notes must be alleged (*Manlove v. Burger*, 38 Ind. 211). As the claim of the company rests on contract, recovery cannot be had on a count for money paid (*Estabrooks v. Fidelity Mut. Fire Ins. Co.*, 74 Vt. 202, 52 Atl. 420). And in the same case it was said, further, that a new count declaring on the policy, filed subsequently, brings in a new cause of action, and should not be allowed.

While plaintiff must allege the fact of loss rendering the assessment proper, it is not necessary to allege the particular loss or losses for which the assessment was made.

Merchants' & Manufacturers' Ins. Co. v. Linchey, 3 Mo. App. 588; *Atlantic Mut. Fire Ins. Co. v. Sanders*, 36 N. H. 252; *Solly v. Moore*, 11 Pa. Co. Ct. R. 333; *Sparks v. Flaccus Glass Co.*, 16 Pa. Super. Ct. 119.

It must also be alleged that the losses for which the assessment is levied occurred during the membership of the defendant and the life of the policy.

Embree, Receiver of Home Ins. Co., v. Shideler, 36 Ind. 423; *Manlove v. Naylor*, 38 Ind. 424; *Same v. Naw*, 39 Ind. 289; *Same v. Bender*, 39 Ind. 371, 13 Am. Rep. 280; *Whitman v. Mason*, 40 Ind. 189; *Downs v. Hammond*, 47 Ind. 131; *Hashagan v. Manlove*, 42 Ind. 330; *Great Falls Mut. Fire Ins. Co. v. Harvey*, 45 N. H. 292; *Columbia Fire Ins. Co. v. Kinyon*, 37 N. J. Law, 33; *South Carolina Mut. Ins. Co. v. Price*, 45 S. E. 173, 67 S. C. 207; *Same v. Tolbert*, 45 S. E. 1040, 67 S. C. 211.

An allegation that the assessment was made to cover losses and expenses is not objectionable, if the exhibit required by 1 Gav. & H. Rev. St. p. 396, § 67, shows that the assessment was made sole-

ly to pay fire losses and not to defray expenses (*Bersch v. Sinnissippi Ins. Co.*, 28 Ind. 64).

The levy of an assessment should be averred (*Devendorf v. Beardsley*, 23 Barb. [N. Y.] 656), and it should also be alleged that it was levied in accordance with the articles of incorporation and by-laws (*Atlantic Mut. Fire Ins. Co. v. Young*, 38 N. H. 451, 75 Am. Dec. 200).

In a suit by the receiver of a mutual company to recover an assessment made pursuant to the decree appointing the receiver, the statement should contain a full copy of the record of the proceeding leading up to the order for assessment; but objection to the failure to include such record will not be heard after a trial on the merits, as such objection should be made either by demurrer or in the affidavit of defense. *Schofield v. Lafferty*, 17 Pa. Super. Ct. 8.

As the Pennsylvania act of July 26, 1842, providing that a mutual company may have execution to collect assessments on filing a sworn statement of agreement, is in derogation of the common law, it must be strictly complied with, and the statement must be specific. A statement showing the gross sum to be paid for officers' salaries and for losses and damage by fire, with an entire absence of detail, is insufficient, as such statement affords the policy holder no means by which to test its correctness.

Barker v. Beeber, 112 Pa. 210, 5 Atl. 1; *Seidler v. Beebe* (Pa.) 5 Atl. 612.

(g) Same—Plea, answer, or affidavit of defense.

The objection that the action has been brought by the company in the wrong name cannot be taken under a plea of the general issue, since such defect must be met by a plea of misnomer in abatement (*Freeland v. Pennsylvania Cent. Ins. Co.*, 94 Pa. 504). Under Code N. Y. § 149, providing that an answer must contain, in respect to each allegation of the complaint controverted by the defendant, a general or a specific denial, an answer admitting the execution of the note and delivery of the policy, but denying each and every other allegation in the complaint, is sufficient (*Genesee Mut. Ins. Co. v. Moynihen*, 5 How. Prac. 321). In an action by a foreign company, an answer alleging that the plaintiff is a foreign company, and that the contract of insurance was entered into within the state, through an agent residing therein, did not show noncompliance with the act regulating foreign companies, and is bad on demurrer (*Black v. Enterprise Ins. Co.*, 33 Ind. 223). An allegation in the answer that defendant was induced to enter into the contract by

misrepresentations made by plaintiff as to the number of members and the amount of insurance it then had, and that, if such representations had been true, the amount of defendant's assessment would have been materially less, is insufficient and too vague and indefinite to constitute a counterclaim for damages (*Northwestern Mut. Hail Ins. Co. of Elkton v. Fleming*, 12 S. D. 36, 80 N. W. 147). A policy holder, who sets up fraud in inducing his insurance as a defense to an action on his premium note, must aver in his answer that he has done all in his power to restore the company to its former condition, and if he fails to do this he cannot be permitted to show it at the trial (*Devendorf v. Beardsley*, 23 Barb. [N. Y.] 656). Generally an answer setting up fraud is insufficient, if it fails to allege any material facts constituting fraud (*Boland v. Whitman*, 33 Ind. 64).

An affidavit of defense must be filed in an action on a premium note given to a mutual insurance company (*West Branch Ins. Co. v. Smith*, 1 Leg. Rec. Rep. [Pa.] 93); and its place is not supplied by the affidavit provided for in Act May 1, 1876, § 56 (P. L. 68), providing that, on the filing of an affidavit denying the necessity of an assessment or setting up fraud, a certificate of assessment shall not be evidence, as such section applies to evidence, and not to pleading (*Sparks v. Vitale*, 44 Wkly. Notes Cas. [Pa.] 150).

An affidavit of defense is sufficient which alleges that defendant's acceptance of the policy was induced by fraud, that no equities have intervened which require him to be held liable, and that the losses for the payment of which the assessment was levied occurred before his policy was taken out (*Capital City Mut. Fire Ins. Co. v. Boggs*, 172 Pa. 91, 33 Atl. 849); which alleges that defendant had not received full, due, and legal notice of the assessment (*Sparks v. Industrial Brick Co.*, 12 Pa. Super. Ct. 404); which denies the existence of the indebtedness for which the assessment is alleged to have been made (*Hoffman v. Whelan*, 160 Pa. 94, 28 Atl. 498).

An affidavit of defense is insufficient which alleges in general terms that the policy which was issued was, through fraud, accident, or mistake practiced by the company, an assessable, and not a non-assessable, policy, which the company had promised and agreed to issue to him (*Sparks v. Flaccus Glass Co.*, 16 Pa. Super. Ct. 119); which merely alleges that the application was not attached to the policy as required by Act May 11, 1881 (*Frederick v. Pennsylvania Mut. Fire Ins. Co.*, 1 Monag. [Pa.] 498); which alleges that the member surrendered his policy on a certain date and paid all indebtedness, but does not state how much was paid, nor the manner of payment (*Stockley v. Riebenack*, 12 Pa. Super. Ct. 169); which alleges merely that the secretary canceled the policy and

promised to return the note (*Solly v. Moore*, 1 Pa. Dist. R. 688); which alleges merely that the policy has been canceled, but fails to give the date of cancellation (*Moore v. Schafer*, 18 Pa. Super. Ct. 122); which alleges that the assessment levied was excessive, that the insurance on his property ceased by reason of the nonexistence of the property insured, that the assessment included losses sustained prior to defendant's membership, and that they were levied for losses that had been paid, such allegations not being specific enough to avoid judgment (*Susquehanna Mut. Fire Ins. Co. v. Sprengle*, 18 York Leg. Rec. [Pa.] 121), which alleges that the funds of the company have been wasted or badly managed, but does not allege that the amount to be raised by assessment is not required to cover losses or pay debts (*West Branch Ins. Co. v. Smith*, 1 Leg. Rec. Rep. [Pa.] 93); which alleges that the assessments sued for are unnecessary and excessive, without setting out the facts on which the allegation depends (*Sparks v. Vitale*, 44 Wkly. Notes Cas. [Pa.] 150); which alleges that the assessment was greatly in excess of the company's needs at the time it was laid, but gives no facts or data (*People's Mut. Fire Ins. Co. v. Bergstresser*, 1 Pa. Dist. R. 771); which sets forth the condition of the company six months prior to the assessment, showing that the assessment would produce nearly four times the amount needed to pay the liabilities at that time, as it is the necessity of the assessment at the time it is made that determines its legality (*People's Mut. Fire Ins. Co. of Harrisburg v. Groff*, 154 Pa. 200, 26 Atl. 63); which, in an action by a receiver, denies the company's liabilities, such matters being judicially passed on in proceedings under which the receiver was appointed (*Stockley v. Cook & Fair*, 30 Pittsb. Leg. J. N. S. [Pa.] 101); but in the same case it was held that a denial of the insolvency of the company was sufficient, as the court would not assume that such insolvency had been judicially determined.

(h) Evidence.

The presumption of law is in favor of the regularity of proceedings to assess and of the legality of the assessment by a mutual company.

Fidelity Mut. Fire Ins. Co. v. Vitale, 10 Pa. Super. Ct. 157; *People's Mut. Fire Ins. Co. v. Bergstresser*, 1 Pa. Dist. R. 771; *Lycoming Ins. Co. v. Wright*, 60 Vt. 515, 12 Atl. 103.

The presumption may, however, be rebutted by showing that the amount is unreasonably in excess of the indebtedness (*Wardle v. Townsend*, 75 Mich. 385, 42 N. W. 950, 4 L. R. A. 511).

In an action for assessments, in the absence of direct proof to the contrary, it will be presumed that a person shown to be a member of a mutual fire insurance company, under Rev. St. § 8689, which pro-

vides that none but members can be insured, has conformed to the requirements of section 3690, by signing the constitution of the company. *Richards v. Hale*, 24 Ohio Cir. Ct. R. 468.

In Pennsylvania, an assessment certificate is regarded as prima facie evidence of the validity of the assessment, and it is therefore held that the burden is on the defendant to show the illegality of the assessment.

Billmeyer v. People's Fire Ins. Co., 1 Walk. 530; *People's Fire Ins. Co. v. Hartshorne & Co.*, 90 Pa. 465; *Susquehanna Mut. Fire Ins. Co. v. Gackenbach*, 115 Pa. 492, 9 Atl. 90; *Lehigh Valley Fire Ins. Co. v. Dryfoos*, 9 Atl. 262. See, also, *American Guaranty Fund Mut. Ins. Co. v. Mattson*, 100 Mo. App. 816, 78 S. W. 385.

So, too, it has been held in Minnesota (*Swing v. Wurst*, 76 Minn. 198, 79 N. W. 94), that, in an action to recover assessments made on premium notes by a foreign mutual company, the burden of showing noncompliance by the company with the statute relating to such foreign companies is on the defendant. However, in other jurisdictions, the burden of proof is held to be on the plaintiff to show the regularity of the assessment.

Rand, McNally & Co. v. Continental Mut. Fire Ins. Co., 58 Ill. App. 665; *Augusta Mut. Fire Ins. Co. v. French*, 89 Me. 522; *Atlantic Mut. Fire Ins. Co. v. Fitzpatrick*, 2 Gray (Mass.) 279; *Washington County Mut. Ins. Co. v. Chamberlain*, 16 Gray (Mass.) 165.

Where the by-laws of a mutual insurance company required notice of assessments to be published in three newspapers in the county, proof, in an action by a receiver on an assessment, of publication in two papers, does not throw on defendant the burden of showing that there was another paper; but the receiver must show either that the notice was so published, or that he could not comply with the statute for the reason that there were not that number of papers published in the county (*Sands v. Graves*, 58 N. Y. 94). In an action by the receiver of an insolvent insurance company on a premium note which has been assessed by him, though the particular loss for the payment of which the assessment is made need not be shown, the plaintiff must give some evidence of the existence of losses which render an assessment proper (*Jackson v. Roberts*, 31 N. Y. 304).

In order to justify an assessment upon an alleged missing premium note, proof of its having existed at some time, unpaid and uncanceled, must be furnished independently of the records of the company. In *re Slater Mut. Fire Ins. Co.*, 10 R. I. 42.

(1) Same—Admissibility and sufficiency.

In actions to recover assessments levied on premium notes, the same rules as to the competency and admissibility of evidence apply as in other actions on contract.

The admissibility of evidence was considered in *Heller v. Crawford*, 37 Ind. 279; *Lycoming Fire Ins. Co. v. Langley*, 62 Md. 196; *People's Mut. Ins. Co. v. Clark*, 12 Gray (Mass.) 165; *Washington Mut. Fire Ins. Co. v. St. Mary's Seminary*, 52 Mo. 480; *Atlantic Mut. Fire Ins. Co. v. Sanders*, 86 N. H. 252; *People's Fire Ins. Co. v. Hartshorne*, 90 Pa. 465; *Susquehanna Mut. Fire Ins. Co. v. Mardorf*, 152 Pa. 22, 25 Atl. 234; *Thropp v. Susquehanna Mut. Fire Ins. Co.*, 125 Pa. 427, 17 Atl. 473, 11 Am. St. Rep. 909; *Moore v. Everitt*, 20 Pa. Super. Ct. 13; *Same v. Bestline*, 23 Pa. Super. Ct. 6.

In an action by a foreign mutual insurance company to recover an assessment upon a deposit note, if plaintiffs, in proving a demand on defendant for payment of the assessment, introduce evidence that defendant refused to pay it because plaintiffs' agent came to him in this commonwealth and induced him to insure by false representations as to the amount of premium, such evidence is competent to show that the contract was made within this commonwealth, and therefore void if the provisions of Rev. St. c. 37, § 41, and St. 1847, c. 273, requiring such company to publish a statement of its affairs in a newspaper published in the county where its agent transacts the business of his agency, were not complied with (*Washington County Mut. Ins. Co. v. Dawes*, 6 Gray [Mass.] 376). An interesting case is *Western Massachusetts Mut. Fire Ins. Co. v. Siegel, Cooper & Co.*, 84 Ill. App. 528, where it was held that Starr & C. Ann. St. c. 74, par. 24, providing that a statement under the hands and seals of the president and secretary of a domestic company, to the effect that it was necessary to levy the assessment and that the assessment was levied, shall be admissible as proof of the levying of such assessment, is not applicable to a foreign company. While the decision hinges entirely on the statute, which does not by its terms apply to foreign companies, the court takes occasion to remark that while the law of the forum governs as to the competency and admission of evidence, so that the plaintiff, seeking to recover the assessment, may have the same rights and remedies in the courts of the state as a domestic company, it does not follow that it could establish such rights by the same methods of proof.

The sufficiency of the evidence to support the action was considered in *Williams v. German Mut. Fire Ins. Co.*, 68 Ill. 387; *New England*

Mut. Fire Ins. Co. v. Belknap, 9 Cush. (Mass.) 140; Williams v. Cheney, 3 Gray (Mass.) 215; People's Mut. Ins. Co. v. Allen, 10 Gray (Mass.) 297; Commonwealth v. Mechanics' Mut. Fire Ins. Co., 112 Mass. 192; Way v. Billings, 2 Mich. 397; American Guaranty Fund Mut. Ins. Co. v. Mattson, 100 Mo. App. 316, 78 S. W. 865; Connecticut River Mut. Fire Ins. Co. v. Way, 62 N. H. 622; Jackson v. Roberts, 31 N. Y. 304; Sparks v. McCreery, 70 N. Y. Supp. 610, 61 App. Div. 402; Davis v. Sharp, 2 Ohio Dec. 197, 2 West. Law Month. 40; West Branch Ins. Co. v. Macklin, 66 Pa. 34; Buckley v. Columbia Ins. Co., 83 Pa. 298; People's Fire Ins. Co. v. Hartshorne, 90 Pa. 465; Kelly v. Troy Fire Ins. Co., 8 Wis. 254.

(J) Trial, judgment, and review.

The question whether the books of the company furnish sufficient data for a correct assessment is for the jury (*Marblehead Mut. Fire Ins. Co. v. Underwood*, 3 Gray [Mass.] 210); and so, too, is the question whether sufficient notice of assessment has been given (*Buckley v. Columbia Ins. Co.*, 83 Pa. 298).

In an action to recover assessments, a judgment and verdict for the plaintiff will be sustained where it appears that, though assessments greater in amount than stipulated for in the policy were levied, the plaintiff was confined at the trial to the amount stipulated (*Quaker City Mut. Fire Ins. Co. v. Notter*, 15 Pa. Super. Ct. 596). Under Laws N. Y. 1853, c. 466, § 13, prescribing the form of judgment in actions on premium notes, it is proper to render judgment for the whole amount of the note instead of the amount of the assessment levied against it, as no injustice results, because execution can only issue for the amount actually due (*Taylor v. Port Jefferson Milling Co.*, 84 Hun, 610, 32 N. Y. Supp. 307). The company is entitled to interest on unpaid assessments (*Knipe v. Scholl*, 16 Montg. Co. Law Rep'r [Pa.] 209), from the time when the same became payable (*Hyatt v. Wait*, 37 Barb. [N. Y.] 29). But the company is entitled only to simple interest, and a by-law imposing as a penalty 10 per cent. interest per month on unpaid assessments is wholly nugatory (*National Mut. Fire Ins. Co. v. Yeomans*, 8 R. I. 25, 86 Am. Dec. 610). A stipulation in the application for a policy that, if any assessment be not paid within 30 days after notice of the same, the insured will "pay 25 per cent. thereon for expense of collection," is not unconscionable and illegal, and the penalty may be collected, in addition to the assessment (*People's Mut. Fire Ins. Co. v. Groff*, 154 Pa. 200, 26 Atl. 63).

A judgment on a premium note will be reversed for failure of the record to show evidence to support the judgment, where the tran-

script merely recites that the plaintiff claimed on the note given for a policy, stating the number and giving a list of the assessments by date and amount, noted the appearance of the parties, and stated that plaintiff's attorney offered in evidence defendant's note and the certificate under Act May 1, 1876; that defendant's attorney filed the defendant's affidavit under said act, and after hearing the parties, their proofs and allegations, judgment was for plaintiff (*Pennsylvania Mut. Fire Ins. Co. v. Lenker*, 5 Pa. Co. Ct. R. 667).

5. RIGHT TO AND LIABILITY FOR PREMIUMS—LIFE AND ACCIDENT INSURANCE.

- (a) Liability for premiums.
- (b) Amount of premiums.
- (c) Payment of premiums in general.
- (d) Persons to whom payment may be made.
- (e) Payment by note.
- (f) Effect of fraud or misrepresentation.
- (g) Effect of receipt.
- (h) Actions for premiums.

(a) Liability for premiums.

As stated in a previous brief,¹ a life insurance contract does not become binding until the insured has either paid, or promised to pay, the first premium. But, when the contract has taken effect, some peculiarities about it become noticeable. In so far as it is executory, the ordinary life insurance contract is unilateral. The insured is not bound to do anything whatsoever, and need not pay any premium when due, as he merely agrees that, if he fails to pay, his rights under the policy shall be forfeited or otherwise affected. Hence the insurer cannot enforce the collection of premiums as they fall due. They do not constitute a debt in any sense. Thus, it was said, in *Worthington v. Charter Oak Life Ins. Co.*, 41 Conn. 372, 19 Am. Rep. 495: "The theory that the premium as it becomes due is a debt is a fallacious one, and leads to erroneous conclusions. It resembles a debt only in that it is a payment of money. A debtor is under obligation to pay. Here no obligation exists. The payment of a debt may be compelled. Payment of the premium is entirely optional with him who is to pay." Even though a policy states that the premium is to be paid annually, no promise to pay

¹ See ante, "Payment of first premium," vol. 1, p. 461.

will be implied, as such implication would be inconsistent with the penalizing spirit of the whole contract. Thus it was held, in *Goodwin v. Massachusetts Mut. Life Ins. Co.*, 73 N. Y. 480, that an unpaid premium on a policy of life insurance was "not an indebtedness," within the meaning of a Massachusetts statute providing for the continuance of such policy for a limited period after default, and that therefore the premium could not be deducted from the net value of the policy in determining the amount of premium for temporary insurance. The court in that case said: "According to the terms of the policy there is no promise to pay, and it rests with insured to say how long he will continue it. He can stop it at the end of the year, and determine when the policy shall cease. When he refuses to pay, the policy lapses, and the insured has no further claim, except what is conferred by the nonforfeiture clause." But the liability for premiums is so far a debt that if the annual premium on a policy of life insurance, primarily payable in advance, is by express stipulation made payable by quarterly installments, and the insured dies after payment of the first quarterly installment, the insurer is entitled to have the remaining installments for the current year deducted as a set-off from the amount of such policy (*Albert v. Mutual Life Ins. Co. of New York*, 122 N. C. 92, 30 S. E. 327, 65 Am. St. Rep. 693).

A creditor, to whom a life insurance policy is assigned as collateral security for a debt, is not obliged to pay the premiums on the policy, in the absence of an express agreement to that effect; and the fact that the creditor pays one premium and charges it on his books to the insured does not obligate him to continue to do so (*Van Duersen v. Scanlan*, 8 Ohio Dec. 362, 7 Wkly. Law Bul. 188). But if an assignee of the policy agrees to "keep it alive" for the benefit of the assignor, and he pays a portion of the premiums, but subsequently allows the policy to be forfeited for nonpayment, he is responsible for his misfeasance, though there was no consideration for the agreement to pay the premiums; for if a person undertakes an employment or trust, and begins the performance thereof, he is liable for any injuries which may result from his neglect, even though he may not have received any consideration for the promise (*Ainsworth v. Backus*, 5 Hun [N. Y.] 414).

In this case the policy was taken out by the assignor on the life of her husband, and a portion thereof was assigned on the assignee's agreement to keep it alive. It was held that, on the assignee's misfeasance in paying the premium, the assignor could maintain an action for damages, even though assignor's husband was alive.

(b) Amount of premiums.

In life insurance it is the yearly death claims which constitute the cost of insurance, which the premiums must pay. While the duration of any particular life is the merest chance, the average duration of life from any given age approaches mathematical certainty. Therefore it is possible to calculate with approximate accuracy the sum which, paid annually by a large number of insured, will satisfy the insurance on those who may die each year. The amount that would thus be required of a young man would be small, but it would increase each year until it would be very large. To avoid the necessity of an increasing premium, most insurance companies calculate the premiums on a level basis, which furnishes at first much more than enough to pay the cost of the insurance, and, later on, is entirely insufficient. The portion of the premium not used for the early yearly cost is reserved for use when the premium will become insufficient, at compound interest. It follows that the portion of the premiums applied to pay the yearly cost gradually increases, and that the portion which has been reserved to make up the deficiency of the premium to pay future cost increases with the aid of interest. The part of the premium intended to meet the cost of insurance, both current and future, is called the "net premium." It is the sum paid yearly by each to furnish the stipulated protection for all. But the policy holders must pay, not only for the cost of insurance, but also for the expense of management; so to the net premium is added a sum deemed sufficient to pay expenses and provide for contingencies. This is called the "loading." In this way, the policy holders pay the sum necessary for the cost of insurance and expense of management. The amount of the net premium is calculated upon the basis of certain tables of mortality, and upon the assumption that the company will receive a certain rate of interest upon all its assets, and the amount of the loading is calculated upon a certain assumed rate of expense. (Fuller v. Metropolitan Life Ins. Co. of New York, 70 Conn. 647, 41 Atl. 4.)

Some insurance companies write insurance on what is known as the "natural" or "graduated premium" basis. Thus the policy involved in *Nall v. Provident Sav. Life Assur. Soc.* (Tenn. Ch. App.) 54 S. W. 109, contained a table of ages from 25 to 60 years, showing a gradual increase in the premium from the first age named to the last. It also contained a provision that the company agreed to renew during each successive year of the life of insured, on payment

on or before a certain date in each successive year of the annual premium rate for the age attained, in accordance with the table mentioned. It was held that, though no figures were given beyond the age of 60, premiums for the ages thereafter were to be determined by calculation on the rule of progression shown by the table, and did not continue the same as that provided for the age of 60.

In many instances the contract provides for a reduction of the premium by dividends or the application of return premiums. If a policy provides that future premiums are to be reduced by return premiums (the surplus portion of preceding payments not needed for the death and guaranty funds) awarded thereon, the discretion of the directors in determining the amount of return premiums to be awarded will not be interfered with by the courts, in the absence of fraud (*Fry v. Provident Sav. Life Assur. Soc. of New York* [Tenn. Ch. App.] 38 S. W. 116). In *Smallwood v. Life Ins. Co. of Virginia*, 133 N. C. 15, 45 S. E. 519, the policy provided for a readjustment at the end of each five years, and stated that it was estimated that the dividends declared every five years would maintain the premiums at a uniform rate, and that no dividends would be declared on the policy except at the end of each five-year period. Through clerical error or inadvertence the insurer, in sending out notices for the first three bimonthly premiums of a five-year period, stated the premiums to be at the same rate as for the prior five years. It was held that this did not estop the insurer, on discovery of the mistake, to demand premiums for the balance of the period at the true and greater rate. An insurance company, on declaring dividends out of the surplus earnings of policies in force, has no right to limit it to such policies as may be continued in force by the payment of the next premium due, though the policy provides that "the amount" of surplus payable thereunder, as determined by the board of directors, shall be conclusive and accepted by the insured and every person interested in the policy, as such provision refers only to the amount of surplus payable under the policy, and not to the fact that the surplus is due under it.

Ætna Life Ins. Co. v. Hartley, 67 S. W. 19, 68 S. W. 1081, 24 Ky. Law Rep. 57. See, also, *Mutual Ben. Life Ins. Co. v. Davis*, 115 Ky. 404, 78 S. W. 1020.

If a policy which provides that an insured shall participate in the profits contains a clause to the effect that premium loans are a just indebtedness against the policy until paid or canceled by profits or otherwise, there is an express direction in the policy that profits

or dividends shall go to pay premium loans (*Union Cent. Life Ins. Co. v. Caldwell*, 68 Ark. 505, 58 S. W. 355). So a dividend due a policy holder, which is sufficient to pay a premium due, should be applied to the payment of such premium upon the request of the policy holder, where the practice of the company has been to apply dividend scrip either to secure a bonus policy, or to reduce the amount of premiums payable at any given time, upon the request of a policy holder (*Manhattan Life Ins. Co. v. Hoelzle*, 16 Fed. Cas. 604).

Where the payment of premiums on a participating life policy was interrupted by the Civil War, and the company afterwards repudiated the liability thereon, claiming that the policy had been forfeited, it was proper, in a suit on such policy, where plaintiff's recovery was reduced by the amount of unpaid premiums, to allow, as against such unpaid premiums, the amount of dividends to which the policy holder became entitled during the continuance of the insurance (*New York Life Ins. Co. v. Clemmitt*, 77 Va. 366).

(c) Payment of premiums in general.

Where payment of premiums on life insurance policies is required to be made at the home office of the company, a premium is not paid until the money is sent by mail or express to the home office and is received there (*State v. Connecticut Mut. Life Ins. Co.*, 106 Tenn. 282, 61 S. W. 75). But, though a policy requires premiums to be paid to the home office or to an agent, yet, if the company for more than eight years accepts money paid by insured to a bank, this will amount to a ratification of an understanding between the insured and the company's agent that payments could be made to the bank (*Greenwood v. New York Life Ins. Co.*, 27 Mo. App. 401).

Payment may be made by a third person. Thus, if a policy is payable to the personal representatives of an insured, the fact that the premiums are paid by one who has no insurable interest, under the belief that the insurance is for his benefit, does not render the policy void (*Prudential Ins. Co. v. Cummins' Adm'r*, 19 Ky. Law Rep. 1770, 44 S. W. 431). If a third person, who has promised an insured to pay his premium, fails to do it in time, the company is not obliged to notify the insured of the nonacceptance of the premium when finally tendered (*Mullins v. Hartford Life Ins. Co.*, 26 Tex. Civ. App. 383, 63 S. W. 909).

Ordinarily the company must receive payment in lawful money in order to be bound; but, if a company accepts a draft given by an insured on a third person and receipts therefor, this will constitute

a payment of the premium (*Texas Mut. Life Ins. Co. v. Munson*, 2 Posey, Unrep. Cas. [Tex.] 649). So, if a company accepts a check and gives an unconditional receipt therefor, at a time when it cannot be presented for payment or collected before the premium for which it is given becomes due, the company will be deemed either to have accepted the check as payment, or to have waived strict compliance with the terms of the policy in regard to the time and manner of payment (*Northwestern Life Assur. Co. v. Sturdivant*, 24 Tex. Civ. App. 331, 59 S. W. 61).

Premiums need not necessarily be paid in cash or its equivalent. They may be paid in services. Thus a company may agree to take advertising in payment for a premium, and if a company does so agree it must furnish the advertising matter. A failure to do so cannot affect the rights of the insured. (*Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96.) But the fact that a company in one instance allowed insured a credit on premiums for services and accepted the balance of the premium in money does not show a custom on the part of the company to accept payment of premiums in services (*Willcuts v. Northwestern Mut. Life Ins. Co.*, 81 Ind. 300).

Credit may be extended for premiums on life insurance policies. But a clause in a policy that the company shall, on proof of death, pay the sum insured, less any balance of the year's premium, when not paid at the commencement of the year, does not extend credit to the insured until the end of the year as to the time of making thrice-yearly payments (*Howard v. Continental Life Ins. Co.*, 48 Cal. 229). And the rule of an insurance company allowing 30 days' grace in which to pay a premium after the same has become due does not apply to a premium becoming due prior to the adoption of the rule (*Nall v. Provident Sav. Life Assur. Soc.* [Tenn. Ch. App.] 54 S. W. 109). However, if mutual accounts are kept between a company and an insured, charging a premium to the insured, by the officers of the company, on account, is equivalent to a payment by him (*Butler v. American Popular Life Ins. Co.*, 42 N. Y. Super. Ct. 342). But proof that the amount of one annual premium was charged to the account of an agent, and marked "Paid," on or about the time the premium became due, supported by the additional fact that the company served upon the insured a notice that the premium of the succeeding year would fall due on a specified time, is not sufficient to establish, in judgment of law, a payment, in the absence of any proof of actual payment to the agent of the premium so charged and credited (*Wright v. Equitable Life Ins. Co.*, 41 N. Y. Super. Ct. 1).

Usually policies stipulate that no moneys payable to the company on account thereof shall be considered as paid unless a receipt be given therefor, signed by the president or secretary of the company; but such a stipulation is intended only to protect the company against unauthorized payments to local agents or collectors, and has no application where the money is sent directly to the company's office (*Bishop v. Covenant Mut. Life Ins. Co.*, 85 Mo. App. 302). Where a person, applying for a life policy on the 18th of a month, then made a payment which the policy, issued on the 22d, required to be paid in advance on the 15th of every month until a certain sum was paid, such payment was not the one required to be made on the 15th of the following month (*Bryan v. National Life Ins. Ass'n*, 21 R. I. 149, 42 Atl. 513).

(d) Persons to whom payment may be made.

A general agent of a life insurance company has authority to receive payments (*Southern Life Ins. Co. v. McCain*, 96 U. S. 84, 24 L. Ed. 653), and may extend the time for the payment of a premium (*United States Life Ins. Co. v. Lesser*, 28 South. 646, 126 Ala. 568). Likewise the regular agent of a foreign life insurance company will be presumed to have full authority to act for the company in the acceptance of premiums, and any limitation of his authority must be brought home to the knowledge of the insured (*Mowry v. Home Life Ins. Co.*, 9 R. I. 346). Notice of the revocation of an agent's authority to receive premiums must be given to the insured.

Southern Life Ins. Co. v. McCain, 96 U. S. 84, 24 L. Ed. 653; *Martine v. International Life Assur. Soc.*, 5 Lans. (N. Y.) 535, 62 Barb. 181.

Where a company had agents in one of the Southern states during the Civil War, authorized to receive premiums, payment to such agents in the currency then in circulation was, in *Martine v. International Life Assur. Soc.*, 5 Lans. (N. Y.) 535, 62 Barb. 181, held to be a valid payment. But in *New York Life Ins. Co. v. Davis*, 95 U. S. 425, 24 L. Ed. 453, it was said that tender of premium to an agent during the war did not bind the company; the agent refusing to accept the premium.

The fact that an agent has authority to collect premiums does not imply that he has authority to accept property, or anything but cash, in payment of premiums.

Sullivan v. Germania Life Ins. Co., 15 Mont. 522, 39 Pac. 742; *Equitable Life Assur. Soc. v. Cole*, 13 Tex. Civ. App. 498, 35 S. W. 720. See, also, *Cyrenius v. Mutual Life Ins. Co.*, 46 N. Y. Supp. 549, 18 App. Div. 599.

The death of a member of a firm acting as agents for an insurance company terminates the agency, so that payment to the survivor by one having knowledge of the facts will not bind the company (*Martine v. International Life Assur. Soc.*, 5 Lans. [N. Y.] 535, 62 Barb. 181). But the entry of an interlocutory judgment against a company, appointing a receiver with power to continue its business, and enjoining the company's officers and agents from receiving or disposing of the company's property, does not revoke or annul the authority of an agent of the company to receive payment of a premium on a policy issued by it (*Rice v. Barnard*, 127 Mass. 241).

If a premium on a policy be paid and accepted by an agent who is apparently authorized by the company to receive it, the payment will be sufficient, whether it be in conformity with the terms of the policy or not (*Eclectic Life Ins. Co. v. Fahrenkrug*, 68 Ill. 463). And a provision that no payment of premiums will be recognized unless entered by the agent collecting them in the receipt book belonging with the policy does not affect the beneficiary's rights if the premiums are actually paid (*East v. Prudential Ins. Co. of America*, 42 N. Y. Supp. 584, 11 App. Div. 190). So payment by one not having knowledge that an agent has authority to accept payment of premiums only on a particular form of receipt is binding on the company, though a different form of receipt is used by the agent (*Southern Life Ins. Co. v. McCain*, 96 U. S. 84, 24 L. Ed. 653). An indorsement, on the margin of a policy requiring premiums to be paid at the home office, that "all receipts for premiums paid at agencies are to be signed by the president or actuary" of the company, is not an agreement on the part of the company to vary the conditions of the contract, and to make any particular agency the legal place of payment, but is merely a notice to the insured that he must not pay to an agent or at an agency without getting a receipt signed by the president or actuary (*New York Life Ins. Co. v. Davis*, 95 U. S. 425, 24 L. Ed. 453). A printed notice on the back of a policy that payment to agents will not be deemed valid, unless a receipt, signed by certain specified officers, is received at the time, is not a limitation on the power of a general agent, and consequently payment to him is valid without such a receipt (*McNeilly v. Continental Life Ins. Co.*, 66 N. Y. 23). In the same case it was said that, even if such notice be considered as a limitation, the fact that an agent, on surrendering all receipts in his hands, is authorized to receive and forward such premiums as should be paid to him thereafter, without having receipts in advance furnished to him, constitutes a

waiver of the provisions of the notice relative to such receipts. A provision, in an accident policy issued to a railway employé, that the assured shall leave in the hands of the paymaster of the railroad the installments of premium as agreed in an order of the assured on the paymaster to retain the installments out of the insured's wages, is complied with by leaving his dues in the hands of the paymaster without seeing that the latter turns them over to the company (*Fidelity & Casualty Co. v. Johnson*, 72 Miss. 333, 17 South. 2, 30 L. R. A. 206).

(e) Payment by note.

In the absence of any provision to the contrary, a note may be accepted in payment of a premium; and, if a note is accepted as payment, this is equivalent to cash payment of the premium.

Massachusetts Benefit Life Ass'n v. Robinson, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261; *Symonds v. Northwestern Mut. Life Ins. Co.*, 23 Minn. 491.

In *Ferguson v. Union Mut. Life Ins. Co. (Mass.)* 72 N. E. 358, it was held that where an insurance policy provided for a forfeiture if any annual premium, with the interest due thereon, should not be paid, or if any note, check, or draft given in payment of any annual premium, should not be paid according to its provisions, and further provided that the company should have the right to set off any demand against either the assured or insured, arising in connection with the insurance, against any claim for which the company should be liable, it was implied that annual premiums might be paid in whole or in part by the note of either the assured or insured.

In the *Ferguson Case* it was further held that where, after a first note for insurance premiums had been given, subsequent notes not only included the amount of the former note, which was surrendered, but were increased by the part of the yearly premium then due, it could not be contended, against a finding that the premiums had been paid, that the last premium note given was only the last renewal of the first and succeeding notes.

In general it is not necessary that a note for a premium be executed by the insured, but such note may be given by a third person (*Timayenis v. Union Mut. Life Ins. Co. [C. C.]* 21 Fed. 223). However, if the charter of the company provides that all persons insured shall be deemed members, the corporation is not authorized to take a note of a third person for a premium, instead of the insured, as the other members of the company have the right to re-

quire every person insured to pay the premium or to give his note, and not that of a stranger (*Mutual Ben. Life Ins. Co. v. Davis*, 12 N. Y. 569). Even if the note of a third person is accepted for a premium, the insurer is under no obligation to enforce payment thereof against the maker. Hence, if, when a note is paid, the payment by an agreement between the parties to the note is applied to a different purpose, such payment does not inure to the benefit of the beneficiary in the policy as a payment of the premium. (*Timayenis v. Union Mut. Life Ins. Co.* [C. C.] 21 Fed. 223.) As a general rule notes may be taken by agents with general authority in payment of premiums, and it is within the apparent scope of a state manager's employment to take notes and renewals thereof (*First Nat. Bank of Dubuque v. Getz*, 96 Iowa, 139, 64 N. W. 799).

Where a note given for premiums on a policy issued by a mutual insurance company recited that it was given for a portion of the premium on a certain policy, and was to remain a lien thereon until the policy became due by limitation or by death of the insured, when it was to be deducted from the policy unless sooner paid, such note will be deemed a payment of the premium, and regarded in equity as evidence of the loan of the money by the corporation to one of its members, and not as evidence that premiums remained unpaid (*Franklin Life Ins. Co. v. Wallace*, 93 Ind. 7). So, if a policy issued in consideration of ten annual premiums, payable part in cash and part by notes, provides that, if default is made in payment of any premium or interest on any premium notes, the company is liable for as many tenth parts of the amount insured as there had been complete annual premiums paid, that the principal of the notes remaining unpaid by dividends is to be paid by deducting the balance due thereon from the amount due on the policy when it becomes payable, and that the interest thereon is to be paid annually, or the policy be forfeited, the payment of the annual cash premiums and the giving annually of the premium notes constitutes so many complete annual payments, and the payment of such notes in cash is not necessary to constitute payment of the premiums.

Northwestern Mut. Life Ins. Co. v. Little, 56 Ind. 504; *Northwestern Mut. Life Ins. Co. v. Bonner*, 36 Ohio St. 51. In the *Little Case* it was held that, except in so far as it provided for the payment of an annual interest, the instrument given by insured was not a note, the payment of which was a condition precedent to a recovery on the policy, but was in the nature of a receipt for money loaned or advanced out of a particular fund in which the assured had an interest.

If an insured's note is accepted for a premium, he is liable thereon, even though the note provides for a forfeiture in case of nonpayment thereof, as such provision is merely a provision of defeasance that may be made operative on default (*Mutual Life Ins. Co. v. French*, 30 Ohio St. 240, 27 Am. Rep. 443, affirming *Mutual Ben. Life Ins. Co. v. French*, 2 Cin. Super. Ct. Rep'r, 321, 13 Ohio Dec. 927); and the insured cannot take advantage of his own wrong in making default in payment of the note (*Kempshall v. Vedder*, 79 Ill. App. 368). The fact that enough has been paid on a note to reasonably compensate the company for the time a policy has been in force until it lapsed for nonpayment of the note does not preclude the company from collecting the balance remaining unpaid (*Economic Life Ass'n v. Spinney*, 89 N. W. 1095, 116 Iowa, 385). But in *Marskey v. Turner*, 81 Mich. 62, 45 N. W. 644, the position was taken that if, on nonpayment of the note, the company terminated the insurance because of such default, no recovery could be had on the note. If a husband gives a loan certificate to an insurance company as part of the first premium paid by him, thus by said arrangement putting the policy in force, upon suit by the company, after the death of the insured, to recover the loan so made, he will be treated as the agent of the wife, for whom the insurance was procured, in effecting the loan, and she will not be allowed to repudiate same (*Provident Sav. Life Assur. Soc. v. Duncan*, 1 Tenn. Ch. App. 562).

The maker's liability on premium notes is not affected by the fact that it was made payable to the agent of the insurance company, instead of to the company (*Roddey v. Talbot*, 115 N. C. 287, 20 S. E. 375). So a note given for a premium on an agreement to insure is binding, as such an agreement is a sufficient consideration for the note (*American Ins. Co. v. McWhorter*, 78 Ind. 136). And a promise on the part of an insurance agent to forward premiums out of his own funds for insured is a valid consideration for a note given for the premiums (*White v. McPeck*, 185 Mass. 451, 70 N. E. 463). However, if an agent, taking a note for the first premium, has no authority to accept anything but cash (*Dunham v. Morse*, 158 Mass. 132, 32 N. E. 1116, 35 Am. St. Rep. 473), or to agree to accept services of insured in payment of a note for the premium (*Anchor Life Ins. Co. v. Pease*, 44 How. Prac. [N. Y.] 385), and his acts are not ratified by the company, the insurance is invalid, and there is no consideration for the note. But in *Sebring v. Hazard*, 128 Mich. 330, 87 N. W. 257, it was held that, though an insured was induced

to take out a policy and give his note for the premium thereon by the agent's assurance that he had procured him a certain kind of work, there was not a total failure of consideration for the note, as the insured had received and retained a policy of insurance. In *Life Ass'n of America v. Cravens*, 60 Mo. 388, defendant claimed that the note sued on was given in consideration of a parol agreement by the company to loan him certain sums of money. It was held that, notwithstanding the failure of the company to comply with the agreement to loan, the defendant was liable on his note, unless he offered to rescind the contract of insurance by returning the policy and demanding the note; but that the company's recovery would be subject, under appropriate pleading, to be reduced to the extent of the damage suffered by the defendant, in consequence of plaintiff's failure to make the loan.

Where insurance is taken in a mutual company under an agreement that the insurance was to be for one year, and the duration of the policy was not stated in the application or in the policy, a note of the regular form of the company, providing for five annual payments of premium, which note was signed by the insured without his knowledge as to its contents, was void in so far as it provided for the last four payments of premium (*Bankers' Acc. Ins. Co. v. Rogers*, 73 Minn. 12, 75 N. W. 747). So a renewal note, given after default to an agent who has no authority to waive a forfeiture, is void for want of consideration, except as to the premium earned before insured defaulted in payment of the original note (*Park v. Hilton*, 21 Ky. Law Rep. 1319, 54 S. W. 949). In *Sydnor v. Boyd*, 119 N. C. 481, 26 S. E. 92, 37 L. R. A. 734, defendant contracted with a life insurance agent for two policies, one on his life for the benefit of his wife, and one on the life of the wife for his benefit, giving the agent his promissory note for the premiums. The policies were both made payable to the wife, and defendant refused to receive them, whereupon the agent secured what purported to be an assignment of one of the policies by the wife to the husband. This assignment the company subsequently refused to recognize. It was held that the contract was an entire one, and the failure to comply therewith entitled defendant to renounce the contract, and released him from liability on the note. The mere fact that an application, though made a part of the policy, states that the first premium has not been paid, does not render the policy invalid, so as to vitiate a premium note, if the first premium has in fact been paid (*Dunn v. Abrams*, 25 S. E. 766, 97 Ga. 762). Where a note is only condi-

tionally delivered to an agent, the insured is not liable thereon if the conditions are not fulfilled, even though the agent has no authority to agree upon the conditions on which delivery to him was made (*Michigan Life Ins. Co. v. Beaver*, 26 Ill. App. 349). But in *Muller v. Swanton*, 140 Cal. 249, 73 Pac. 994, it was said that though a note was given to an agent in order to enable him to make a good showing to the company, and on an agreement that it would never be collected, yet, if the agent assigned the note to the company before maturity, in consideration of a policy, and the company took it without knowledge of the fraud, the maker of the note was liable to the company.

The refusal of an insurance company to change the beneficiary in the manner provided in a life policy under which risk has attached is no defense to an action on a note given for the premium, in the absence of fraud (*Harris v. Scrivener* [Tex. Civ. App.] 78 S. W. 705). So a father, who has given his note in payment of the first premium on a policy taken out by his minor son, in consideration that the policy be made payable to him and his heirs, and who makes no objection until after maturity of the note that the policy was made payable to him, and after his death to the son, though he has knowledge thereof, cannot defend an action on the note by showing that the policy was not made payable as agreed (*Roddey v. Talbot*, 115 N. C. 287, 20 S. E. 375). But a note given to a company which has not complied with the laws of the state is void and unenforceable, in the absence of a statute making the policy valid notwithstanding the company's noncompliance with the laws of the state.

Hoffman v. Banks, 41 Ind. 1; *Hacheny v. Leary* (*Beneo v. Yesler*) 12 Or. 40, 7 Pac. 329; *Cincinnati Mut. Health Assur. Co. v. Rosenthal*, 55 Ill. 85, 8 Am. Rep. 626; *Barbor v. Boehm*, 21 Neb. 450, 32 N. W. 221.

So a note given for the premium on a policy, where the insurer has given a rebate in violation of law, is without consideration and cannot be collected.

Citizens' Life Ins. Co. v. Commissioner of Insurance, 128 Mich. 85, 87 N. W. 126, *Heffron v. Daly*, 133 Mich. 613, 95 N. W. 714. And a check given in payment of such a note is void. *Tillinghast v. Craig*, 17 Ohio Cir. Ct. R. 531, 9 O. C. D. 459.

The failure of a mutual life insurance company does not constitute a failure of consideration, so as to defeat an action on a premium note.

Conigland v. North Carolina Mut. Life Ins. Co., 62 N. C. 341, 93 Am. Dec. 89; *North Carolina Mut. Life Ins. Co. v. Powell*, 71 N. C. 389.

It was also decided in these cases that the policy holder could not set off the value of his policy against the premium note.

But if, on the assignment of the company, the assets are more than sufficient to meet all the liabilities, a note given for a premium cannot be enforced, especially if the policy holder has been notified that unearned premiums will be returned (*Bostick v. Maxey*, 5 Sneed [Tenn.] 173). Though an insurance company to which an insured has given a note for a premium transfers its assets to another company before maturity of the note, the insured is nevertheless bound to pay the note, in the absence of a showing that, with the cessation of business of the company, insured was deprived of the benefit of the insurance upon his life for the unexpired portion of his policy (*Jackson v. Alabama Gold Life Ins. Co.*, 1 White & W. Civ. Cas. Ct. App. [Tex.] § 751).

The general rule that a purchaser of a note for value before maturity takes it free from equities of which he has no notice applies to promissory notes given in payment of insurance premiums (*Johnson v. White*, 120 Ga. 1010, 48 S. E. 426). But a purchaser before maturity of a note given to pay the first premium on a life insurance policy, with notice that the policy has not been issued, runs the risk of a failure of the company to deliver to the maker of the note a policy in accordance with the application (*Heard v. Shedden*, 113 Ga. 162, 38 S. E. 387). And an insurance agent who takes from a subagent an assignment of a note given for the first year's premium on a policy received by the latter in the usual course of the business of the agency is charged with knowledge of the acts of the agent, and hence is not an innocent purchaser of the note (*Perry v. Archard*, 1 Ind. T. 487, 42 S. W. 421).

Insurance companies may, of course, extend the time of payment of a note; but, unless provision for an extension is made in the contract, an insured cannot insist thereon. And even where provision is made for an extension, insured can only demand an extension of the time for the payment of the note on compliance with the terms of the contract. Thus, where a note was given for a life insurance premium to one who agreed "to renew said note at the request of [the maker] until three annual payments had been made," the maker was not entitled to a renewal without a tender or a payment in cash of the next annual premium falling due under the policy after the note became due, the contract not requiring notes to be accepted for subsequent premiums. (*Mutual Life Ins. Co. v. Smith*, 25 S. E. 727, 98 Ga. 771.)

(f) Effect of fraud or misrepresentation.

A premium note, procured by fraud of the insurer or its agent, or through misrepresentations as to the policy and its conditions, cannot, as a general rule, be enforced (*Webb v. Moseley*, 30 Tex. Civ. App. 311, 70 S. W. 349). The insured is not bound to pay the note and sue on his receipt. He may set up the fraud as a defense to an action on the note. (*Penn Mut. Life Ins. Co. v. Crane*, 134 Mass. 56, 45 Am. Rep. 282.) But in *Blanks v. Moore*, 139 Ala. 624, 36 South. 783, it was held that an insured cannot show, in defense to an action on a premium note, that the insurer's agent in soliciting the insurance represented that the policy would contain certain conditions, which it did not contain, on the ground that a contract in writing cannot be contradicted or varied by a contemporaneous parol agreement. However, in *Parker v. Bond*, 121 Ala. 529, 25 South. 898, the position was taken that, if the insured seasonably repudiated the transaction and offered to return the policy, he had a good defense to the note. Even if an insured is not considered liable on a premium note obtained by fraud or misrepresentation, yet, if he retains the policy for an unreasonable time and fails to repudiate the contract, he will be held to have waived the fraud or misrepresentation, and will be held liable on the note.

Jones v. Gilbert, 98 Ga. 604, 20 S. E. 48; *Leigh v. Brown*, 99 Ga. 258, 25 S. E. 621; *Johnson v. White*, 48 S. E. 423, 120 Ga. 1010; *Perry v. Archard*, 1 Ind. T. 487, 42 S. W. 421; *King v. Mayes*, 3 Ind. T. 862, 58 S. W. 573; *National Life & Trust Co. v. Omans* (Mich.) 100 N. W. 595. So an insured, who retains a policy for a year and a half with knowledge of a mutual mistake in the application, cannot resist liability on his note for the premium on the ground of the voidability of the policy. *Plympton v. Dunn*, 148 Mass. 523, 20 N. E. 180.

So, if an insured signs an application for a policy without reading it, and the policy issued thereon is in conformity with the application, he cannot set up, in defense to an action on the premium note which has been transferred to a general agent, that the agent at whose instance he signed the application fraudulently induced him to sign it, as the general agent would be authorized to act on the assumption that the application was voluntarily made.

Shedden v. Heard, 110 Ga. 461, 35 S. E. 707; *Johnson v. White*, 120 Ga. 1010, 48 S. E. 423. But in *Webb v. Moseley*, 30 Tex. Civ. App. 311, 70 S. W. 349, it is said that a general agent is held chargeable with notice of the fraud of a subagent in procuring a note for premiums by means of false representations as to the policy, though

the general agent acquires the note before maturity. In *Muller v. Swanton*, 140 Cal. 249, 73 Pac. 994, it was said that the maker of a note given to an agent cannot set up the fraud of the agent in procuring the note, as against the company, to which the note was assigned for value before maturity.

A statement by the agent of a life insurance company to the insured that the company "would allow an advance dividend," even when not fulfilled, is not a misrepresentation of a fact that would avoid the insured's premium note (*Cunyus v. Guenther*, 96 Ala. 564, 11 South. 649). And a slight error in the spelling of the name of insured in a policy will not, after his acceptance of the policy, constitute a valid defense to an action on a promissory note given for the first premium, unless it affirmatively appears that, after discovering the error, the insured made a proper request for its correction, and the same was refused (*Jones v. Methvin*, 25 S. E. 318, 97 Ga. 449). So a statement by an insurance agent that the first premium would be \$213, when in fact it was \$222.50, is not such a misrepresentation as will make void a note for the former sum given by the insured to the agent, who by agreement paid the first premium and sought to collect from insured only the amount of the note (*Dunn v. Abrams*, 25 S. E. 766, 97 Ga. 762). And a representation by an agent "that there would be no trouble in getting the cash surrender value" of an old policy is merely an expression of the agent's opinion, and not a defense to the note for the premium on the new policy (*Garber v. Bresee*, 96 Va. 644, 32 S. E. 39). But in *Webb v. Moseley*, 30 Tex. Civ. App. 311, 70 S. W. 349, it was held that representations by an agent that a fully paid-up life policy for \$25,000 would be issued to the obligor on making payments of \$1,200, \$400, and \$200, were not so palpably absurd as not to constitute fraud, invalidating a note for \$1,200 obtained by reason of such representations.

(g) Effect of receipt.

A receipt for a premium on a policy of life insurance does not constitute a new contract (*Northwestern Mut. Life Ins. Co. v. Amerman*, 119 Ill. 329, 10 N. E. 225), but it is prima facie evidence of payment of the premium (*Mutual Life Ins. Co. v. French*, 30 Ohio St. 240, 27 Am. Rep. 443); and a receipt signed by an agent, dated on the day that a premium on a policy became due, is presumptive evidence of payment thereof on such day (*Mowry v. Home Ins. Co.*, 9 R. I. 346). So it was held, in *Norton v. Phoenix Mut. Life Ins. Co.*, 36 Conn. 503, 4 Am. Rep. 98, that a receipt issued to

a local agent for a premium on a policy on his life was prima facie evidence of payment, though not countersigned by such agent, as required, especially since a prior receipt issued to the agent had not been countersigned by him. But a receipt, signed by the secretary of a company and countersigned by a clerk of a general agent on behalf of such agent, is insufficient to establish payment of a premium on a policy issued to such clerk, both as to him and his beneficiary (*Neuendorff v. World Mut. Life Ins. Co.*, 69 N. Y. 389).

(h) Actions for premiums.

Prima facie a foreign life insurance company may sue in the courts of a state on a promissory note, the same as a domestic corporation or natural person (*Mutual Ben. Life Ins. Co. v. Davis*, 12 N. Y. 569). But an agent of an insurance company cannot sue an insured in his own name to recover a premium voluntarily paid by the agent, where he is not the assignee or successor in interest of the company, to which the money was paid (*Chapin v. Betts*, 14 Ohio Cir. Ct. R. 335, 7 O. C. D. 422).

Where by stipulation of a life policy the tables of surrender value are open to insured's inspection, a statement in scire facias on a mortgage given to secure premiums and an advancement by the company on the policy, which fails to have such tables annexed, is not insufficient, especially if insured is given additional time for filing his defense, so as to permit him to inspect the tables (*United Security Life Ins. & Trust Co. v. Ritchey*, 40 Atl. 978, 187 Pa. 173). A plea in defense to a note that it was given for a premium on policies issued by an association of which plaintiff was agent, and that plaintiff before execution made certain false representations as to the policies, sufficiently shows that plaintiff was a party or privy to the policies, so that a replication that defendant was estopped from pleading such false representations by a provision in the application that no statements made by the person soliciting the application should be binding on the association, unless reduced to writing and presented to its officers, was not objectionable for failure to show plaintiff's privity to the contract (*Blanks v. Moore*, 139 Ala. 624, 36 South. 783).

An answer to an action on a note is insufficient to raise the defense of failure of consideration which alleges that the note in suit was executed in consideration of a valid life policy to be issued by plaintiff, and for no other or different consideration, and that, though a reasonable time for such delivery had lapsed, plaintiff

wholly neglected and refused to execute and deliver a valid life policy for the amount of the note (*Franklin Life Ins. Co. v. Cardwell*, 65 Ind. 138). So an affidavit of defense which avers that "deponent is informed, and expects to be able to prove," that the note was to be returned on the happening of a certain contingency, and that such contingency happened, and that plaintiff took the note with full knowledge of this arrangement, is insufficient, as it should aver that deponent believes the alleged facts to be true, and should set forth the grounds of his belief (*Woods v. Van Kirk*, 17 Pa. Co. Ct. R. 158, 5 Pa. Dist. R. 135).

In an action by a foreign life company on notes given for a premium, there is no presumption that the company has not complied with the requirements of the state laws (*Mutual Ben. Life Ins. Co. v. Davis*, 12 N. Y. 569). On an issue that the kind of policy agreed upon had not been delivered, evidence of the value of the policy actually delivered was inadmissible (*Jones v. Gilbert*, 93 Ga. 604, 20 S. E. 48); and a witness, not testifying that he has expert knowledge of the forms and contents of life insurance policies, or to any facts by which to determine his competency to testify in regard thereto, is incompetent to testify as to the difference between the respective policies (*Cobb's Adm'r v. Wolf*, 96 Ky. 418, 29 S. W. 303). Where insurance contracts are by law required to be in writing, parol evidence is inadmissible to show an oral agreement that the time of payment of a note should be different from that stipulated in the policy (*Mitchell v. Universal Life Ins. Co.*, 54 Ga. 289). But in *Penn Mut. Life Ins. Co. v. Crane*, 134 Mass. 56, 45 Am. Rep. 282, evidence was held admissible, in an action on a note given an insurance company for the premium on a policy, to show that insured made the note relying on fraudulent representations by the company's agent. And oral evidence is admissible to show the meaning of the term "tontine policy," used in an application (*Thompson v. Thorne*, 83 Mo. App. 241). Where the defense to a note given for a premium on a policy issued by a foreign insurance company is that such company failed to comply with the laws of the state, defendant cannot, in order to prove the want of consideration for the note, introduce admissions of the plaintiffs that the note was given for a premium upon a policy of insurance issued by them, where defendant does not introduce the policy in evidence and fails to prove its loss or destruction (*Hope Mut. Life Ins. Co. v. Chapman*, 6 Gray [Mass.] 75). In *Norton v. Gleason*, 61 Vt. 474, 18 Atl. 45, defendant, who had returned his policy for misrepresentations by the in-

suror's agent, pleaded the fraud as a defense to an action on the note. Plaintiff, to show that defendant sought to surrender his policy for other reasons inconsistent with such defense, offered to show that defendant was taking out policies in other companies. This was held properly excluded, as the letter of defendant, when he returned the policies, stating that he would "carry no more insurance," taken in connection with the statement that he would "take out all the paid-up policies" that he could, was consistent both with the defense and the fact of examination for other insurance.

Though a letter written by insured to the insurer, stating that he could not keep the policy because he was not able to make the payments, is some evidence of the ratification of a note given for a premium, it is not conclusive (*Parker v. Bond*, 121 Ala. 529, 25 South. 898). But the testimony of a single witness is sufficient in law to prove the fraud of an insurer in procuring the maker of a note to take out insurance, though the fraud is denied by the person against whom it is charged (*Beckwith v. Ryan*, 66 Conn. 589, 34 Atl. 488).

Where an insured seeks to avoid a note for a premium on the ground that he was induced to take the policy by false and fraudulent representations of the company's agent, the question of the materiality of such representations is for the court (*Penn Mut. Life Ins. Co. v. Crane*, 134 Mass. 56, 45 Am. Rep. 282). And in *Security Life Ins. & Annuity Co. v. Elliott*, 3 Wkly. Notes Cas. [Pa.] 504, the question whether a note given by an insured was accepted as an absolute or conditional payment of a premium on a life policy was held one for the jury. Where the evidence is conflicting as to the meaning of the term "tontine policy," used in an application, an instruction that insured was bound by the terms of his application, subject to an explanation of such technical terms, and submitting to the jury the question of the meaning of such terms, is proper (*Thompson v. Thorne*, 83 Mo. App. 241). So the overruling of a demurrer to a plea in an action on a note, because it failed to show that defendant reasonably made known his dissatisfaction with the policy, which he was to return if not satisfactory, is not prejudicial to plaintiff, where the evidence shows that, if defendant acted at all, he did so in a reasonable time (*Parker v. Bond*, 121 Ala. 529, 25 South. 898).

6. DISCRIMINATION IN RATES—LIFE INSURANCE.

- (a) Statutory provisions prohibiting discrimination in rates.
- (b) Validity of statutes.
- (c) To what companies statute applies.
- (d) What constitutes a violation of the statute.

(a) Statutory provisions prohibiting discrimination in rates.

Many states have statutes prohibiting discrimination by life insurance companies in favor of individuals of the same class and equal expectation of life, and making it a criminal offense for agents to pay rebates as inducements to insure in the companies represented by them. These statutes provide in substance that life insurance companies doing business in the state shall not make any discrimination in favor of individuals of the same class and of the same expectation of life, either in the amount of premium charged or any return of premium, dividends, or other advantages, nor shall any such company or its agent pay or allow, or offer to pay or allow, as inducement to any person to insure, any rebates of premium, or any special favor or advantage whatever, in the dividends to accrue thereon, or any inducement whatever, not specified in the policy.¹

(b) Validity of statutes.

The constitutionality of the statutes prohibiting discrimination has been upheld in several jurisdictions. Thus it has been held in Pennsylvania (*Commonwealth v. Morning Star*, 144 Pa. 103, 22 Atl. 867) that such a law is within the police power of the state. So, too, it has been held (*Equitable Life Assur. Soc. v. Commonwealth*, 113 Ky. 126, 67 S. W. 388) that such statutes are not in restraint of trade. A similar view was taken in *People v. Formosa*, 131 N. Y. 478, 30 N. E. 492, 27 Am. St. Rep. 612, affirming 16 N. Y. Supp. 753, 61 Hun, 272, where the court also held the act constitutional, though it made it a criminal offense for an agent to pay rebates. The court said: "It would be quite preposterous to say that, while the legislature could in the exercise of its legitimate author-

¹ See Code Ala. 1896, § 2802; Hurd's Rev. St. Ill. 1908, c. 73, par. 27; Code Iowa 1897, § 1782; Ky. St. 1903, § 656; Rev. St. Me. 1903, c. 49, § 104; Comp. Laws Mich. 1897, § 7219; Birds-eye's Rev. St. N. Y. (3d Ed.) p. 1852, § 89; Bates' Ann. St. Ohio (4th Ed.) § 3631-4; Pepper & Lewis' Dig. Pa., p. 2381, par. 84; V. S. 4218.

ity regulate these corporations and prescribe the terms under which they may exist and do business, yet it could not by similar laws regulate and control the conduct of their agents. When these corporations seek the benefits and privileges of the law creating and authorizing them, they must conform to the laws enacted for their conduct. * * * So, too, all persons who seek to act as agents of such corporations must conform to the laws regulating the business of such corporations, or cease to act for them. We have not here the question as to what a private individual may do in the conduct of his private business, but the question here is as to the power of the legislature over corporations and their agents. The power exercised over these insurance companies and their agents is similar to that exercised by the legislature over banks and railway corporations, and it has never been doubted that such power exists. And the legislative power to regulate them and their agents in the minutest particular in the interest of the public has never been questioned."

(c) To what companies statute applies.

The Illinois statute prohibiting discriminations by life insurance companies ² was, in *Western Mut. Life Ass'n v. People*, 73 Ill. App. 496, held to apply to companies writing life or accident insurance on the assessment plan, and in *Citizens' Life Ins. Co. v. Commissioner of Insurance*, 128 Mich. 85, 87 N. W. 126, it was said that such a law is applicable to a benevolent association. The law applies to foreign, as well as domestic, life insurance companies; for, when such corporations come into the state by comity, they must obey the laws of the state and conform to its public policy (*People v. Formosa*, 131 N. Y. 478, 30 N. E. 492, 27 Am. St. Rep. 612, affirming 16 N. Y. Supp. 753, 61 Hun, 272).

(d) What constitutes a violation of the statute.

A statute prohibiting discriminations does not forbid an insurance company from issuing a first-year term policy with the privilege of taking whole life policy at the end of the first year, since it is not the same as a single-term policy, and the persons insured are not of the same class (*Bankers' Life Ins. Co. v. Howland*, 73 Vt. 1, 48 Atl. 435, 57 L. R. A. 374). It is not a violation of the law for a company to make a contract for insurance by which it agrees to

² Act Ill. June 19, 1891 (Laws 1891, p. 148).

make a loan to insured in consideration of the insurance (*Key v. National Life Ins. Co.*, 107 Iowa, 446, 78 N. W. 68). It was said, in *Heffron v. Daly*, 133 Mich. 613, 95 N. W. 714, that under the statute it is illegal for an agent to allow an insured the benefit of his (the agent's) commission; but it has been held, in Rhode Island (*Quigg v. Cobbey*, 18 R. I. 757, 30 Atl. 794), that the law is not violated by the action of an insurance agent in allowing one whose life he has insured to retain a portion of the premium, equal in amount to the agent's commission, in consideration of the insured furnishing him with the names of certain others whom he may solicit to take insurance. As the law is not leveled at an offer to effect the prohibited insurance, but the prohibited insurance must have been effected to come within the law, a mere offer to give a rebate on a policy to be issued does not violate the statute.

People v. Mutual Life Ins. Co., 72 Ill. App. 569; *Commonwealth v. Morningstar*, 12 Pa. Co. Ct. R. 34, 2 Pa. Dist. R. 41.

An agreement to make an insured a member of the advisory board, whereby he is to receive advantages over other members not belonging to such board, is within the prohibition of the statute, when it forms part of the same transaction in which a premium note is given for the insurance (*State Life Ins. Co. v. Strong*, 127 Mich. 346, 86 N. W. 825).

A policy providing that no dividend shall be apportioned or paid before the end of the accumulation period is not in contravention of the Illinois statute (Rev. St. c. 73, § 27), providing that no life insurance company shall make or permit any distinction or discrimination between insurants of the same class and equal expectation of life, on the ground that a discrimination as to the distribution of the surplus is made in favor of those who survive the accumulation period, and against those who may die before that time (*Rothschild v. New York Life Ins. Co.*, 97 Ill. App. 547). On the other hand, it has been held in Indiana (*Robison v. Wolf*, 27 Ind. App. 683, 62 N. E. 74) that a contract by a mutual accident insurance company reciting that, in consideration of the full annual premium, the company selected the insured as one of 500 policy holders to participate in a special renewal dividend on all insurance written during certain years, the dividends to be credited on his ensuing premiums, is void, as conferring unequal rights on the selected members.

In *Equitable Life Assur. Soc. v. Commonwealth*, 113 Ky. 126, 67 S. W. 388, it was held that, notwithstanding a statute against

rebates, a company may discharge its debts to its agent by issuing a policy on his life, provided he is charged the same rate that is charged other insurants of the same age and equal expectation of life. But it is said that the statute would be violated if an agent or company should pay more for property than a fair value in accepting it in the payment of premiums, or should agree to pay one more for his services than they were worth to solicit business for the company, and either was done with the design to give insured a rebate on premiums.

A note given for the premium on a policy on which a rebate has been allowed is void, as it is without consideration.

Citizens' Life Ins. Co. v. Commissioner of Insurance, 128 Mich. 85, 87 N. W. 126; *Heffron v. Daly*, 133 Mich. 613, 95 N. W. 714; *Tillinghast v. Craig*, 9 O. C. D. 459, 17 Ohio Cir. Ct. R. 531.

The illegality of an insurance policy, under a law punishing an agent who gives a rebate or makes a special inducement to secure insurance, need not be pleaded in defense of an action on the premium note, as it is the duty of the court to take notice of the illegality *sua sponte* (*Heffron v. Daly*, 133 Mich. 613, 95 N. W. 714).

Under the Illinois statute * prohibiting discrimination in rates, and making the company and its agents jointly and severally liable to penalties, an insurance company is liable for the penalty, though it never authorized or ratified its agent's act in granting a rebate.

Franklin Life Ins. Co. v. People ex rel. Atwood, 200 Ill. 594, 66 N. E. 878, affirming 103 Ill. App. 565; *Franklin Life Ins. Co. v. People ex rel. Yancey*, 66 N. E. 879, 200 Ill. 619, affirming 103 Ill. App. 554.

Where an insurance company has violated the law against rebates, the insurance commissioners may withhold the company's certificate of authority to do business in the state (*Citizens' Life Ins. Co. v. Com'r of Insurance*, 128 Mich. 85, 87 N. W. 126).

For discussion of questions of practice in actions to recover penalties and prosecutions for violation of the anti-rebate law, see *Western Mutual Life Ass'n v. People*, 73 Ill. App. 496; *Metropolitan Life Ins. Co. v. People*, 106 Ill. App. 516; *State v. Schwarzschild*, 83 Me. 261, 22 Atl. 164; *People v. Formosa*, 61 Hun, 272, 16 N. Y. Supp. 753; *Commonwealth v. Morningstar*, 12 Pa. Co. Ct. R. 34, 2 Pa. Dist. R. 41.

The facts were considered sufficient to show a ratification of an agent's acts in giving rebates in *Thompson v. New York Life Ins. Co.*, 21 Or. 466, 28 Pac. 628; *New York Life Ins. Co. v. Tallafiero*, 95 Va.

* Hurd's Rev. St. 1899, p. 978.

522, 28 S. E. 879. And in the Thompson Case it was held that, on an issue of ratification, the court may receive the testimony of other policy holders, where policies were for the same amount, written by the same agent, in the same locality, and about the same time that the company had recognized the agent's authority to give them rebates.

7. RIGHTS AND LIABILITIES AS TO ASSESSMENTS—MUTUAL BENEFIT ASSOCIATIONS.

- (a) Nature or ground of obligation.
- (b) Liability to assessment.
- (c) Power to change rate of assessment.
- (d) Power and duty to make assessments.
- (e) Same—Delegation of power.
- (f) Notice of assessment.
- (g) Levy of assessment.
- (h) Waiver of objections to assessment.
- (i) Actions to recover assessments.

(a) Nature or ground of obligation.

Though a certificate of membership in a mutual benefit association is a contract, such contract, like ordinary contracts of life insurance, is purely unilateral, in the absence of express stipulations to the contrary; and though it may be enforced against the association, where the member has performed all the prescribed conditions, none of its stipulations are enforceable against the member without an express agreement to that effect (*Chicago Mutual Life Indemnity Association v. Hunt*, 127 Ill. 257, 20 N. E. 55, 2 L. R. A. 549). The levying of an assessment does not make a member a debtor to the association, so as to authorize it to bring suit in case of his neglect or refusal to pay, as the only effect of the default is to relieve the association of its obligation to the member.

Clark v. Lehman, 65 Ill. App. 238; *Association v. Hunt*, 127 Ill. 257, 20 N. E. 55; *Lehman v. Clark*, 174 Ill. 279, 51 N. E. 222, 43 L. R. A. 648; *Covenant Mut. Life Ass'n v. Kentner*, 188 Ill. 431, 58 N. E. 966; *Clark v. Schromeyer*, 23 Ind. App. 585, 55 N. E. 785; *Gibson v. Megrew*, 154 Ind. 273, 56 N. E. 674, 48 L. R. A. 362; *New Era Life Ass'n v. Dare*, 6 Pa. Co. Ct. R. 528.

In the *Lehman Case* the Supreme Court of Illinois, after citing cases in support of the rule, says: "If any other rule should exist than that a contract is purely unilateral, then, in effect, a partnership would be formed, by which every person insured would become

liable to all others insured, and benefits derived from life insurance would be rendered so doubtful and uncertain, and so prejudicial to those seeking insurance, that their individual interests would require them to abstain from taking out a policy or certificate of membership. If by taking out a certificate of membership or a policy they create a continuous liability against themselves, which might be enforced by the company, association, or by the court through its receiver, then few men would avail themselves of the benefits of a policy or certificate of membership which would create a liability they could not throw off at pleasure, but would make them indefinitely liable for assessments or premiums. The whole scheme of insurance is based on a contract purely unilateral, and, whether the payment for insurance be deemed a premium or an assessment, the right of the association or company is to declare a forfeiture for nonpayment of premium or assessment, and not a right to recover assessment or premium in a suit." But a contrary rule will, of course, apply, if there is an express agreement on the part of a member to pay any assessments levied while he is a member. In such case, a member is generally held to be under obligation to pay assessments made during the time he is a member, so that, on his failure to pay, an action will lie against him for the amount. Thus it was held, in *McDonald v. Ross-Lewin*, 29 Hun (N. Y.) 87, that if a member agrees in his application that in case a certificate is granted he will "accept and pay for the same, subject to all the conditions of the by-laws and regulations" of the association, he is liable to pay assessments while he is a member, and on his failure to do so payment may be enforced by suit, as the issuance and acceptance of the certificate constitute a sufficient consideration to support the member's agreement to pay assessments while he continues a member of the association.

Reference may also be made to *Calkins v. Angell*, 128 Mich. 77, 81 N. W. 977, and *New Era Life Ass'n v. Rossiter*, 132 Pa. 314, 19 Atl. 140, in which the applications contained agreements to pay assessments.

In some instances the doctrine supported by these cases has been followed, even though there was no express agreement in the application to pay assessments, but only a requirement in the charter or by-laws that payment be made on pain of forfeiture.

Clark v. Lehman, 65 Ill. App. 238; *Ellerbe v. Barney*, 119 Mo. 632, 25 S. W. 384, 23 L. R. A. 435; *In re Globe Mutual Benefit Ass'n*, 63 Hun, 263, 17 N. Y. Supp. 852.

It is, however, to be noted that the decision in the Lehman Case was subsequently overruled in *Lehman v. Clark*, 174 Ill. 279, 51 N. E. 222, 43 L. R. A. 648, reversing 71 Ill. App. 366, and that in the Ellerbe Case three of the justices dissented on the ground that the payment of assessments was merely a condition to the continuance of the insurance; there being no express agreement, as in the McDonald and New Era Life Association Cases. And a similar view was taken by Van Brunt, P. J., in a dissenting opinion filed in the Globe Mutual Benefit Ass'n Case.

(b) Liability to assessment.

The liability of members of mutual benefit associations to assessments depends largely on the construction of the particular contract. If the by-laws of a mutual benefit association provide that no member shall be assessed for a death occurring prior to the date of his certificate, a member is not liable for an assessment levied for a death which occurred prior to such date (*Rowswell v. Equitable Aid Union* [C. C.] 13 Fed. 840), and a certificate is not "issued," within the meaning of a constitutional provision to the effect that a member shall be liable for assessments, dues, etc., for the month in which his benefit certificate is "issued" or dated by the supreme secretary, until it has been delivered to and accepted by the member (*Logsdon v. Supreme Lodge of F. U. of A.*, 34 Wash. 666, 76 Pac. 292). However, a rule charging with assessments all members who take the final degree "on and prior to" a certain date makes them liable to contribute to all deaths occurring during that calendar day (*Eaton v. Supreme Lodge Knights of Honor*, 8 Fed. Cas. 275). Where the charter and by-laws of a mutual life insurance company provide that, whenever the secretary shall deem it necessary to replenish the policy fund, he shall make an assessment by the entry of an order in a book to be kept for that purpose, a member's liability to pay is fixed not by the death of a member, but by the making of an assessment and giving notice thereof, to replenish the policy fund, for the payment of the deceased member's certificate (*Fulton v. Stevens*, 99 Wis. 307, 74 N. W. 803). So, where the by-laws of an association provided that, on proof of the death of the member, an assessment should, on decision of the directors, be levied on each member of deceased's class, the assessment should be made on those who were members of the company at the time the resolution was passed by the directors (*Miller v. Georgia Masonic Mut. Life Ins. Co.*, 57 Ga. 221).

If a member has expressly agreed in his application for membership to pay all dues and assessments for which he may become liable, he is legally liable to pay assessments for death claims accruing while he is a member.

Calkins v. Angell, 128 Mich. 77, 81 N. W. 977; *McDonald v. Ross-Lewin*, 29 Hun (N. Y.) 87; *New Era Life Ass'n v. Rossiter*, 182 Pa. 814, 19 Atl. 140; *Fulton v. Stevens*, 99 Wis. 307, 74 N. W. 803. In the *McDonald* Case it was said that a member should be charged with interests on assessments from the time they became due, if he failed to pay.

If there is no express promise of a member to pay assessments, but only the obligation imposed by the laws of the associations to pay on pain of forfeiture, there is no legal liability on the part of a member, and he may pay or not, as he chooses, forfeiting his membership if he defaults.

Association v. Hunt, 127 Ill. 257, 20 N. E. 55, 2 L. R. A. 649; *Lehman v. Clark*, 174 Ill. 279, 51 N. E. 222, 43 L. R. A. 648, reversing 71 Ill. App. 386, and overruling *Clark v. Lehman*, 65 Ill. App. 238; *Covenant Mut. Life Ass'n v. Kentner*, 188 Ill. 431, 58 N. E. 966; *Clark v. Schromeyer*, 23 Ind. App. 585, 55 N. E. 785; *Gibson v. Megrew*, 154 Ind. 273, 56 N. E. 674, 48 L. R. A. 362; *New Era Life Ass'n v. Dare*, 6 Pa. Co. Ct. R. 526; *Johnston v. Anderson*, 23 Pa. Super. Ct. 152. Contra: *Ellerbe v. Barney*, 119 Mo. 632, 25 S. W. 384, 23 L. R. A. 435 (Black, C. J., and Brace and Burgess, JJ., dissenting); *Provident Mut. Relief Ass'n v. Pelissier*, 69 N. H. 606, 45 Atl. 562; *In re Globe Mutual Benefit Ass'n*, 63 Hun, 263, 17 N. Y. Supp. 852 (Van Brunt, P. J., dissenting).

However, a member is not liable for assessments levied after his membership has ceased (*Hendel v. Reverting Fund Assur. Ass'n*, 2 Pa. Dist. R. 116), even though his membership was terminated by his default in paying assessments (*Fulton v. Stevens*, 99 Wis. 307, 74 N. W. 803), unless such assessments were levied to pay the losses accruing before the termination of his membership, and he has agreed to pay assessments on the death of members.

Provident Mutual Relief Ass'n v. Pelissier, 69 N. H. 606, 45 Atl. 562; *McDonald v. Ross-Lewin*, 29 Hun, 87.

But if a member merely has agreed to pay assessments levied to replenish the policy fund, he is not liable for assessments levied after the termination of his membership to pay death losses accruing prior thereto (*Fulton v. Stevens*, 99 Wis. 307, 74 N. W. 803). In a *New*

York case (*Baker v. New York State Mut. Ben. Ass'n*, 9 N. Y. St. Rep. 653) the position was taken that, inasmuch as a forfeiture might be waived, it was optional with the association to terminate or treat as terminated the relation as member of one who was in default, or to continue him as a member and charge him with liability to pay dues and assessments until he exercised his right to withdraw by giving notice of his purpose to do so. If a member is merely suspended for failure to pay an assessment, he is liable for dues and assessments levied after his suspension, but before termination of his membership (*Provident Mut. Relief Ass'n v. Pelissier*, 69 N. H. 606, 45 Atl. 562). But under a law of an association requiring a suspended member to pay all assessments levied during his suspension, should the action of a subordinate lodge suspending him be reversed, a member who has been suspended is not required to pay such assessments until the order of reversal is actually made (*Vivar v. Supreme Lodge K. P.*, 52 N. J. Law, 455, 20 Atl. 36).

If a member voluntarily withdraws from an association, and pays all dues and assessments levied up to the date of his withdrawal, he is not subject to further assessments, though they are levied to pay liabilities which accrued while he was a member (*Gray v. Daly*, 57 N. Y. Supp. 527, 40 App. Div. 41). A member is liable, on the insolvency of the company, for assessments levied by the receiver to pay death claims at the date the decree of insolvency was entered (*Vanatta v. New Jersey Mutual Life Insurance Company*, 31 N. J. Eq. 15), and in winding up the affairs of the association by the appointment of a receiver members are liable to the receiver for assessments levied by him to pay death claims which had accrued at the time the petition for dissolution was filed (*Calkins v. Angell*, 123 Mich. 77, 81 N. W. 977). But the liability of certificate holders in an endowment company, which did a life insurance business by way of assessments levied as deaths occurred, to pay assessments, terminates on its insolvency and the commencement of proceedings to wind up its affairs (*Gilbert v. Washington Beneficial Endowment Ass'n*, 21 App. D. C. 344; *Stewart v. Same, Id.*). If the by-laws of a mutual benefit society require each member to pay a specified fee, after having been a member for a year, for the beneficiaries of the next member who shall die, and make a similar payment at each death, such fee is due from a member one year after he joins, though no member may have died during such year (*Menard v. Society of St. Jean Baptiste*, 63 Conn. 172, 27 Atl. 1115). But, if the law providing for the incorporation of fraternal beneficiary as-

sociations in terms prohibits the employment of paid agents,¹ members of an association which employs agents to solicit business may refuse to pay assessments without forfeiting payments already made (*Fogg v. Supreme Lodge United Order of Golden Lion*, 156 Mass. 431, 31 N. E. 289).

It is obvious that a member is not liable for assessments if he was induced to take insurance through the fraud of the association. In *Fawcett v. Supreme Sitting of Order of Iron Hall*, 64 Conn. 170, 29 Atl. 614, 24 L. R. A. 815, it was held that a corporation which issues certificates providing that the holder shall be entitled to receive from its benefit fund a sum not exceeding \$1,000, in accordance with its laws, which provide that members may participate in its benefit fund to an amount not to exceed \$1,000, to be paid at the end of seven years, on payment of \$2.50 on each assessment, but does not make provision as to the number of assessments that shall be made, cannot be said, as a matter of law, to be guilty of fraud in offering more than its assessments justify, though it uses a seal, with the figures "\$1,000" and the words "in seven years." Where a party has paid a legal assessment with full knowledge of all the facts, he cannot afterwards recover the amount thus paid (*Howard v. Mutual Reserve Fund Life Ass'n*, 125 N. C. 49, 34 S. E. 199, 45 L. R. A. 853); and a suit in equity will not lie against a foreign mutual insurance company doing business in the state to enjoin the collection of excessive and illegal assessments from a resident member, as the object of laws requiring the appointment of resident agents to accept service of process is to provide for the enforcement of individual rights of citizens against such foreign insurance companies, and does not contemplate suits which would involve the regulation of the internal affairs of the company.

Clark v. Mutual Reserve Fund Life Ass'n, 14 App. D. C. 154, 27 Wash. Law Rep. 114, 43 L. R. A. 390; *Condon v. Mutual Reserve Fund Life Ass'n*, 89 Md. 99, 42 Atl. 944, 44 L. R. A. 149, 73 Am. St. Rep. 169, followed in *Howard v. Mutual Reserve Fund Life Ass'n*, 125 N. C. 49, 34 S. E. 199, 45 L. R. A. 853.

If persons named as beneficiaries in a certificate, who cannot take as beneficiaries, pay assessments on the certificate in order to keep it alive, they are entitled to an equitable lien on the fund derived from the payment of such assessments (*Tepper v. Supreme Council of Royal Arcanum*, 59 N. J. Eq. 321, 45 Atl. 111). So an original

¹ See Acts Mass. 1888, c. 429.

beneficiary is entitled to repayment, out of the fund realized on a certificate at the death of insured, of assessments paid in ignorance that a new beneficiary had been designated (*Southern Tier Masonic Relief Ass'n v. Laudenbach* [Sup.] 5 N. Y. Supp. 901); but a beneficiary who voluntarily pays the assessments on a certificate, with knowledge that the certificate, though in her possession, authorizes the member to change the beneficiary at will, is not entitled to recover the assessments paid, on the happening of such event (*Spengler v. Spengler*, 55 Atl. 285, 65 N. J. Eq. 176). In *Presbyterian Mut. Assur. Fund v. Lotz*, 10 Ky. Law Rep. 155, the charter provided that on the death of a named beneficiary certain persons should take the fund. A member, after the death of the designated beneficiary, told the managing officer of the association that he would not continue his membership unless he could designate certain persons as beneficiaries, and the officers told him it could be so arranged. It was held that he could not recover for dues and assessments paid in consequence of such statement, as the society was liable to him for sick benefits, and to the person entitled under the charter for the amount of insurance.

Where a charter of a mutual insurance company provided for assessments against members in proportion to their insurance to pay losses, not to exceed the amount of their premium notes, which could be given for three-fourths of the premium, a premium note, though absolute on its face, was only security for such losses, and a member was only liable thereon for assessments regularly made. *Mutual Ben. Life Ins. Co. v. Jarvis*, 22 Conn. 133.

(c) Power to change rate of assessment.

Though an assessment in a fraternal association cannot be increased, contrary to the terms of the original contract (*Covenant Mut. Life Ass'n v. Tuttle*, 87 Ill. App. 309), yet, if a member accepts a certificate which provides that he shall comply with future, as well as existing, by-laws, he is bound by a reasonable by-law,² subsequently passed, without fraud or improper motives, and in accordance with the constitution, which increases his assessments, as under his contract he has no vested rights to insurance at the original rate.

This doctrine is supported by *Fullenwider v. Supreme Council of Royal League*, 54 N. E. 485, 180 Ill. 621, 72 Am. St. Rep. 289, affirming 73 Ill. App. 321; *Miller v. National Council K. & L. of H. (Kan.)*

² Effect of subsequent by-laws in general, see ante, vol. 1, p. 703.

76 Pac. 830; *Duer v. Supreme Council Order of Chosen Friends*, 21 Tex. Civ. App. 493, 52 S. W. 109. In *Brower v. Supreme Lodge Nat. Reserve Ass'n*, 74 Mo. App. 490, the by-law limited the assessments to the membership in the division where the member resided and changed the boundaries of such division.

In other cases it has been held that, in the absence of an agreement to be bound by future by-laws, an association is not authorized to adopt a by-law by which the assessments are increased (*Miller v. Tuttle* [Kan.] 73 Pac. 88), even though the association has the power to alter or change its by-laws (*Covenant Mut. Life Ass'n of Illinois v. Kentner*, 58 N. E. 966, 188 Ill. 431, affirming 89 Ill. App. 495). So, where the certificate of membership provides for the rate of assessments, and stipulates that the application for membership and the certificate shall constitute a complete contract between the member and the association, the latter cannot by its by-laws change the contract (*Covenant Mut. Ben. Ass'n v. Baldwin*, 49 Ill. App. 203); and if a society makes an unauthorized change in its by-laws, relating to method and rate of assessments, mandamus will lie to compel such society to accept from a member the proper amount owing by him (*Miller v. Tuttle* [Kan.] 73 Pac. 88). But, if a certificate makes no mention of the rate of assessment, a subsequent by-law changing the mode of assessment from a level plan to one based on the classification of the members according to age, is operative, since it changes merely the forms and methods of business, without affecting the general plan and purpose of the organization (*Messer v. Ancient Order of United Workmen*, 180 Mass. 321, 62 N. E. 252). In *Steuve v. Grand Lodge A. O. U. W.*, 5 Ohio Cir. Ct. R. 471, 3 O. C. D. 231, it appeared that by the law of the order a certificate could only be legally issued on an application stipulating that the applicant would comply with the rules of the order, existing or subsequently enacted. By mistake the application blank required compliance only with the rules of the grand lodge of that particular jurisdiction. Subsequently the jurisdiction was divided by the supreme governing body of the order, and a heavier assessment on the member resulted; the mortality being greater in the jurisdiction in which the grand lodge was situated. The court held that the member was bound by such change, especially as he had failed to make timely objection. However, a contract between a society and a member cannot be enlarged by the society, so as to require him to pay dues for "disability" purposes, in addition to those for "mortality" purposes, required by his original contract,

by the action of the company in levying and collecting such dues for some time without objection on the part of the member (*Margesson v. Massachusetts Ben. Ass'n*, 165 Mass. 262, 42 N. E. 1132). In Illinois the question whether an assessment is or is not reasonable is not one for the courts. Any complaint in that regard must be made to the state auditor (*Fullenwider v. Supreme Council of Royal League*, 73 Ill. App. 321).

A contract of insurance in a mutual assessment association is of such nature that it contemplates an unsteady and varying fund from which to pay death claims, and implies that the amount of assessments will vary according to the number of deaths, the growth of the association and membership, and the earning capacity of its reserve fund. Hence it may be said, in general, that such an association has authority to change the rate of assessment of policy holders from time to time, to meet the death losses and expenses, providing the apportionment is equitable (*Ebert v. Mutual Reserve Fund Life Ass'n*, 81 Minn. 116, 83 N. W. 506, affirmed without opinion on rehearing 81 Minn. 116, 84 N. W. 457). But a contrary rule is asserted in *Strauss v. Mutual Reserve Fund Life Ass'n*, 126 N. C. 971, 36 S. E. 352, 54 L. R. A. 605, 83 Am. St. Rep. 699 (rehearing denied 128 N. C. 465, 39 S. E. 55, 54 L. R. A. 605, 83 Am. St. Rep. 699), on the ground that the insured has a vested right to have the assessments remain at the original rate; and a similar rule appears to find support in *Hogan v. Pacific Endowment League*, 99 Cal. 248, 33 Pac. 924.

In the *Strauss Case* it was held that a mere general consent of a member to the amending of the constitution and by-laws does not authorize such a change in the association's rules as will destroy vested rights, by subjecting a member to pay a greater rate of assessment than the contract calls for. And in the *Hogan Case* it was said: "The mere fact * * * that the articles of association, constituting the contract, do not operate equally upon the individual members, confers no authority upon the directors to change or amend such articles for the purpose of 'equalization of payments' or other burdens imposed by the original compact, otherwise than authorized by the original articles. As such change or amendment would impair the obligation of the original contract, it could have been made only by consent of all members to be affected thereby, and such consent is not implied in article 1 (of the constitution), which confers upon the board of directors power 'to enact laws for the government of the league,' because it must have been understood that this power was limited by the laws of the land, with reference to which the article conferring it must be construed."

In determining the power of a mutual assessment association to raise its assessments, the certificate of membership, prescribing the amount in which the member may be assessed on notice, must be read in connection with the constitutional provision authorizing its board of directors to fix and determine rates of assessment.

Seymour v. Mutual Reserve Fund Life Ass'n, 14 Misc. Rep. 151, 35 N. Y. Supp. 793. See, also, *Sowles v. Mutual Reserve Fund Life Ass'n*, 45 Atl. 1045, 71 Vt. 466.

If the charter of an association gives it the power to change the rate or basis of assessments upon its policy holders from time to time, and its contracts do not prohibit such change, the association may make a necessary and equitable change in its assessments, though the change increases them to such an extent as to render them prohibitive to persistent members (*Gaut v. Mutual Reserve Fund Life Ass'n* [C. C.] 121 Fed. 403). So a clause in the policy providing that the rate of assessment may be changed every five years, to correspond with the actual mortality experience of the association, allows it to change the rate as to different ages to meet the result of its experience (*Mutual Reserve Fund Life Ass'n v. Taylor*, 99 Va. 208, 37 S. E. 854), and does not prevent the company from increasing the rate at other times than the expiration of the five-year period, where such increase is authorized by other provisions and by the constitution (*Haydel v. Mutual Reserve Fund Life Ass'n* [C. C.] 98 Fed. 200). A provision in a policy that the reserve fund, above a specified amount and in excess of outstanding bond obligations, shall be applied to the payment of claims in excess of the American Experience Table, cannot avail a policy holder as a defense against increased assessments, on a mere allegation that the reserve fund has, for a number of years, been greatly in excess of the specified amount, and that the company has failed to apply it in accordance with the contract, where it is not alleged that the death claims against the company have been in excess of the American Experience Table, and where the board of directors has authority to divert such reserve fund to other uses (*Haydel v. Mutual Reserve Fund Life Ass'n* [C. C.] 98 Fed. 200). So the fact that an assessment company prints on the back of its policies a table, which purports to show the amounts to which one becoming a policy holder at a given age will be subjected, does not prevent the company from increasing such rates, where the policy is expressly subject to the constitution and by-laws of the company, which give its

executive committee power to make modifications in the assessments to be levied from time to time (*Haydel v. Mutual Reserve Fund Life Ass'n* [C. C.] 98 Fed. 200). Such table will be construed only to fix the ratio of payment of every member on the basis of age.

Haydel v. Mutual Reserve Fund Life Ass'n (C. C.) 98 Fed. 200; *Haydel v. Mutual Reserve Fund Life Ass'n*, 104 Fed. 718, 44 C. C. A. 169; *Barbot v. Mutual Reserve Fund Life Ass'n*, 100 Ga. 681, 28 S. E. 498. See, also, *Crosby v. Mutual Reserve Fund Life Ass'n*, 78 N. Y. Supp. 237, 88 Misc. Rep. 708.

But, in the absence of authority contained in the contract of insurance, the directors of a co-operative company cannot place all members who join prior to a certain year into a class by themselves, and advance their ages each year as assessments are made, while all members joining after that date are assessed as of the age of entry, as this is not an equitable distribution of the increase in cost of carrying the older members, but constitutes an unwarranted discrimination against the old members.

Ebert v. Mutual Reserve Fund Life Ass'n, 81 Minn. 116, 83 N. W. 506, affirmed without opinion on rehearing, 81 Minn. 116, 84 N. W. 457; *Strauss v. Mutual Reserve Life Ass'n*, 36 S. E. 352, 128 N. C. 971, 54 L. R. A. 605, 83 Am. St. Rep. 699, rehearing denied 39 S. E. 55, 128 N. C. 465, 54 L. R. A. 605, 83 Am. St. Rep. 699.

So, if an increase in the rate of the assessment against a member is not made to correspond with the actual mortality experience of the association, as his policy expressly requires, the assessment is unauthorized (*Mutual Reserve Fund Life Ass'n v. Taylor*, 99 Va. 208, 37 S. E. 854). But a member who assents to an increase in his assessments by voting therefor at a stockholders' meeting cannot complain that it is unreasonable; and fraudulent conduct on the part of an association or an agent of a member voting for an increase cannot be inferred from the fact that the increase in the member's assessment was made by adding to his age of entry one-half the number of years intervening between that time and the time of the assessment, where the increase was necessary, and due notice thereof was given the member (*Mutual Reserve Fund Life Ass'n v. Taylor*, 99 Va. 208, 37 S. E. 854). A promise by a general agent of an insurance company that the premiums on a policy should not be raised was not so unreasonable that insured should not have relied thereon, where the policy itself, which was not on the level premium plan, contained a note that, unless there was an un-

foreseen mortality, the company expected to maintain the level rate (*Gwaltney v. Provident Sav. Life Assur. Soc.*, 132 N. C. 925, 44 S. E. 659).

(d) Power and duty to make assessments.

Where a certificate of membership in an assessment insurance association, which contains a promise to pay a sum received from a death assessment, not exceeding a stipulated amount, requires the member to pay assessments on the death of members and makes provision for the levying of assessments, this constitutes an implied promise to levy assessments on the death of the member for the payment of the stipulated death benefit (*Lawler v. Murphy*, 58 Conn. 294, 20 Atl. 457, 8 L. R. A. 113); and it is the duty of the board of directors of the association to make a mortuary assessment on the happening of such a contingency.

Dillingham v. New York Cotton Exchange (C. C.) 49 Fed. 719; *Dial v. Valley Mut. Life Ass'n*, 29 S. C. 560, 8 S. E. 27.

The fact that the constitution of an association provides that mortuary assessments shall be made only by authority of the board, and the by-laws make it the duty of the secretary, in case of a member's death, to submit proofs of death to the board, and declare that with the indorsement and approval of the president an assessment shall be made, does not make it discretionary with the board to levy an assessment in case proper proofs of death are presented (*Railway Passenger & Freight Conductors' Mut. Aid & Ben. Ass'n v. Robinson*, 147 Ill. 138, 35 N. E. 168). So a provision in a benefit certificate, evidently contemplating a mortuary assessment to meet each death loss, will prevail over a clause of the by-laws limiting the number and amount of assessments to be levied inconsistent therewith, though the application stipulates that the by-laws shall be a part of the contract; it not appearing that the applicant's attention had been called to the clause (*Fitzgerald v. Equitable Reserve Fund Life Ass'n* [City Ct. N. Y.] 3 N. Y. Supp. 214, affirmed in 5 N. Y. Supp. 837, 15 Daly, 229). But the levy of an assessment is not a condition precedent to an association's liability on a death claim, where the by-laws provide several sources from which death benefits may be paid, and nowhere indicate that an assessment must necessarily be made for each death (*Wood v. Farmers' Life Ass'n*, 121 Iowa, 44, 95 N. W. 226). Where the obligation of the trustees to levy an assessment on the death of a member is absolute, the investigation of the trustees is not conclusive as to whether a de-

cedent was a member or not (*Dillingham v. New York Cotton Exch.* [C. C.] 49 Fed. 719).

A society has no right to make an assessment on surviving members to pay benefits due representatives of a deceased member until it has received proper proofs of death (*Coyle v. Kentucky Grangers' Mut. Ben. Life Soc.*, 2 S. W. 676, 8 Ky. Law Rep. 604), and cannot levy assessments for anticipated losses, unless provision therefor is made in the articles of the association (*Crossman v. Massachusetts Ben. Ass'n*, 143 Mass. 435, 9 N. E. 753). This principle is also approved in *Hogan v. Pacific Endowment League*, 99 Cal. 248, 33 Pac. 924, which was a case involving the right of an endowment society to levy assessments for a reserve fund. But in *Fullenwider v. Supreme Council of Royal League*, 73 Ill. App. 321, the court takes the position that, as the Illinois law governing fraternal insurance associations requires such associations, among other things, to report their reserve funds, if they have any, an association incorporated under the law has a right to levy assessments for a reserve fund. Where the law of an association provides that if the amount received from the last assessment, paid prior to the death of the member, shall be less than the sum called for by his certificate, the beneficiary shall be entitled to the amount of such assessment, another law, providing that where the amount of one assessment is insufficient to pay all the claims a double assessment may be made, does not authorize a double assessment for one death (*Newton v. Northern Mut. Relief Ass'n*, 21 R. I. 476, 44 Atl. 690).

A law giving beneficiary associations the right to hold an amount not exceeding one assessment as a fund belonging to the beneficiaries of anticipated deceased members^{*} does not require that losses as they occur shall be paid from this fund, but the officers, at their discretion, may levy an assessment to pay such losses (*Crossman v. Massachusetts Ben. Ass'n*, 143 Mass. 435, 9 N. E. 753). And a provision of the constitution of an assessment association that its reserve fund above a certain sum "may be applied to the payment of claims in excess of the American Experience Table of Mortality," or to make up any deficiency in the death fund after the collection of an assessment, is permissive, rather than mandatory, so that, where other provisions vest the board of directors with power to devote the reserve fund to other purposes, an assessment is not invalid because the reserve fund is largely in excess of the sum

^{*} See St. Mass. 1880, c. 196, § 2.

named (*Haydel v. Mutual Reserve Fund Life Ass'n*, 44 C. C. A. 169, 104 Fed. 718). So the fact that a benefit has already been paid out of funds on hand does not affect the validity of an assessment, where the fund was created under authority of the charter, and the assessment was levied to reimburse such fund (*McGowan v. Supreme Council of Catholic Mut. Ben. Ass'n*, 78 Hun, 534, 28 N. Y. Supp. 177), or the practice of paying claims in this way was in accordance with the practice adopted by the company and sanctioned by its by-laws (*Smith v. Covenant Mut. Ben. Ass'n*, 16 Tex. Civ. App. 593, 43 S. W. 819). And moneys in the hands of the treasurer of a society, if already drawn upon, are not "in" the benefit fund, so as to prohibit the calling of a new assessment (*Eaton v. Supreme Lodge Knights of Honor*, 8 Fed. Cas. 275). Where an association received the membership of another association, under an agreement that the mortuary fund contributed by the members who should thereafter join the consolidated association should inure to the benefit of all the members, the beneficiaries of a member of the latter association were not entitled to compel an assessment upon the members of the consolidated association to pay the death benefit of the insured, since such agreement inferentially excluded those who became members of the association before the consolidation. But, as assessments were collected from members taken in by the consolidation, the association was estopped to refuse to levy an assessment on its members joining after the consolidation to pay beneficiaries of a member of the former association, on the ground that the contract was ultra vires. (*Cathcart v. Equitable Mut. Life Ass'n*, 111 Iowa, 471, 82 N. W. 964.)

An action at law will lie against a mutual benefit association for refusal or neglect to make a mortuary assessment, since it is a duty imposed by the contract for a breach of which the plaintiff is entitled to damages (*Covenant Mut. Life Ass'n v. Kentner*, 89 Ill. App. 495, judgment affirmed 58 N. E. 966, 188 Ill. 431); and the measure of damages is the full amount of the certificate, unless it appears in defense that an assessment would not have produced such sum (*Lawler v. Murphy*, 58 Conn. 294, 20 Atl. 457, 8 L. R. A. 113).

These principles are also illustrated in *Newman v. Covenant Mut. Ben. Ass'n*, 72 Iowa, 242, 33 N. W. 662; *Earnshaw v. Sun Mut. Aid Soc.*, 68 Md. 465, 12 Atl. 884, 6 Am. St. Rep. 460; *Burland v. Northwestern Mut. Ben. Ass'n*, 47 Mich. 424, 11 N. W. 269; *Bates v. Detroit Mut. Ben. Ass'n*, 47 Mich. 648; *Silvers v. Michigan Mut. Ben. Ass'n*, 94 Mich. 39, 53 N. W. 935; *Bentz v. Northwestern Aid Ass'n*, 40 Minn. 202, 41 N. W. 1037, 2 L. R. A. 784; *Herndon v. Triple Al-*

Hance, 45 Mo. App. 428; O'Brien v. Home Ben. Soc., 117 N. Y. 310, 22 N. E. 954, affirming 51 Hun, 495, 4 N. Y. Supp. 275; Jackson v. Northwestern Mut. Relief Ass'n, 73 Wis. 507, 41 N. W. 708, 2 L. R. A. 786.

In some jurisdictions it is held that a suit in equity may be maintained to compel the levy of an assessment.

Covenant Mut. Ben. Ass'n v. Sears, 114 Ill. 198, 29 N. E. 490; Covenant Mut. Life Ass'n v. Kentner, 89 Ill. App. 495.

But mandamus will not lie to compel the levying of an assessment to pay the amount falling due on the death of a member, as the proper course is to bring suit upon the undertaking of the company.

Bates v. Detroit Mut. Ben. Ass'n, 47 Mich. 646; Burland v. Northwestern Mut. Ben. Ass'n, 47 Mich. 424, 11 N. W. 269. But see People v. Masonic Guild & Mut. Ben. Ass'n, 126 N. Y. 615, 27 N. E. 1037.

However, even if mandamus will lie to compel the levying of an assessment, yet where the by-laws provide that an association's members shall be subject to but one assessment for each death loss, and one assessment is made, from which only part of the amount due on a certificate is paid, mandamus will not lie to compel the levy of another assessment in order to pay the balance; and it is immaterial whether the first assessment is sufficient to pay the claimant in full or not (People v. Masonic Guild & Mut. Ben. Ass'n, 126 N. Y. 615, 27 N. E. 1037, reversing 58 Hun, 395, 12 N. Y. Supp. 171). On the insolvency of an association, an order levying an assessment to pay accrued benefits will not be made, if there is no agreement on the part of the members to pay assessments (Gibson v. Megrew, 154 Ind. 273, 56 N. E. 674, 48 L. R. A. 362), or if it is found that an attempt to raise money to pay the claim by such an assessment would be futile (Burdon v. Massachusetts Safety Fund Ass'n, 147 Mass. 360, 17 N. E. 874, 1 L. R. A. 146).

(c) Same—Delegation of power.

If the by-laws of a mutual benefit insurance society provide that assessments for death losses shall be levied by the board of directors, the board cannot delegate such power to the president (Garretson v. Equitable Mut. Life & Endowment Ass'n, 93 Iowa, 402, 61 N. W. 952). But where the articles of a company provided that the directors should control its affairs, and empowered them to enact by-laws and rules and to appoint from their number an ex-

ecutive committee, who should supervise the business of the company and audit accounts and provide for assessments, but was silent as to who should make them, the directors had authority, through a by-law, to empower the executive committee to make assessments (*Fee v. National Masonic Acc. Ass'n*, 110 Iowa, 271, 81 N. W. 483). So, where the constitution of a beneficial association provided that on certain fixed dates, or at such other dates as the board of directors might determine, an assessment should be made on the entire membership for such sums as the executive committee might deem sufficient, an assessment authorized by a resolution of the board of directors as to the date of making it, and by a resolution of the executive committee as to the amount and necessity, was not void because the directors had delegated their power to make the assessment to the executive committee (*Miles v. Mutual Reserve Fund Life Ass'n*, 84 N. W. 159, 108 Wis. 421). Where the by-laws of an association required all assessments to be made by the directors, and provided that the chairman should approve all proofs of death, and, on receipt of a claim for benefits on the death of a member, for which notice, but no proofs, had been received, the board directed the chairman to examine the proofs when received, and instructed the secretary, if the proofs were found correct, to issue notices of assessment, and the proofs were examined and the assessment made according to directions, the assessment was valid and binding (*Passenger Conductors' Life Ins. Co. v. Birnbaum*, 116 Pa. 565, 11 Atl. 378).

(2) Notice of assessment.

In the case of ordinary life policies the insurance company is perhaps under no obligation to give the insured notice of the amount and maturity of the premiums accruing on the policy, because the policy fixes definitely the amount of premiums and the time of their payment, and the assured is bound to know these facts. But in the case of beneficiary associations, where the time and frequency of payments depend on the mortality of members, the amounts which the members are liable to pay cannot be known in advance of the assessments made by the proper authority. Therefore, unless otherwise provided by the laws of the society, no liability to pay assessments is imposed on a member until notice of such assessment is given in accordance with the constitution and by-laws of the society.

Reference may be made to *Hall v. Supreme Lodge Knights of Honor* (D. C.) 24 Fed. 450; *Cronin v. Supreme Council Royal League*, 199

Ill. 228, 65 N. E. 323, 93 Am. St. Rep. 127; *Gunther v. New Orleans Cotton Exchange Mut. Aid Ass'n*, 40 La. Ann. 776, 5 South. 65, 2 L. R. A. 118, 8 Am. St. Rep. 554; *Courtney v. U. S. Masonic Ben. Ass'n (Iowa)* 58 N. W. 238; *Gellatly v. Minnesota Odd Fellows Mutual Benefit Society*, 27 Minn. 215, 6 N. W. 627; *Backdahl v. Grand Lodge A. O. U. W.*, 46 Minn. 61, 48 N. W. 454. But notice of fixed dues aside from assessments is not necessary. *Riddick v. Farmers' Life Ass'n*, 132 N. C. 118, 43 S. E. 544.

An association cannot, by subsequent by-laws, abrogate a provision for notice of assessments before forfeiture, as such by-laws are unreasonable (*Thibert v. Supreme Lodge Knights of Honor*, 81 N. W. 220, 78 Minn. 448, 47 L. R. A. 136, 79 Am. St. Rep. 412). But the association may adopt a different plan of giving notices than that prescribed in the charter, and by its use estop itself from relying on the sufficiency of a notice given in accordance with the charter (*Gunther v. New Orleans Cotton Exchange Mut. Aid Ass'n*, 40 La. Ann. 776, 5 South. 65, 2 L. R. A. 118, 8 Am. St. Rep. 554).

If a member of a mutual benefit association is in possession of knowledge from which the amount of an assessment can be determined, the fact that the notice of assessment does not specify the amount is immaterial (*Hansen v. Supreme Lodge Knights of Honor*, 40 Ill. App. 216). A statutory provision, requiring that each notice of assessment made upon the members of a co-operative insurance company "shall truly state the cause and purpose of the assessment,"⁴ does not apply to notices where the assessment could be for one cause only (*Bridges v. National Union*, 73 Minn. 486, 76 N. W. 270). Nor does a similar statute⁵ apply to payments falling due under a certificate requiring periodical payment of a certain sum by a member, as such payment is not an assessment within the statute (*Smith v. Bown*, 75 Hun, 231, 27 N. Y. Supp. 11). If the laws of an association, which require the official seal to be attached to all documents and papers, do not expressly require the signature of the reporter of a local lodge to the notice of assessment, the presence of the seal upon the notice is sufficient, and the absence of the reporter's signature is not a substantial defect (*Hansen v. Supreme Lodge Knights of Honor*, 40 Ill. App. 216). But a notice without the required stamp or seal is void (*Cronin v. Supreme Council Royal League*, 65 N. E. 323, 199 Ill. 228, 93 Am. St. Rep. 127). So a notice requiring payment before an assessment is due and within a less time than the by-laws prescribe is invalid

⁴ Gen. St. Minn. 1894, § 3311.

⁵ Laws N. Y. 1883, c. 175.

(*Railway Passengers & Freight Conductors' Mut. Aid & Ben. Ass'n v. Thompson*, 91 Ill. App. 580). The insufficiency of a notice, as an excuse for a failure to pay the assessment, must be proved by the holder of the certificate or his beneficiary (*Eaton v. Supreme Lodge Knights of Honor*, 8 Fed. Cas. 275).

Where the by-laws so provide, a service of a notice of assessment by mail, in accordance with the terms of the by-law, is sufficient and effective (*Modern Woodmen of America v. Trevis*, 117 Fed. 369, 54 C. C. A. 293). But a by-law changing the method of giving notice from actual notice to notice by mail is not binding on a member, where his certificate does not provide that he shall be bound by future, as well as existing, by-laws, and he has not acquiesced in the change.

Courtney v. United States Masonic Ben. Ass'n (Iowa) 53 N. W. 238. See, also, *Thibert v. Supreme Lodge Knights of Honor*, 78 Minn. 448, 81 N. W. 220, 47 L. R. A. 138, 79 Am. St. Rep. 412.

The various questions relating to the sufficiency and effect of notice of assessment are so closely connected with the right to forfeit the certificate for nonpayment of assessments that the discussion of this phase of the subject will be taken up in connection with forfeiture for nonpayment.*

(g) Levy of assessment.

The method of levying assessments is generally prescribed by the charter, constitution, and by-laws of an association; and, in order that an assessment shall be valid and binding on a member, a call therefor must be made in strict accordance with such provisions.

Underwood v. Iowa Legion of Honor, 66 Iowa, 134, 23 N. W. 300; *American Mut. Aid Soc. v. Helburn*, 2 S. W. 495, 8 Ky. Law Rep. 627.

Thus a requirement that a subordinate lodge shall make an assessment on its members is not complied with by simply reading in the subordinate lodge a notice from the grand recorder, and entering it upon the lodge minute book, with the statement that the assessment was called, without any further action by way of making the assessment (*Grand Lodge A. O. U. W. v. Bagley*, 45 N. E. 538, 164 Ill. 340).[†] Likewise a subordinate lodge of a mutual benefit

* See post, vol. 3, p. 2353.

see 131 Ill. 498, 22 N. E. 487; 46 Ill.

[†] For a judicial history of this case, App. 411; 60 Ill. App. 589.

society, organized under the laws of one state, cannot subject itself or its members to the jurisdiction of a supreme lodge of a society organized in another state, so as to render enforceable in the first state an assessment on members levied by the supreme lodge (*Lamphere v. Grand Lodge A. O. U. W.*, 47 Mich. 429, 11 N. W. 268). However, in *Chapple v. Sovereign Camp Woodmen of the World*, 64 Neb. 55, 89 N. W. 423, it is said that substantial compliance with a by-law empowering two officers of a society to make an assessment on a certain day in each month, and requiring the clerk of the superior branch of the order to give notice to the clerk of inferior associations, is sufficient to uphold an assessment. So, where no form or method of making an assessment is prescribed, and no record of it is required to be kept, except in the books of an officer of the subordinate lodge, it is not necessary that such assessment be formally made by the lodge, or that it be entered on the lodge minutes (*Backdahl v. Grand Lodge A. O. U. W.*, 46 Minn. 61, 48 N. W. 454). And a mortuary call for payment of a bimonthly premium is not void for including in its list of death claims a number that might have been included in the preceding call (*Smith v. Covenant Mut. Ben. Ass'n*, 16 Tex. Civ. App. 593, 43 S. W. 819). So, though the laws of an association provided that an assessment should be made only on the first secular days of certain months, the fact that a resolution ordering an assessment was passed prior to the date so fixed, the intervening time being occupied in preparing the notices, which were mailed on the day before the first, did not render the assessment invalid (*Mee v. Bankers' Life Ass'n*, 69 Minn. 210, 72 N. W. 74). Even though the board of directors is empowered by resolution to pay claims from current receipts, which, under the constitution and by-laws are applicable to another fund, this leaves the exercise of such power in the discretion of the board, and an assessment made by the board is not invalid because larger than it would have been if current receipts were so applied (*Barbot v. Mutual Reserve Fund Life Ass'n*, 28 S. E. 498, 100 Ga. 681). A call on a member for payment of a greater premium rate than that required of others is not, on that account, void, where the amount required to be paid by each is in accordance with the by-laws in force at the time of issuing their respective policies (*Smith v. Covenant Mut. Ben. Ass'n*, 16 Tex. Civ. App. 593, 43 S. W. 819). So an assessment for the precise purpose specified in the by-laws will not be treated as invalid, because not abstractly equitable (*Chapple v.*

Sovereign Camp Woodmen of the World, 64 Neb. 55, 89 N. W. 423).

Where, by the articles of an association, members are assessed according to their ages on the death of a member, a vote of the directors instructing the secretary to levy an assessment for certain named deceased members constitutes an assessment by the board of directors (*Van Frank v. United States Masonic Ben. Ass'n*, 158 Ill. 560, 41 N. E. 1005). And if the constitution fixes the rate, requires monthly assessments, and directs that payment be made on a certain day in the month, this is sufficient to require members to pay monthly assessments (*Grand Lodge A. O. U. W. v. Marshall*, 31 Ind. App. 534, 68 N. E. 605, 99 Am. St. Rep. 273). So the irregularity of an assessment, levied at a meeting of the board when less than a quorum was present, was cured by the approval of the minutes of such meeting at a subsequent meeting when a quorum was present (*Wolf v. Michigan Masonic Mut. Ben. Ass'n*, 108 Mich. 665, 66 N. W. 576). A resolution by an insolvent company to wind up its affairs has the legal effect of an assessment of 100 per cent. on the premium notes, to enable the company to meet its liabilities and divide its excess, if any (*Conigland v. N. C. Mut. Ins. Co.*, 62 N. C. 341, 93 Am. Dec. 89). Under a constitution requiring the grand recorder to call on subordinate lodges for the beneficiary funds in their treasuries when needed, and directing that such calls shall constitute an assessment, and shall contain a list of all deaths occurring since the last call was made, the recorder, in making such call, is required only to give a list of such deaths occurring since the last call as have been officially reported to him by the subordinate lodges; and the notice of assessment and call on the beneficiary fund are sufficiently approved when signed and approved as one instrument (*Grand Lodge A. O. U. W. v. Marshall*, 31 Ind. App. 534, 68 N. E. 605, 99 Am. St. Rep. 273).

The record of an assessment reciting that the resolution ordering it "was unanimously adopted by the directors as a body, and by the executive committee," is prima facie evidence against the members of the association (*Anderson v. Mutual Reserve Fund Life Ass'n*, 49 N. E. 205, 171 Ill. 40, affirming judgment 71 Ill. App. 269). But the fact that an assessment on the members of a society was made by the proper officer of a society is not prima facie evidence of the validity of the assessment (*Order of Chosen Friends v. Austerlitz*, 75 Ill. App. 74). However, if the secretary is empowered by a society's by-laws to increase the number of assessments,

whenever the condition of the treasury demands more revenue, in anticipation of death claims, where deaths have actually occurred, a notice by the secretary requiring the payment of extra assessments is presumptive evidence that such assessments are necessary to meet death claims (*Bridges v. National Union*, 73 Minn. 486, 76 N. W. 270).

(h) Waiver of objections to assessment.

The mere fact that the holder of a certificate of a benefit association pays illegal assessments levied against his certificate in violation of his contract, rather than take the possible chances of having his certificate forfeited, does not estop him or his beneficiary of questioning the legality of subsequent similar assessments.

Benjamin v. Mutual Reserve Fund Life Ass'n (Cal.) 79 Pac. 517; *Duggans v. Covenant Mut. Life Ass'n*, 87 Ill. App. 415; *Covenant Mut. Life Ass'n v. Tuttle*, 87 Ill. App. 309; *Covenant Mut. Life Ass'n of Ill. v. Kentner*, 188 Ill. 431, 58 N. E. 966, affirming 89 Ill. App. 495; *Langdon v. Massachusetts Ben. Ass'n*, 166 Mass. 316, 44 N. E. 226, following *Margesson v. Same*, 165 Mass. 262, 42 N. E. 1132.

By the making of such payments the certificate holder cannot be said to have acted fraudulently, or willfully to have done anything calculated to mislead others to their injury (*Covenant Mut. Life Ass'n v. Tuttle*, 87 Ill. App. 309). But in *Covenant Mut. Life Ass'n v. Kentner*, 188 Ill. 431, 58 N. E. 966, it was held that, if a policy holder is guilty of fraud in paying an illegal assessment, or misleads others to their injury by such payment, he may be estopped to contest the validity of such assessments. And in *Steuve v. Grand Lodge A. O. U. W.*, 5 Ohio Cir. Ct. R. 471, 3 O. C. D. 231, the court takes the broad position that a member who pays assessments made by his grand lodge under orders of the supreme lodge levied on a different basis from that contemplated by the certificate thereby waives any right which he may have to object to the changed basis of assessments, and admits that such change was not inconsistent with, or unauthorized by, the certificate of membership. In *Pokrefky v. Detroit Firemen's Fund Ass'n*, 90 N. W. 689, 131 Mich. 38, the trustees of the association, after deceased became a member, adopted an amendment to the by-laws changing the schedule of benefits and increasing the membership dues. A member testified that deceased had told him that he was satisfied with the change, and it appeared that he paid without protest the dues levied under the amended by-laws. This was held sufficient to sus-

tain the finding that deceased had waived his right to object to the amendment, so as not to be bound thereby.

If an offer to pay an assessment is not accepted, such offer is withdrawn by the bringing of a suit on the certificate, and cannot be regarded as a waiver of any objection to the validity of the assessment (*Langdon v. Massachusetts Ben. Ass'n*, 166 Mass. 316, 44 N. E. 226); and even the payment of an assessment does not estop the insured to question the validity thereof, where the payment is accepted conditionally (*Shea v. Massachusetts Ben. Ass'n*, 160 Mass. 289, 35 N. E. 855, 39 Am. St. Rep. 475). So a member is not estopped to object to an assessment by the fact that the assessment was made by the company acting as trustee for the policy holders (*Rowell v. Covenant Mut. Life Ass'n*, 84 Ill. App. 304), nor by the fact that it was customary to make the assessment in a way not provided by the constitution or by-laws of the order, unless the certificate holder had knowledge thereof (*Underwood v. Iowa Leg. of Honor*, 66 Iowa, 134, 23 N. W. 300). Likewise an offer to pay a delinquent assessment of which no valid notice has been given is not such an application for reinstatement as will constitute a waiver of the invalidity of the notice (*Dowling v. Knights Templars' & Masons' Life Indemnity Co.*, 116 Mich. 471, 74 N. W. 725). And plaintiff, in an action on a benefit certificate, is not estopped from contesting the validity of an alleged excessive assessment by a statement in the agreed facts that "a call [for the assessment] was made in accordance with the provisions in said policy"; it being nowhere stated that the amount named in the call was justly due (*Langdon v. Massachusetts Ben. Ass'n*, 166 Mass. 316, 44 N. E. 226). The payment of assessments after forfeiture of membership, but in ignorance of that fact, does not estop a member from denying his liability to pay subsequent assessments (*Elerbe v. Faust*, 119 Mo. 653, 25 S. W. 390, 25 L. R. A. 149). But where a certificate holder, with knowledge that his first payment was applied on the advance premium or membership fee, and not as an advance payment of the first bimonthly call, retains his certificate without objection until after forfeiture for nonpayment of such call, he cannot be heard to complain that such application was wrongful (*Smith v. Covenant Mut. Ben. Ass'n*, 16 Tex. Civ. App. 593, 43 S. W. 819). And a limitation of six months in the by-laws of a mutual insurance company as to the time within which an assessment may be questioned was, in *Survick v. Valley Mut. Life Ass'n (Va.)* 23 S. E. 223, held valid.

(1) Actions to recover assessments.

Attention has been called to the principle that a certificate of membership in a mutual benefit association is generally regarded as a unilateral contract, which imposes no legal obligation on the certificate holder to pay assessments, unless he has expressly agreed to do so. It is optional with him to pay or not. The only penalty which follows a refusal or neglect to pay is a loss of the certificate holder's rights under his certificate, and an action cannot be maintained by the association to recover assessments past due.

This principle is supported by *In re Protection Life Ins. Co.*, 20 Fed. Cas. 6; *Vick v. Clark*, 77 Ill. App. 599; *People ex rel. Swigert v. Golden Rule*, 114 Ill. 35, 28 N. E. 383; *Chicago Mut. Life Indemnity Ass'n v. Hunt*, 127 Ill. 257, 20 N. E. 55, 2 L. R. A. 549; *Lehman v. Clark*, 174 Ill. 279, 51 N. E. 222, 43 L. R. A. 648, reversing 71 Ill. App. 366; *Covenant Mut. Life Ass'n v. Kentner*, 188 Ill. 431, 58 N. E. 966; *Clark v. Schromeyer*, 23 Ind. App. 565, 55 N. E. 785; *Gibson v. Megrew*, 154 Ind. 273, 56 N. E. 674, 48 L. R. A. 362. In *L'Union St. Jean Baptiste De Pawtucket v. Ostigny*, 25 R. I. 478, 56 Atl. 681, 64 L. R. A. 158, the court held that a beneficiary society cannot sue a member for assessments after having expelled him.

A contrary doctrine, however, finds support in some of the cases. Thus it was held in the early case of *McDonald v. Ross-Lewin*, 29 Hun (N. Y.) 87, which is perhaps the earliest case involving the right of an association to recover assessments, that a suit could be maintained against a member to recover past-due assessments; and a similar decision was rendered in *New Era Life Ass'n v. Rossiter*, 132 Pa. 314, 19 Atl. 140. But it is to be noted that in the *McDonald Case* the member had signed an application in which he in terms agreed to accept the certificate and pay therefor as provided by the by-laws and regulations of the association, and that in the *New Era Life Association Case* the member had signed an application which contained a statement to the effect that members and beneficiaries should be jointly and severally liable for all death claims during the life of membership. Consequently it may be said that in these cases there was an express agreement on the part of the certificate holder to pay assessments levied while he was a member. The *McDonald Case* was followed in *Smith v. Bown*, 75 Hun, 231, 27 N. Y. Supp. 11, and also in *Re Globe Mut. Ben. Ass'n*, 63 Hun, 263, 17 N. Y. Supp. 852, though the question was not directly involved in that case. The question there presented was whether a benefit association could insure an infant.

The majority of the court held that it could not, for the reason that there was necessity for a mutual contract between the association and a member, so that the latter would be bound to pay assessments. But Van Brunt, P. J., dissented from the ground of the decision stated, and expressed as his opinion that a member of a benefit association assumes no obligation to pay assessments. In *Ellerbe v. Barney*, 119 Mo. 632, 25 S. W. 384, 23 L. R. A. 435, the Supreme Court of Missouri took the position that, though a mutual benefit certificate is a contract of life insurance in a general sense, it is not, like ordinary policies, a unilateral contract, but mutually binding, so that an action to recover assessments can be maintained against a member who has failed to pay, even though the certificate provides for forfeiture in case of such default. But in a well-considered dissenting opinion by Black, C. J., concurred in by Brace and Burgess, JJ., the position was taken that a certificate is but a unilateral contract, imposing no obligation to pay on the holder thereof, and it is pointed out that in the *McDonald* and *New Era Life Ass'n* Cases, which appear to support a contrary doctrine, there was an express promise to pay assessments in the application signed by the member, thus binding him to make such payments. In *Clark v. Lehman*, 65 Ill. App. 238, the Appellate Court of Illinois held that, where the constitution of an association provides that each member shall pay certain assessments, and a member by his application obligates himself to perform its requirements, payment is not optional with him, and, though his certificate provides that failure to pay shall render his membership void, the company may elect to compel payment; and this decision was followed in a subsequent appeal of the same case (*Lehman v. Clark*, 71 Ill. App. 366). But the Supreme Court, in reversing the latter case (*Lehman v. Clark*, 51 N. E. 222, 174 Ill. 279, 43 L. R. A. 648, reversing 71 Ill. App. 366), squarely takes the position that mutual benefit certificates are only unilateral contracts, and that consequently no right of recovery exists in any association against a member for nonpayment of assessments. Even though a member of a benefit association is held liable for assessments made while he is a member, the fact that the officers of the association receive assessments from a member after the passage of a by-law expelling him therefrom will not estop him from disavowing his membership, when sued for assessments made after those paid (*Ellerbe v. Faust*, 119 Mo. 653, 25 S. W. 390, 25 L. R. A. 149). A member of an associa-

tion, acting for himself alone, cannot apply to vacate an order authorizing the receiver of the association to levy assessments and to enforce payment, as such order is not an adjudication against him (*People v. United States Mut. Acc. Ass'n*, 41 N. Y. Supp. 756, 10 App. Div. 319; *In re Moses*, Id.).

Where the by-laws of a benefit association do not require that an assessment be recorded in the minutes, the fact that an assessment was made may be shown by parol (*Supreme Council American Legion of Honor v. Landers*, 23 Tex. Civ. App. 625, 57 S. W. 307). If defendant in an action for premiums denies having the policy when called upon to produce it, the entries in the company's books and the application for the policy, after the signature thereto has been verified by the defendant, are competent evidence of membership; and if plaintiff shows the entries in the books and application for the policy, and also that while defendant was insured deaths occurred among the members, for which he was assessed and notice thereof given, and there is not contradictory evidence, this is sufficient to warrant an instruction for the plaintiff (*New Era Life Ass'n v. Rossiter*, 132 Pa. 314, 19 Atl. 140).

8. RECOVERY OF PREMIUMS PAID IN GENERAL.

- (a) Circumstances authorizing recovery in general.
- (b) Fraud of company or agent.
- (c) Void and voidable policies.
- (d) Same—Policies taken without knowledge of person insured.
- (e) Same—Defect in insurable interest.
- (f) Failure of risk to attach.
- (g) Termination of risk—Forfeiture or cancellation.
- (h) Same—Life policies.
- (i) Questions of practice.

(a) Circumstances authorizing recovery in general.

In connection with the payment of premiums some interesting questions arise as to the right of the insured to recover the premiums he has paid. The insured is, of course, entitled to recover the premium paid, if the policy was never issued and delivered (*Summers v. Mutual Life Ins. Co.* [Wyo.] 75 Pac. 937, 66 L. R. A. 812), and especially where no explanation of the delay is given (*Stilwell v. Covenant Mut. Life Ins. Co.*, 83 Mo. App. 215). Re-

covery may be had, even if the policy was in fact issued, if the insured never received it by reason of miscarriage of the mail (*Mutual Life Ins. Co. of New York v. Elliott*, 93 Tex. 144, 53 S. W. 1014). So, too, recovery may be had if the premium was paid by note, if the note has not been returned to the insured.

Mutual Life Ins. Co. v. Gorman, 19 Ky. Law Rep. 295, 40 S. W. 571; *Godfrey v. New York Life Ins. Co.*, 70 Minn. 224, 73 N. W. 1; *Mutual Life Ins. Co. v. Herron*, 80 South. 691, 79 Miss. 381. But not when paid by a draft which was protested for nonpayment. *Whiting v. Equitable Life Assur. Soc.*, 60 Fed. 197, 8 C. C. A. 558.

It is no defense to an action for recovery that there was an oral agreement for insurance under which the insured might have recovered in case of loss (*Collier v. Bedell*, 39 Hun [N. Y.] 238). If, however, it was the fault of the insured that the policy was never issued, the premium cannot be recovered (*Lewis v. Carr*, 86 Ill. App. 412).

An insurance agent, who has made a full disclosure of his agency and the name of his principal, is not liable to insured for a premium paid on the policy which the insurer has failed to issue. *Bleau v. Wright*, 110 Mich. 188, 68 N. W. 115.

If the policy issued is not as agreed, and therefore unsatisfactory to the insured, the premium may be recovered.

Dobson v. Jordan, 124 Mass. 542; *Tift v. Phoenix Mut. Life Ins. Co.*, 6 Lana. (N. Y.) 198; *Sengfelder v. Mutual Life Ins. Co.*, 5 Wash. 121, 31 Pac. 428.

Thus, where the insured accepted a life policy, pending delivery of an endowment policy, for which he paid the full premium, but which the company had at the time no authority to issue, he was entitled, on demand at the expiration of the period for which the premium was paid, to a return of the sum paid in excess of that due on the life policy (*Calandra v. Life Ass'n of America* [Sup.] 84 N. Y. Supp. 498). The insured cannot recover, however, where the dissatisfaction is based merely on a misconstruction of the terms of the policy (*Condon v. Mutual Reserve Fund Life Ass'n*, 42 Atl. 944, 89 Md. 99, 44 L. R. A. 149, 73 Am. St. Rep. 169).

A member of a mutual company is not entitled to recover the premium paid on the ground that the company was reorganized under legislative authority without his consent, if the identity of the company and its rights and liabilities were not affected by the

reorganization (*Muller v. State Life Ins. Co.*, 27 Ind. App. 45, 60 N. E. 958); and in the same case it was held that the invalidity of a collateral contract did not affect the policy, so as to entitle the insured to a recovery of the premium for the risk actually run by the company. Where the insured accepted the policy, giving his notes for the premiums thereon, with an agreement that the agent was to realize a satisfactory amount on other policies held by the insured issued by other companies, otherwise the present policies to be returned and the notes given up, the failure of the agent to realize on such other policies entitled the insured to recover the notes (*Harnickell v. New York Life Ins. Co.*, 40 Hun, 558, affirmed 111 N. Y. 390, 18 N. E. 632, 2 L. R. A. 150).

(b) Fraud of company or agent.

Where one, by the fraud or misrepresentation of the company or agent, is induced to take a policy of insurance, he may rescind on discovery of the fraud and recover the premiums.

American Mut. Life Ins. Co. v. Bertram (Ind. Sup.) 70 N. E. 258, 64 L. R. A. 935; *Armstrong v. Mutual Life Ins. Co.*, 96 N. W. 954, 121 Iowa, 362; *Hedden v. Griffin*, 186 Mass. 229, 49 Am. Rep. 25; *Fisher v. Metropolitan Ins. Co.*, 162 Mass. 236, 38 N. E. 503; *McCann v. Same*, 177 Mass. 280, 58 N. E. 1026; *Prudential Ins. Co. v. Connelly* (Neb.) 98 N. W. 812; *Delouche v. Metropolitan Life Ins. Co.*, 69 N. H. 587, 45 Atl. 414; *Rohrschneider v. Knickerbocker Life Ins. Co.*, 76 N. Y. 216, 32 Am. Rep. 290; *Fulton v. Metropolitan Life Ins. Co.* (Om. Pl.) 19 N. Y. Supp. 660; *United States Life Ins. Co. v. Wright*, 33 Ohio St. 533; *Martin v. Aetna Life Ins. Co.*, 1 Tenn. Cas. 361; *Mailholt v. Metropolitan Life Ins. Co.*, 87 Me. 374, 32 Atl. 989, 47 Am. St. Rep. 336; *Shanahan v. Same*, 87 Me. 385, 32 Atl. 993; *May v. New York Safety Reserve Fund Soc.*, 14 Daly (N. Y.) 389.

The rule has been applied where the false representations related to the form and provisions of the policy.

La Marche v. New York Life Ins. Co., 58 Pac. 1053, 126 Cal. 498; *McKay v. New York Life Ins. Co.*, 56 Pac. 1112, 124 Cal. 270; *Anderson v. New York Life Ins. Co.*, 76 Pac. 109, 84 Wash. 616.

So, too, false representations as to the solvency of the company will justify a recovery of the premiums, but proof of the insolvency long after the payment of the premiums does not entitle the insured to recover (*Life Ass'n of America v. Goode*, 71 Tex. 90, 8 S. W. 639). Nor can the action be based on mere expression of

opinion by the company's officer as to the condition of the company (*Commonwealth v. Mechanics' Mut. Fire Ins. Co.*, 120 Mass. 495).

(c) Void and voidable policies.

There seems to be no question that the insured is not entitled to recover premiums, where with knowledge of the fact he enters into a contract of insurance absolutely void because of illegality.

Wheeler v. Mutual Reserve Fund Life Ass'n, 102 Ill. App. 48; *Touro v. Cassin*, 1 Nott & McC. (S. C.) 173, 9 Am. Dec. 680.

A somewhat different position is presented when the invalidity does not rest on absolute illegality. As a general rule it is conceded that, if the policy is void ab initio, the insured may recover the premiums he has paid.

Fulton v. Metropolitan Life Ins. Co., 1 Misc. Rep. 478, 21 N. Y. Supp. 470; *Waller v. Northern Assur. Co.*, 64 Iowa, 101, 19 N. W. 865; *Georgia Home Ins. Co. v. Rosenfield*, 95 Fed. 358, 37 C. C. A. 96; *Friesmuth v. Agawam Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 587; *Low v. Union Central Life Ins. Co.*, 6 Wkly. Law Bul. 666, 8 Ohio Dec. 247.

It has been held that this rule applies, though the company is estopped by its conduct from asserting the invalidity (*Hogben v. Metropolitan Life Ins. Co.*, 38 Atl. 214, 69 Conn. 503, 61 Am. St. Rep. 53). But in New York (*Fay v. Prudential Ins. Co.*, 80 N. Y. Supp. 683, 80 App. Div. 350) and Ohio (*Low v. Union Central Life Ins. Co.*, 6 Wkly. Law Bul. 666, 8 Ohio Dec. 247, affirmed in 41 Ohio St. 273) it has been said that, if the policy is merely voidable, the insured cannot claim that his own misrepresentation avoided the policy, and so recover back the premiums. Such an objection can be taken advantage of only by the company. So, where the act rendering the policy invalid was the act of the agent and binding on the company (*Farrow v. Cochran*, 72 Me. 309), the insured can take advantage of the invalidity to recover the premiums. If, however, the invalidity arises on a fraudulent misrepresentation by the insured, he cannot recover.

Schwartz v. United States Ins. Co., 21 Fed. Cas. 770; *Hoyt v. Gilman*, 8 Mass. 336; *Georgia Home Ins. Co. v. Rosenfield*, 95 Fed. 358, 37 C. C. A. 96; *Friesmuth v. Agawam Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 588; *United States Life Ins. Co. v. Smith*, 92 Fed. 503, 34

C. O. A. 508. But see *Fishbeck v. Phenix Ins. Co.*, 54 Cal. 422, and *Hanover Fire Ins. Co. v. Shrader*, 11 Tex. Civ. App. 255, 31 S. W. 1100.

On the other hand, if the misrepresentation is due to the mistake or fraud of the agent (*Clark v. Manufacturers' Ins. Co.*, 8 How. 235, 12 L. Ed. 1061),¹ there may be a recovery.

Thus, where a medical examiner for a life insurance company fraudulently wrote different answers than those given by the insured, which false answers would be a defense to an action on the policy difficult to meet after the death of the insured, he was entitled to repudiate the contract and recover the premiums (*Bennett v. Massachusetts Mut. Life Ins. Co.*, 64 S. W. 758, 107 Tenn. 371). So, too, where the invalidity is due to an innocent mistake, the premiums may be recovered.

Connecticut Mut. Life Ins. Co. v. Pyle, 44 Ohio St. 19, 4 N. E. 465, 58 Am. Rep. 781; *Mutual Assur. Co. v. Mahon*, 5 Call. (Va.) 517.

If the policy is not absolutely void, and the option to declare it void rests with the insured, as in the case of policies insuring the lives of infants, the insured may disaffirm the contract and recover the premiums.

Simpson v. Prudential Ins. Co., 184 Mass. 348, 68 N. E. 673, 68 L. R. A. 741, 100 Am. St. Rep. 560; *Johnson v. Northwestern Mut. Life Ins. Co.*, 56 Minn. 365, 57 N. W. 984, 59 N. W. 992, 26 L. R. A. 187, 45 Am. St. Rep. 478.

(d) Same—Policies taken without knowledge of person insured.

The general rule that policies taken out on the life of another without such other's knowledge or consent are void has been discussed elsewhere.² If the person taking out the policy is innocent of an intentional wrong, he may recover the premiums paid.

American Mut. Life Ins. Co. v. Bertram (Ind. Sup.) 70 N. E. 258, 64 L. R. A. 985; *Metropolitan Life Ins. Co. v. Blesch*, 58 S. W. 436, 22 Ky. Law Rep. 530; *Metropolitan Life Ins. Co. v. Asmus*, 25 Ky. Law Rep. 1550, 78 S. W. 204; *Fisher v. Metropolitan Ins. Co.*, 162 Mass. 236, 38 N. E. 503; *McCann v. Metropolitan Life Ins. Co.*, 58 N. E. 1023, 177 Mass. 230; *Fulton v. Metropolitan Life Ins. Co.*, 4 Misc. Rep. 76, 23 N. Y. Supp. 598; *Id.* (Com. Pl.) 19 N. Y. Supp. 660; *Griffin's Adm'r v. Equitable Assur. Soc.*, 27 Ky. Law Rep. 313, 84 S. W. 1164.

The objection may, however, be waived by the insurer, in which case there can be no recovery (*McElwain v. Metropolitan Life Ins.*

¹ For opinion below, see 5 Fed. Cas. 889.

² See ante, p. 556.

Co., 63 N. Y. Supp. 293, 50 App. Div. 63). It has, indeed, been held, in *Mailhoit v. Metropolitan Life Ins. Co.*, 87 Me. 374, 32 Atl. 989, 47 Am. St. Rep. 336, that such policy is voidable merely at the option of the company, and the insured cannot repudiate it and recover the premiums, in the absence of any cancellation by the company. This decision has been followed in *Brokamp v. Metropolitan Life Ins. Co.*, 8 O. C. D. 116, 16 Ohio Cir. Ct. R. 630. On the other hand, it has been held that, although the company would have been estopped by the agent's representations to declare the policy void, the plaintiff was not obliged to take the risk of litigation after his death, but could rescind and recover premiums (*Delouche v. Metropolitan Life Ins. Co.*, 69 N. H. 587, 45 Atl. 414). This phase of the question as to the right to recover premiums has been raised in several cases in Kentucky in which the wife has taken out insurance on the life of her husband without his knowledge or authority. It has been held (*Metropolitan Life Ins. Co. v. Asmus*, 78 S. W. 204, 25 Ky. Law Rep. 1550) that the wife, if innocent of any intentional wrong, may recover the premiums so paid. It has also been held that where the money used in the payment of premiums belonged to the husband, or where it was furnished to the wife for household expenses only, the husband could recover the amount so paid.

Metropolitan Life Ins. Co. v. Reinke, 15 Ky. Law Rep. 125; *Same v. Monahan*, 102 Ky. 13, 42 S. W. 924; *Same v. Trende*, 21 Ky. Law Rep. 909, 53 S. W. 412; *Same v. Smith*, 59 S. W. 24, 22 Ky. Law Rep. 868, 53 L. R. A. 817. But the burden is on the husband to show that it was his money that was used (*Metropolitan Life Ins. Co. v. Reinke*, 15 Ky. Law Rep. 125), and it is not sufficient to show merely that the wife had no income and earned no money (*Metropolitan Life Ins. Co. v. Monahan*, 102 Ky. 13, 42 S. W. 924).

Of course, where the statute (Burns' Ann. St. Ind. 1901, § 4905) declares a securing of policies on the lives of persons without their knowledge or consent a felony, there can be no recovery of the premiums, though the insurer knew all the facts (*Work v. American Mut. Life Ins. Co.*, 67 N. E. 458, 31 Ind. App. 153).

(c) Same—Defect in insurable interest.

In marine insurance it has generally been held that an entire or partial failure of interest justified a recovery of the premiums pro tanto.

Foster v. United States Ins. Co., 11 Pick. (Mass.) 85; *Flinney v. Warren Ins. Co.*, 1 Metc. (Mass.) 16, 35 Am. Dec. 343; *Holmes v. United*

States Co., 2 Johns. Cas. (N. Y.) 329; Steinback v. Rhinelander, 3 Johns. Cas. (N. Y.) 269; Sharp v. United States Ins. Co., 14 Johns. (N. Y.) 201.

In the case of life policies, one paying the premiums cannot recover them on the ground that the policy was void for lack of insurable interest, unless he is innocent of any wrong himself in taking out such a policy.

Lewis v. Phoenix Mut. Life Ins. Co., 39 Conn. 100; McDermott v. Prudential Ins. Co., 7 Kulp (Pa.) 246.

A bona fide assignee of such a policy may, however, recover (American Mut. Life Ins. Co. v. Bertram [Ind. Sup.] 70 N. E. 258, 64 L. R. A. 935). A beneficiary who has paid the premiums unknown to the company cannot recover, the company believing the insured was paying them (Knights and Ladies of Honor v. Burke [Tex. App.] 15 S. W. 45), and in an action on the policy judgment for the premiums will not be given, where no recovery of premiums is asked (Wilton v. New York Life Ins. Co. [Tex. Civ. App.] 78 S. W. 403).

The statute of limitations begins to run against an action to recover money paid for insurance on property in which the assured had no insurable interest, as soon as the fire occurs and the company refuses to pay, even if not when the premiums are paid, though the assured may not have known that he had no insurable interest until a decision of the supreme court, rendered some years afterwards, in an action by him on the policy. New Holland Turnpike Road Co. v. Farmers' Mut. Ins. Co., 144 Pa. 541, 22 Atl. 923.

(2) Failure of risk to attach.

It is a principle of almost elementary character that, if the risk has once attached, there can be no return of the premiums (Hendricks v. Commercial Ins. Co., 8 Johns. [N. Y.] 1). It would seem to be equally obvious that, if the policy does not attach, the insured, in the absence of any fraud on his part, is entitled to recover the premiums paid.

Toppan v. Atkinson, 2 Mass. 365; Taylor v. Sumner, 4 Mass. 56; Forbes v. Church, 3 Johns. Cas. (N. Y.) 159; Richards v. Marine Ins. Co., 3 Johns. (N. Y.) 307; Murray v. Columbian Ins. Co., 4 Johns. (N. Y.) 443; Elbers v. United Ins. Co., 16 Johns. (N. Y.) 128; Waddington v. United Ins. Co., 17 Johns. (N. Y.) 23; Mellen v. National Ins. Co., 1 N. Y. Super. Ct. 500.

Thus, on breach of implied warranty of seaworthiness, the policy fails to attach, and the premiums paid by the insured may be recovered.

Scriba v. Insurance Co. of North America, 21 Fed. Cas. 874; *Dodge v. Boston Marine Ins. Co.*, 85 Me. 215, 27 Atl. 105; *Porter v. Bussey*, 1 Mass. 436; *Taylor v. Lowell*, 8 Mass. 331, 3 Am. Dec. 141; *Penniman v. Tucker*, 11 Mass. 66.

Similarly it was held, in *Jones v. Insurance Co. of North America*, 90 Tenn. 604, 18 S. W. 260, 25 Am. St. Rep. 706, that a breach of the clear space clause, being in effect a failure to comply with a condition precedent to the policy attaching, caused the risk never to attach, and, in the absence of intentional fraud, the insured could recover the premiums.

One who pays insurance premiums, knowing that the insured property has been destroyed, cannot recover them; but if at the time of payment he has no information as to the destruction of the property, he may recover back the amount so paid (*Reese v. Delaware Mut. Ins. Co.*, 3 Leg. & Ins. Rep. 83).

If the risks are divided, separate premiums being paid or rebates being allowed for separate losses, the insured may recover such portions of the premium as were paid for risks not incurred.

Waters v. Allen, 5 Hill (N. Y.) 421; *Ogden v. New York Firemen's Ins. Co.*, 12 Johns. (N. Y.) 114.

But, where the insurer for an additional premium agreed that a supposed deviation should not affect the insurance (*Crowningshield v. New York Ins. Co.*, 3 Johns. Cas. [N. Y.] 142), the insured was not entitled to a return of the premium on the ground that the entire deviation had not been made. If an additional premium is paid for an additional risk, and it is found that such risk was covered by the policy originally, such additional premium may be recovered (*Forbes v. American Mut. Life Ins. Co.*, 15 Gray [Mass.] 249, 77 Am. Dec. 360). Where insurance is effected on condition that, if it had already been effected abroad, a certain portion of the premium should be returned, no recovery can be had for insurance taken out subsequently (*New York Ins. Co. v. Thomas*, 3 Johns. Cas. [N. Y.] 1), nor for prior insurance, unless it cover the same risk and interest (*Columbian Ins. Co. v. Lynch*, 11 Johns. [N. Y.] 233).

(g) Termination of risk—Forfeiture or cancellation.

It is the general rule that, if a policy of insurance has become void because of a violation of the conditions by the insured, whereby a valid forfeiture is incurred, there can be no recovery of the unearned premium.

Hearne v. New England Mut. Marine Ins. Co., 20 Wall. 488, 22 L. Ed. 395; *St. Paul Fire & Marine Ins. Co. v. Coleman*, 6 Dak. 458, 48 N. W. 693, 6 L. R. A. 87; *Victor v. Hartford Fire Ins. Co.*, 33 Iowa, 210; *Colby v. Cedar Rapids Ins. Co.*, 68 Iowa, 577, 24 N. W. 54; *Phoenix Ins. Co. v. Stevenson*, 78 Ky. 150; *McEvoy v. Nebraska & I. Ins. Co.*, 46 Neb. 782, 65 N. W. 888; *Farmers' Mut. Ins. Co. v. Home Fire Ins. Co.*, 54 Neb. 740, 74 N. W. 1101; *Home Fire Ins. Co. v. Kuhlman*, 58 Neb. 488, 78 N. W. 936, 76 Am. St. Rep. 111; *Hicks v. Merchants' & Manufacturers' Ins. Co.*, 1 Ohio Dec. 374; *Davison v. London & Lancashire Fire Ins. Co.*, 42 Atl. 2, 189 Pa. 182.

Even where the policy provides that, if it should become void, the unearned portion of the premium shall be returned on the surrender of the policy, this does not prevent the company, in a suit thereon, from resisting recovery on the ground that the policy was forfeited, and at the same time retaining the premium (*Senor v. Western Millers' Mut. Fire Ins. Co.*, 79 S. W. 687, 181 Mo. 104). Premiums paid after the forfeiture has been incurred may, however, be recovered, though they were received without knowledge that the policy had been forfeited (*Hazard v. Franklin Mut. Fire Ins. Co.*, 7 R. I. 429).

Mr. Ostrander, after citing the general rule, says * that a different rule has been laid down in Illinois and Nebraska, and in support of this he cites *Schoneman v. Western, etc., Ins. Co.*, 16 Neb. 404, 20 N. W. 284, and *Manufacturers' & Merchants' Ins. Co. v. Armstrong*, 145 Ill. 469, 34 N. E. 553. An examination of these cases, however, shows that they are in no way exceptions to the general rule. The *Schoneman* Case contained no language from which such a principle could be deduced. The policy in this case was on live stock, and was issued March 21, 1882, and contained a provision that the annual premium must be paid within 15 days after the date of the policy; otherwise, the policy should be canceled. The agent, however, extended the time of payment until May 15th. After the death of the animal insured, on or about May 10th, the insured paid the premium and received the policy. The premium was accepted

* Ostrander on Fire Insurance, § 18.

by the agent and was retained by the company, apparently with knowledge that the animal insured had died before the payment was made. The court held that there was a waiver of the right reserved to cancel the policy for nonpayment of the premium within 15 days, and the company could not, therefore, deny liability under the policy. The court remarks that, if the policy had been obtained by fraud, the company might have tendered back the premium and asked for a cancellation. But this is the general rule, and in no way affects the rule as to forfeiture. The case may perhaps fairly be regarded as within the rule as to recovery of premiums on failure of the risk to attach. In the *Armstrong Case* the policy contained a condition that certain designated improvements should be completed within 60 days or the policy should be null and void. There was, however, a waiver of this provision, as it was shown to the agents of the insurer that the improvements could not be made within the 60 days. They were, however, made before the destruction of the property, though they had not been inspected and accepted by the company. The court held that the condition was waived, and, moreover, that, if the general agents did not regard the policy as in force, they should have canceled the policy and returned the unearned portion of the premium. It is apparent that this condition can be regarded only as a condition precedent to the taking effect of the policy. Consequently, even if there was no waiver, the case would fall within the rule that, on failure of the risk to attach, insured is entitled to a return of the premium. This is entirely different from the rule as to forfeiture, to which Mr. Ostrander says this case is an exception.

It has, however, been held in North Carolina (*Hayes v. United States Fire Ins. Co.*, 132 N. C. 702, 44 S. E. 404) that, if a policy provides that it shall terminate on the commencement of foreclosure proceedings, the insured, on the commencement of such proceedings, is entitled to a return of a ratable proportion of the premium.

Where a mutual policy provided that in case of sale of the property, if the policy was not transferred, the deposit money might be withdrawn, and insured, who has parted with both his title to the property and the ownership of the policy, cannot recover the premium (*Edwards v. Franklin Ins. Co.*, 8 Wkly. Notes Cas. [Pa.] 241); but, if the policy is assigned to a mortgagee as collateral security for the mortgage debt, he is entitled to the deposit premium, if on a sale of the mortgaged premises on foreclosure there is not enough realized to satisfy the debt (*Appeal of Rafsnyder*, 88 Pa. 436).

It is also a general rule that on the cancellation of the policy the insured is entitled to the unearned premium.

Scottish Union & Nat. Ins. Co. v. Dangaix, 108 Ala. 388, 15 South. 956; *State Mut. Fire Ins. Ass'n v. Brinkley Stave & Heading Co.*, 61 Ark. 1, 31 S. W. 157, 29 L. R. A. 712, 54 Am. St. Rep. 191; *Carr v. Union Mut. Fire Ins. Co.*, 33 Mo. App. 291; *State Ins. Co. v. Farmers' Ins. Co.*, 65 Neb. 84, 90 N. W. 997; *Farmers' Mut. Ins. Co. v. Phoenix Ins. Co.*, 65 Neb. 14, 95 N. W. 3; *Insurance Com'rs v. People's Fire Ins. Co.*, 68 N. H. 51, 44 Atl. 82.

In view of the general rule as to forfeiture, a cancellation on valid grounds of forfeiture does not justify a recovery of the unearned premiums.

Farmers' Mutual Ins. Co. v. Phoenix Ins. Co., 90 N. W. 1000, 65 Neb. 14; *Colby v. Cedar Rapids Ins. Co.*, 66 Iowa, 577, 24 N. W. 54.

Where the policy was taken out by a mortgagee, the mortgagor being named as the insured, payable in case of loss to such mortgagee, and the policy was subsequently canceled, and a new one issued to a purchaser at a sale of the mortgaged premises under the power in the mortgage, the mortgagor was not entitled to the unearned premium (*Parker v. Trustees of Smith Charities*, 127 Mass. 499).

The insolvency of the insurance company operates as a cancellation of the policy, entitling the insured to a return of the unearned premium.

Smith v. Binder, 75 Ill. 492; *In re Minneapolis Mut. Fire Ins. Co.*, 49 Minn. 291, 51 N. W. 921; *Smith v. National Credit Ins. Co.*, 65 Minn. 283, 68 N. W. 28, 33 L. R. A. 511; *Relfe v. Commercial Ins. Co.*, 10 Mo. App. 393; *Carr v. Union Mut. Fire Ins. Co.*, 28 Mo. App. 215. It has, however, been held in Wisconsin that *Sanborn & B. Ann. St. § 1940d*, providing that at the request of the party insured the company shall cancel the policy and return the unearned premium, and by-laws of the company, giving the company the right to cancel a policy and requiring it in such case to return the unearned premium, do not require the return of such premium, where the policy has been determined by the insolvency of the company, but only where it has been determined at the request of the insured or the express desire of the company. *Dewey v. Davis*, 82 Wis. 500, 52 N. W. 774; *Atlas Paper Co. v. Seamans*, 82 Wis. 504, 52 N. W. 775.

A claim for unearned premiums because of insolvency cannot, however, be set off against an assessment, if the losses are so great in amount as to require an assessment of the full amount author-

ized by law (*Commonwealth v. Massachusetts Mut. Fire Ins. Co.*, 112 Mass. 116). On cancellation by insolvency of the company, the insured shares ratably with the other creditors.

Fogerty v. Philadelphia Trust, Safe-Deposit & Ins. Co., 75 Pa. 125; *Appeal of Dean*, 98 Pa. 101; *Commonwealth v. Massachusetts Mut. Fire Ins. Co.*, 112 Mass. 116.

(h) Same—Life policies.

On the principle that when the risk has once attached a premium must be considered earned, a valid forfeiture of a life policy will not justify a recovery of the premium paid, in the absence of an agreement giving the insured such a right.

This principle is elementary, but is supported directly or by inference in *Ætna Life Ins. Co. v. Paul*, 10 Ill. App. 431; *Continental Life Ins. Co. v. Houser*, 89 Ind. 258; *McDonald v. Metropolitan Life Ins. Co.*, 68 N. H. 4, 38 Atl. 500, 73 Am. St. Rep. 548; *Taylor v. Charter Oak Life Ins. Co.*, 59 How. Prac. (N. Y.) 468; *Grant v. Alabama Gold Life Ins. Co.*, 76 Ga. 575; *McLaughlin v. Supreme Council Catholic Knights of America*, 184 Mass. 298, 68 N. E. 344.

In recent forms of policies provision is usually made for returning to the insured some portion of the premiums paid. The rights of the insured under such provisions will be discussed in a subsequent brief. So, too, the contract may provide for a return of a portion of the premiums on cancellation of the policy (*Hayward v. Knickerbocker Ins. Co.*, 12 Daly [N. Y.] 42), though usually a definite cash surrender value is fixed by agreement.⁴

The question whether there can be a recovery of the unearned premium, when the policy terminates by the death of the insured before the period for which payment has been made has expired, has been directly raised in but two cases. In *Real Estate Title Insurance & Trust Co. v. Ætna Life Ins. Co.*, 37 Atl. 639, 181 Pa. 61, it appeared that at the expiration of a life policy, issued on the renewal term plan, insured became entitled to two-thirds of the cash accumulation on the policy. This sum he did not draw out, but took out another policy, receiving receipts for three advance annual premiums thereon, aggregating the full amount of said accumulation. Insured died a few days thereafter, and his administrator brought action for the amount of the last two of the three premiums as for premiums unearned. There was, however, a special agreement with the insured, whereby the whole amount of

⁴ See post, vol. 3, p. 2423.

the accumulation was to be applied at once, at the date of the new policy, to the payment of additional insurance. It was held, therefore, that no recovery could be allowed. In *Dickerson v. Northwestern Mut. Life Ins. Co.*, 65 N. E. 694, 200 Ill. 270, affirming 102 Ill. App. 280, a life policy provided that it should be void in case of suicide by the insured, and payments thereon should be forfeited to the company. The insured committed suicide before the insurance purchased by one quarterly payment had expired. It was held, however, that, as each quarterly payment constituted an entire consideration for the risk assumed by the company that the insured might die within the period covered, the company was not bound to return the unearned premium, on the theory that the forfeiture contemplated was only of the earned premium.

The principle that there can be no recovery of the premium may be regarded as supported, also, by those cases in which the policies provide for an annual premium, payable in advance, but for the convenience of the insured payment is allowed in semiannual or quarterly installments, and the insurer, on paying the loss, has been allowed to deduct from the face of the policy the unpaid installments of the annual premium (*Albert v. Mutual Life Ins. Co.*, 122 N. C. 92, 30 S. E. 327, 65 Am. St. Rep. 693).⁵

(1) Questions of practice.

As there is no privity of contract between the beneficiary and the company where the policy was taken out by a stranger, who paid the premiums, the beneficiary cannot maintain an action for a recovery of the premiums (*Sullivan v. Metropolitan Life Ins. Co.*, 54 N. E. 879, 174 Mass. 467, 75 Am. St. Rep. 365). And one whose life is insured by a policy issued to another is not a party to the contract, so as to be entitled to sue for a recovery of premiums paid (*North America Life Ins. Co. v. Wilson*, 111 Mass. 542). So, too, it has been held in Massachusetts (*Trabandt v. Connecticut Mut. Life Ins. Co.*, 131 Mass. 167), that where a policy insures the life of A. for the use of B., A. cannot maintain an action against the insurer for the premiums paid by him on the policy, although the same never took effect by reason of fraud on the part of the agents of the insurer. But in any event, to entitle a policy holder to recover the premiums paid, he must offer to return the policy (*Farrow v. Cochran*, 72 Me. 309). An action to recover back premiums is not an action on the policy, and need not be brought within the

⁵ See, also, post, vol. 4, p. 3288.

period limited in the policy for bringing actions thereon (*McCallum v. National Credit Ins. Co.*, 84 Minn. 134, 86 N. W. 892). But such actions are governed by the general statute of limitations.

American Mut. Life Ins. Co. v. Bertram (Ind. Sup.) 70 N. E. 258, 64 L. R. A. 935; *Metropolitan Life Ins. Co. v. Blesch*, 58 S. W. 436, 22 Ky. Law Rep. 530.

The right to recover premiums as money had and received is not affected by a demand for damages for the refusal of the company to issue a policy (*Summers v. Mutual Life Ins. Co.* [Wyo.] 75 Pac. 937, 66 L. R. A. 812). Generally, however, in an action to recover premiums, it must be alleged that there was a promise by the company to return the premiums, and a copy of the policy should be attached to the complaint, to show its terms (*Selzer v. German Fire Ins. Co.*, 14 Pa. Co. Ct. R. 32). The burden is on the plaintiff to show that the policy was void ab initio, where a recovery of premiums is based on that ground (*Metropolitan Ins. Co. v. Bowser*, 20 Ind. App. 557, 50 N. E. 86). A receipt for the premium, signed by the agent individually, is admissible to show payment of the premiums, notwithstanding a provision of the policy that receipts for premiums must be signed by the secretary and countersigned by the person to whom payment is made (*Equitable Life Assur. Soc. v. Cole*, 13 Tex. Civ. App. 486, 35 S. W. 720). In an action to recover premiums on the ground that the policy was void because the application therefor was not signed by the insured, special findings, which fail to state any reason why the application should be so signed, or any other fact rendering the policy void ab initio, are sufficient to support a judgment allowing a recovery (*Metropolitan Ins. Co. v. Bowser*, 20 Ind. App. 557, 50 N. E. 86).

Where the declaration in an action on a life policy contains a count for the amount thereof, and also one for money had and received, on the ground that the policy never attached, by reason of the company's agent having inserted false answers in the application without the insured's knowledge, plaintiff cannot recover the premium paid, where the question as to such recovery was not raised at the trial. *McCoy v. Metropolitan Life Ins. Co.*, 133 Mass. 82.

9. RECOVERY OF PREMIUMS BY INSURED ON WRONGFUL FORFEITURE OR REPUDIATION OF LIFE POLICY.

- (a) Scope of discussion.
- (b) Recovery of premiums permitted—The Missouri rule.
- (c) Same—Pennsylvania.
- (d) Same—North Carolina.
- (e) Same—Texas.
- (f) Same—Federal cases.
- (g) Same—Other jurisdictions.
- (h) Contrary doctrine—New York.
- (i) Same—Indiana.
- (j) Same—Kansas.
- (k) Same—Other jurisdictions.

(a) Scope of discussion.

In the preceding brief the right to recover premiums under ordinary circumstances was considered. From that discussion it appeared that where the policy is void ab initio or fails to attach, or is canceled by the parties, the insured is entitled to recover the premiums or a portion of them. On the other hand, when the policy is void because of the fraud of the insured, or is subsequently declared void because of his failure to comply with the conditions of the policy, the insured has no right to a return of the premium. A more important phase of the question arises where the policy is repudiated by the insurer, either by a forfeiture wrongfully declared or by some act or conduct, the effect of which is a substantial repudiation of its obligations to the insured. This phase of the question has been deemed of sufficient importance to warrant a separate and more extended discussion.

(b) Recovery of premiums permitted—The Missouri rule.

The earliest and the leading case supporting the principle, that, where a life policy has been wrongfully forfeited, the insured may elect to consider the contract as rescinded and recover the premiums paid, is *McKee v. Phoenix Ins. Co.*, 28 Mo. 383, 75 Am. Dec. 129, where the company wrongfully refused to receive a premium tendered when due, and declared the policy forfeited. The court even went further, and intimated that a recovery of the premium merely would not be sufficient, if the life was not insurable at the time the forfeiture was declared.

The principle decided in the *McKee* Case has been approved in *Tutt v. Insurance Co.*, 19 Mo. App. 681; *Suess v. Imperial Life Ins. Co.*,

64 Mo. App. 1; *Dickey v. Covenant Mut. Life Ass'n*, 82 Mo. App. 372; *Bishop v. Covenant Mut. Life Ins. Co.*, 85 Mo. App. 302—the principle being applied, also, to the wrongful forfeiture of a certificate in a mutual benefit association.

It is true that in the *Tutt* Case the court does not directly approve or disapprove the *McKee* Case, but calls attention to the rule there laid down, and also to the rule in *Smith v. Charter Oak Life Ins. Co.*, 64 Mo. 330, declining to decide which is the proper rule. The judgment of the court below, allowing plaintiff damages according to the rule in the *McKee* Case, is, however, affirmed.

The *Smith* Case, referred to above, was discussed in *Suess v. Insurance Co.*, 64 Mo. App. 1, and it was there held that the case could not be regarded as overruling the *McKee* Case, as the exact question presented in the *McKee* Case had not been raised in the *Smith* Case. The plaintiff in the latter case did not elect to consider the contract as rescinded and sue for the premiums, but brought his action for the value of the policy at the time of the rescission by the company. It cannot be regarded as deciding that plaintiff could not have recovered the premiums paid, if he had so elected.

Another Missouri case that has been regarded as opposed to the ruling in the *McKee* Case is *Rumbold v. Insurance Co.*, 7 Mo. App. 71. On a motion for rehearing in the *Suess* Case the court called attention to the fact, however, that the *Rumbold* Case presented an entirely different issue, and that the *McKee* Case was not in point. The action was brought, not on a wrongful forfeiture of the policy, but on the breach of an agreement to issue a paid-up policy after forfeiture. Moreover, the *Rumbold* Case recognizes the *McKee* Case as the law where there has been a wrongful rescission.

The rule laid down in the *McKee* Case, and the cases following it, was also applied in *Slater v. Supreme Lodge K. & L. of H.*, 76 Mo. App. 387, where the association wrongfully expelled a member, and in *Puschman v. Hartford Life & Annuity Ins. Co.*, 92 Mo. App. 640, it was held that, where the insured was wrongfully denied reinstatement, he might treat the contract as repudiated and recover the full amount of the assessments he had paid.

(c) Same—Pennsylvania.

The doctrine thus laid down in the Missouri cases has been followed in *Helme v. Philadelphia Life Ins. Co.*, 61 Pa. 107, 100 Am.

Dec. 621, though the issue cannot be said to have been distinctly raised in that case. In *American Life Insurance Co. v. McAden*, 109 Pa. 399, 1 Atl. 256, the point was, however, raised directly, and it was there decided that, **the policy having been declared forfeited without warrant, the insured was entitled to recover back the money he had paid in as premiums.** The ground of the decision in this case seems to have been that, though rights had attached under the policy, the insured had in fact received no actual benefit from the contract; the court holding that, though the beneficiary in a sense enjoyed the protection which the policy afforded in the event of the husband's death, yet, as that event did not occur, the policy had been of no appreciable actual advantage to the plaintiff, and of no real disadvantage to the defendant.

Conceding the correctness of the conclusion arrived at in this case, the reasoning on which it is based appears, in the light of other decisions, to be faulty.

Reference may be made to *Speer v. Insurance Co.*, 36 Hun (N. Y.) 322; *Insurance Co. v. Weck*, 9 Ill. App. 358; *Insurance Co. v. Statham*, 93 U. S. 24, 23 L. Ed. 789 (but see dissenting opinion of Mr. Justice Strong); *Lovell v. Insurance Co.*, 111 U. S. 274, 4 Sup. Ct. 890, 28 L. Ed. 423; *Insurance Co. v. Garmany*, 74 Ga. 51.

It is, too, a little difficult to reconcile the position taken by the court in this case with the decision in *Mutual Life Ins. Co. v. Girard Life Ins. Co.*, 100 Pa. 172, where the court regards the contract of life insurance, not as an entire contract, but as a contract for insurance for one year, in consideration of an advance premium, with the right to continue it from year to year on payment of the premium as stipulated.¹

In *McNulty v. Prudential Ins. Co.*, 7 Pa. Super. Ct. 1, the rule that on wrongful cancellation the premiums may be recovered was applied to allow a creditor, who had paid the premiums on a policy on the life of his debtor, to recover the amount so paid. The recovery of premiums on wrongful rescission was also allowed in *Kerns v. Prudential Ins. Co.*, 11 Pa. Super. Ct. 209.

American Life Ins. & Trust Co. v. Schultz, 82 Pa. 46, has been cited as opposing the rule laid down in the Pennsylvania cases mentioned above; but it cannot be regarded as contravening the gen-

¹ For authorities on the question entire contract or a contract from year whether a policy of life insurance is an to year, see ante, p. 98.

eral principle, as there was no disaffirmance of the contract. The action was brought on a breach of an agreement to issue a paid-up policy, and the court held that the measure of damages was, not the amount of the premiums paid, but the difference between the value of the paid-up policy and the value of the policy held by the plaintiff.

(d) Same—North Carolina.

The principle that the premiums are recoverable on wrongful forfeiture has also been adopted in North Carolina.

Braswell v. American Life Ins. Co., 75 N. C. 8; *Lovick v. Provident Life Ass'n*, 110 N. C. 93, 14 S. E. 506; *Gwaltney v. Providence Sav. Life Assur. Soc.*, 41 S. E. 795, 130 N. C. 629; *Gwaltney v. Provident Sav. Life Assur. Soc.*, 132 N. C. 925, 44 S. E. 659, reaffirmed on rehearing 134 N. C. 552, 47 S. E. 122; *Smallwood v. Life Ins. Co. of Virginia*, 133 N. C. 15, 45 S. E. 519.

In *Burrus v. Life Ins. Co. of Virginia*, 124 N. C. 9, 32 S. E. 323, it was held that the rule applied, though the policy provided that it should terminate at the end of each five-year period unless the insured elected to pay an increased premium. The rule that, on breach of the contract, the insured is entitled to recover back the amount of premiums paid, is also applied to mutual benefit associations in *Strauss v. Mutual Reserve Fund Life Ass'n*, 36 S. E. 352, 126 N. C. 971, 54 L. R. A. 605, 83 Am. St. Rep. 699 (for opinion on rehearing see 128 N. C. 465, 39 S. E. 55, 54 L. R. A. 609, 83 Am. St. Rep. 703). The court in its discussion of the rule admits that it falls far short of theoretical perfection, but regards it as the most proper solution of the question as to probable damage. In *Makely v. Supreme Council American Legion of Honor*, 133 N. C. 367, 45 S. E. 649, where the association adopted a by-law reducing the amount payable on its certificates, it was held that the insured might maintain an action for the recovery of such proportion of the premiums paid by him as was represented by the canceled insurance.

(e) Same—Texas.

The Court of Civil Appeals of Texas, in *Piedmont & Arlington Life Ins. Co. v. Fitzgerald*, 1 White & W. Civ. Cas. Ct. App. § 1348, while approving the principle of the *McKee Case*, goes further, and not only allows as damages the premiums paid, with in-

terest, but also holds that the insured is entitled to such damages as he may have suffered from the loss of his insurance. The right of a member of a mutual benefit association to recover premiums paid on wrongful expulsion was recognized in *Supreme Council Catholic Knights of America v. Gambati*, 29 Tex. Civ. App. 80, 69 S. W. 114, and it was said the association was not entitled to credit for the value of the insurance during the time it was in force.

It is difficult to reconcile the decisions in these cases with the later case of *Harris v. Scrivener* (Tex. Civ. App.) 78 S. W. 705, decided in the Third district. Indeed, it is difficult to reconcile this last case with the earlier case of *American Union Life Ins. Co. v. Wood* (Tex. Civ. App.) 57 S. W. 685, decided in the same district. In the Wood Case it was held that on a breach of the contract by the insurer the insured might elect to consider it rescinded and recover a first premium he had paid. In the Harris Case, however, the court laid down the proposition that in the absence of fraud, if the risk has once attached, a recovery of premium paid cannot be had because of a breach of the insurer of some provision of the policy.

(2) Same—Federal cases.

New York Life Ins. Co. v. Statham, 93 U. S. 24, 23 L. Ed. 789, has been cited and relied on as a leading case in opposition to the principle allowing a recovery of premiums on wrongful forfeiture. It was not, however, a case arising on a wrongful forfeiture, but on an actual forfeiture due to a failure to pay premiums during the Civil War; payment being prevented by the nonintercourse law. The court held that the policy holder was entitled to the equitable value of his policy arising from the premiums paid; it being considered that the insured had received a benefit in the insurance actually enjoyed by him while the policy was in force. Mr. Justice Strong, however, dissented from even this allowance, on the ground that a policy of life insurance is not a continuing contract, but merely a contract from year to year, by which the insured has the option to pay his premiums or not, and thus to continue the obligation of the insurer from year to year, or to determine such obligation at his pleasure.

Another case relied on as opposed to the right of recovery of premiums is *Lovell v. St. Louis Mut. Life Ins. Co.*, 111 U. S. 274, 4 Sup. Ct. 390, 28 L. Ed. 423. In this case the facts were similar to those in *Meade v. Insurance Co.*, 51 How. Prac. (N. Y.) 1. The

company had transferred its assets to another company. The policy provided that, in case of default in the payment of premiums, the insured might exchange his policy for a paid-up policy. The forfeiture occurred through mutual mistake. The court adopted the rule that the insured was entitled to the equitable value of his policy, after allowing the company compensation for the risk during the time the policy was in force.

But, however these cases may be interpreted, the federal courts have agreed in holding that, on the wrongful repudiation of the contract by the reduction of the amount to be paid on the certificate, the insured is entitled to recover the amount he has paid in.

Reference may be made to *Henderson v. Supreme Council American Legion of Honor* (C. C.) 120 Fed. 585; *Black v. Supreme Council American Legion of Honor* (C. C.) 120 Fed. 580; *Supreme Council A. L. H. v. Black*, 123 Fed. 650, 59 C. C. A. 414; *Dalx v. Supreme Council A. L. H.* (C. C.) 127 Fed. 374; *McAlarney v. Supreme Council A. L. H.* (C. C.) 131 Fed. 538.

(g) Same—Other jurisdictions.

The rule allowing a recovery of premiums was also approved in *Ætna Life Ins. Co. v. Paul*, 10 Ill. App. 431, although the Appellate Court had in *Brooklyn Life Ins. Co. v. Weck*, 9 Ill. App. 358, apparently laid down a different rule, to the effect that, as the insured had received a benefit in the protection afforded by the policy while it was in force, he was not entitled to the full amount of the premiums paid, but to the value of the policy at the time of forfeiture. *Phoenix Mutual Life Ins. Co. v. Baker*, 85 Ill. 410, must be distinguished from other cases, as the policy provided that after three annual payments had been made the insured should receive a paid-up policy by surrendering the original. The court consequently held that the measure of damages for the refusal to give a paid-up policy was, not the amount of premiums paid, but the actual value of the policy.

The Supreme Court of Iowa, in *Van Werden v. Equitable Life Assur. Soc.*, 99 Iowa, 621, 68 N. W. 892, followed the decisions in the *McKee* and *McAden* Cases, holding that the rule laid down in those cases has clear support in *Meade v. Insurance Co.*, 51 How. Prac. (N. Y.) 1. The ground of the decision seems to be that, though the wrongful forfeiture by the company did not impair the rights of the insured, he had the option to elect whether to enforce the contract, or to take the insurance company at its word and treat the contract as rescinded.

The rule that, after a wrongful forfeiture or repudiation of the policy, the insured may recover the premiums paid, has met with approval and has been adopted as the rule of damages in several other jurisdictions.

Reference may be made to *Alabama Gold Life Ins. Co. v. Garmany*, 74 Ga. 51; *Supreme Council American Legion of Honor v. Jordan*, 117 Ga. 808, 45 S. E. 33; *People's Mut. Ins. Fund v. Bricken*, 92 Ky. 297, 17 S. W. 625; *Union Cent. Life Ins. Co. v. Poettker*, 5 Ohio Dec. 263; *Gass v. United States Life Ins. Co.*, 3 Ohio N. P. 216, 4 S. & C. P. Dec. 234; *Insurance Co. v. Tullidge*, 39 Ohio St. 240; *Thompson v. New York Life Ins. Co.*, 21 Or. 466, 28 Pac. 628; *McCall v. Phoenix Mut. Life Ins. Co.*, 9 W. Va. 237, 27 Am. Rep. 558; *True v. Bankers' Life Ass'n*, 78 Wis. 287, 47 N. W. 520. And see *Iowa Life Ins. Co. v. Eastern Mut. Life Ins. Co.*, 63 N. J. Law, 439, 43 Atl. 720, where the principle is apparently approved, though recovery was denied on other grounds.

Abell v. Penn Mut. Life Ins. Co., 18 W. Va. 400, has been cited as denying the right to recover premiums. Though apparently opposed to the *McCall Case*, it may in fact be clearly distinguished. There was, in this case, an actual forfeiture for nonpayment of premiums; the failure being due to nonintercourse during the Civil War. The court held that the company had the right to retain the actual cost of the insurance during the years the policy was in force. It would seem, therefore, that the company could not retain any profit which may have been included in the premiums, but that the insured could recover such portion of the premiums as is in excess of the actual cost.

(b) Contrary doctrine—New York.

In New York, after some years of uncertainty, the courts have finally taken a position in opposition to the right to recover premiums. In *Fisher v. Hope Mut. Life Ins. Co.*, 69 N. Y. 161, and in *Meade v. St. Louis Mut. Life Ins. Co.*, 51 How. Prac. 1, recovery of premiums was allowed. In the latter case the insurance company transferred its assets to another company and ceased to do business. The court held that this was a violation of its contract with the insured, giving him the right to rescind and recover the whole amount of premiums paid, with interest, as money had and received for his benefit. The company was a Missouri corporation, but the court does not appear to have based its decision on that fact, as it is held to be immaterial whether the contract is construed

as a New York or a Missouri contract. In *Hayner v. American Popular Life Ins. Co.*, 36 N. Y. Super. Ct. 211, the insured was held to have a right of action in equity to have the policy, which had been canceled, decreed to be in life and in full force.

The tendency to repudiate the doctrine that premiums are recoverable was crystallized in *People v. Security Life Insurance & Annuity Co.*, 78 N. Y. 114, 7 Abb. N. C. 198, 34 Am. Rep. 522, where the court laid down the general principle that the annual premium paid on a life policy is not paid solely for insurance for the year in which it is paid, but each premium may be regarded as part of the consideration for the entire insurance for life, or as payment for the insurance for the year, and the right to have the insurance continued upon payment of the same premium thereafter. The company had become insolvent, and the court held that this was a breach of the contract, for which the insured was entitled to recover. The measure of damages, however, was held, not to be the premiums paid, but the equitable value of the policy, to be measured by the excess of premiums paid during the years of the life of the policy over what was required to carry the risk for those years. The question may be said to have been settled in New York by the decision in *Speer v. Phoenix Mut. Life Ins. Co.*, 36 Hun, 322, where the Supreme Court, in opposition to the rule laid down in the *McKee* and *McAden* Cases, held that on the wrongful forfeiture of the policy the measure of damages is, not the amount of premiums paid, but, if the life is still insurable, the difference between the present value of the premiums he would have had to pay to keep the policy in force and the present value of the premiums he would have to pay on a new policy. If the life is not insurable, the measure of damages is the actual value of the policy at the time of the breach. The reasoning is that there was not a total failure of consideration for the premiums paid, that the insured had received a benefit during the continuance of the insurance, and that the real contract broken was the insured's right to have the policy continued in force at the same premium.

The later New York cases, though not in express terms following the *Speer* Case, are apparently decided on similar grounds. *Skudera v. Metropolitan Life Ins. Co.*, 17 Misc. Rep. 367, 39 N. Y. Supp. 1039; *Palmer v. Metropolitan Life Ins. Co.*, 47 N. Y. Supp. 347, 21 App. Div. 287; *Keyser v. Mutual Reserve Fund Life Ass'n*, 70 N. Y. Supp. 82, 60 App. Div. 297; *Langan v. American Legion of Honor*, 70 N. Y. Supp. 663, 34 Misc. Rep. 629.

(1) Same—Indiana.

The doctrine that the insured is entitled to recover the premiums paid on wrongful forfeiture by the company has been directly repudiated in Indiana. In *Continental Life Ins. Co. v. Houser*, 89 Ind. 258, the court holds that, as the policy was valid in its inception and for a time the risk attached, premiums cannot be recovered, basing the decision on the general rule that where a risk has once attached there can be no recovery of premiums. That there should be some remedy in cases of wrongful forfeiture is admitted, but what the remedy should be is not decided. This decision was adhered to in a subsequent appeal of the same case, reported in 111 Ind. 266, 12 N. E. 479, and has been followed in *Standley v. Northwestern Mut. Life Ins. Co.*, 95 Ind. 254, where it was attempted to set off the premiums on a policy wrongfully forfeited in an action to recover money loaned to the insured by the company, and in *Metropolitan Life Ins. Co. v. McCormick*, 49 N. E. 44, 19 Ind. App. 49, 65 Am. St. Rep. 392. The reasoning in these cases seems to be that to allow a recovery of the premiums would in effect compel the insurer to carry the risk from the issuance of the policy to the time of cancellation without compensation, and that, as the risk had attached, the premium was earned. It is to be noted, however, that the cases cited in support of this rule are fire insurance cases.

(2) Same—Kansas.

Mound City Mut. Life Ins. Co. v. Twining, 12 Kan. 475, has been cited as opposed to the rule laid down in the *McKee* Case. But it is to be observed that the *Twining* Case did not involve a question of wrongful forfeiture. The policy provided for the issue of a paid-up policy after one premium had been paid. The insured having defaulted and died, suit was brought for the full amount of the policy. The court held that the holder of the policy was entitled to recover the amount of the paid-up policy to which the insured was entitled by the payment of one premium.

The doctrine that recovery of premium is not the proper remedy is, however, established in the case of *Barney v. Dudley*, 42 Kan. 212, 21 Pac. 1079, 16 Am. St. Rep. 476. The rule laid down is that the measure of damages is the difference between the rate of premium paid by the insured and the rate another company of equal credit and standing would charge for a new policy on the same life, the difference to be calculated on the expectancy. The court bases

its decision on the ground that to allow a recovery of premium would be to allow the insured free insurance during the time the policy had been in force.

(k) Same—Other jurisdictions.

In *Universal Life Ins. Co. v. Cogbill*, 30 Grat. (Va.) 72, the Supreme Court of Virginia held that one who has taken out a policy of insurance on his own life for the benefit of his wife, may, on the failure of the company, maintain an action in his own name to recover the premiums he has paid. The real issue, however, was as to the defect of parties, and the case cannot, therefore, be regarded as deciding that a recovery of premiums would be allowed. The rule finally adopted by the courts of Virginia is a modification of the rules prevailing in New York and Kansas. Thus, in *Universal Life Ins. Co. v. Binford*, 76 Va. 103, the court held that on the insolvency of the company the insured is entitled to recover such an amount as will purchase from a solvent company a policy of the same kind for the same amount and the same rate of premium. The court declined to pass on what would be the measure of damages if the insured had become uninsurable before the insolvency. The rule was also laid down in *Guy v. Globe Ins. Co.*, 9 Ins. Law J. 466, decided in the circuit court of the city of Richmond, to be that on the insolvency of the company, if the insured's life was reinsurable, he was entitled to recover the equitable value; that is to say, the present cost price of an annuity for the amount of the difference between the premium required by the policy and the premium which a solvent company would, at his advanced age, require of the insured for a similar policy. If, however, the insured's life was not reinsurable, the court held that he was entitled to a return of the premiums paid, with interest thereon.

Reference may also be made to *Clemmitt v. New York Life Ins. Co.*, 76 Va. 355, where it was held that on the repudiation of a life policy the value of the policy was to be estimated as of the date of the repudiation of the contract, less the unpaid premiums.

In *Ebert v. Mutual Reserve Fund Life Ass'n*, 81 Minn. 116, 83 N. W. 506 (on rehearing 84 N. W. 457), the rule that the measure of damages on wrongful cancellation of the policy is the amount of the premiums paid by the insured was rejected as against the weight of authority, and the rule laid down that the measure of damages is the actual damage resulting at the date of the wrongful cancellation, allowance being made for the insurance already

had. The court does not, however, specify what would be the proper mode of estimating the damages, and concedes the difficulty of determining the proper method. It was this difficulty that led the Supreme Court of North Carolina to reject the rule of the Ebert Case (*Strauss v. Mutual Reserve Fund Life Ass'n*, 126 N. C. 971, 36 S. E. 352, 54 L. R. A. 605, 83 Am. St. Rep. 699; *Id.*, 128 N. C. 465, 39 S. E. 55, 54 L. R. A. 609, 83 Am. St. Rep. 703), and adhere to the rule, theretofore announced in North Carolina, that the premiums paid determined the measure of damages.

In Massachusetts the issue seems never to have been fairly raised. In *Howland v. Continental Life Ins. Co.*, 121 Mass. 499, the court refused to allow the insured to recover the premiums, but the decision appears to have been based on the ground that he did not elect to treat the policy as rescinded in time; 11 months having been allowed to elapse. In *Porter v. American Legion of Honor*, 183 Mass. 326, 67 N. E. 238, where a by-law was passed reducing the amount of the benefit payable under the certificate, the court held that such amendment was ineffectual to reduce the amount, and there was therefore no breach of the contract which would entitle the insured to recover the assessments he had paid.

The Tennessee courts do not approve the rule adopted in Missouri and Pennsylvania. In *Knickerbocker Ins. Co. v. Heidel, 8 Lea* (Tenn.) 488, though the issue was not squarely raised, the court held that the insured should recover only the equitable proportion of the premiums after paying for the risk actually carried. In *Smith v. St. Louis Mut. Life Ins. Co.*, 2 Tenn. Ch. 727, the rule was laid down that on the insolvency of the company the insured is entitled to recover the equitable value of his policy. This was stated to be the difference between the cost of a new policy and the present value of the premiums yet to be paid on the policy at the date of the breach.

It has been held in Maryland that on the insolvency of an accident company a policy holder is entitled to recover the unearned premiums. *Boston & A. R. Co. v. Mercantile Trust & Deposit Co. of Baltimore*, 82 Md. 535, 84 Atl. 778, 88 L. R. A. 97.

Day v. Connecticut Life Ins. Co., 45 Conn. 480, 29 Am. Rep. 693, has been regarded as denying the right to recover the premiums. The case was, however, based on a theory somewhat different from the cases heretofore considered, in that the policy holder, without electing to rescind the contract, brought his action on an implied promise by the company to receive the premiums and keep the

policy in force. The court held that the law did not imply such a promise, and that the action could not be maintained, laying down the rule that the insured might (1) elect to consider the policy at an end and recover its just value; (2) institute an equitable proceeding to have the policy adjudged in force, in which case the question of forfeiture could be determined; or (3) tender the premium and wait until the policy became payable by its terms, and then try the question of forfeiture in a proper action on the policy. It is to be noted that *McKee v. Insurance Co.*, 28 Mo. 383, 75 Am. Dec. 129, is cited apparently with approval.

IX. ASSIGNMENT OF THE POLICY.

- 1. Assignment of policy—Insurance of property.**
 - (a) General principles.
 - (b) Insurance running with the property.
 - (c) Necessity of consent of insurer.
 - (d) Same—Collateral assignment.
 - (e) Form and sufficiency of assignment.
 - (f) Sufficiency of consent.
 - (g) Effect of assignment—Right to maintain action.
 - (h) Same—Equities and defenses.
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- 2. Assignment of life insurance policies—Right to assign.**
 - (a) What law governs.
 - (b) Assignability in general.
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- 3. Requisites, construction, and effect of assignments of life policies.**
 - (a) Requisites in general.
 - (b) Necessity for written assignment—Formal requisites.
 - (c) Delivery.
 - (d) Consent of insurer.
 - (e) Fraud as between parties.
 - (f) Fraud as against creditors.
 - (g) Construction in general.
 - (h) Right to redeem—Surrender and conversion.
 - (i) Equities and defenses.
 - (j) Rights growing out of assignment by assignee.
 - (k) Pleading and practice.

1. ASSIGNMENT OF POLICY—INSURANCE OF PROPERTY.

- (a) General principles.
- (b) Insurance running with the property.
- (c) Necessity of consent of insurer.
- (d) Same—Collateral assignment.
- (e) Form and sufficiency of assignment.
- (f) Sufficiency of consent.
- (g) Effect of assignment—Right to maintain action.
- (h) Same—Equities and defenses.
- (i) Questions of practice.

(a) General principles.

An assignment of a policy of insurance with the consent of the company to a purchaser of the interest of the insured constitutes

a new contract between the assignee and the company; the terms of the policy constituting the basis of the new contract.

Reference may be made to the following cases: *Spare v. Home Mut. Ins. Co.* (C. C.) 17 Fed. 568; *In re Hamilton* (D. C.) 102 Fed. 683; *Virginia-Carolina Chemical Co. v. Sundry Ins. Cos.* (C. C.) 108 Fed. 451; *Manchester Fire Assur. Co. v. Glenn*, 13 Ind. App. 365, 41 N. E. 847, former report 40 N. E. 926, 55 Am. St. Rep. 225; *Simeral v. Dubuque Mut. Fire Ins. Co.*, 18 Iowa, 319; *Home Ins. Co. v. Allen*, 13 Ky. Law Rep. 95; *Leavitt v. Western Marine & Fire Ins. Co.*, 7 Rob. (La.) 351; *Wilson v. Hill*, 3 Metc. (Mass.) 66; *Fogg v. Middlesex Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 337; *Bullman v. North British & Mercantile Ins. Co.*, 159 Mass. 118, 34 N. E. 169; *New England Loan & Trust Co. v. Kenneally*, 38 Neb. 895, 57 N. W. 759; *Kase v. Hartford Fire Ins. Co.*, 58 N. J. Law, 34, 32 Atl. 1057; *Hayes v. Saratoga & W. Fire Ins. Co.* (N. Y.) 71 N. E. 1131, affirming 80 N. Y. Supp. 888, 81 App. Div. 287; *Imperial Fire Ins. Co. v. Dunham*, 117 Pa. 460, 12 Atl. 668, 2 Am. St. Rep. 686; *Wood v. Rutland & Addison Mut. Fire Ins. Co.*, 31 Vt. 552. But see *Gilliat v. Pawtucket Mut. Fire Ins. Co.*, 8 R. I. 282, 91 Am. Dec. 229.

Such an assignment may also be made to a mortgagee, he being substituted in the place of the mortgagor originally insured (*Rollins v. Columbian Mut. Fire Ins. Co.*, 25 N. H. 200). And where consent has been given by the company to an assignment, it cannot object that the assignee has only the equitable, and not the legal, title to the property (*Breckinridge v. American Cent. Ins. Co.*, 87 Mo. 62). Nor is there any legal obstacle to a transfer of a portion of the insurance to the purchaser of a portion of the property, or of a part interest therein.

Bullman v. North British & Mercantile Ins. Co., 159 Mass. 118, 34 N. E. 169; *Manchester Fire Assur. Co. v. Glenn*, 13 Ind. App. 365, 40 N. E. 926, 41 N. E. 847, 55 Am. St. Rep. 225; *Same v. Koerner*, 13 Ind. App. 372, 40 N. E. 1110, 41 N. E. 848, 55 Am. St. Rep. 231.

But there is another species of assignment of a policy. If the original insured retains an interest in the property, he may assign the policy with the intention of making the loss following the destruction of that interest payable to another. Manifestly such a transaction is entirely different from an assignment of the policy as such, with the intention of covering the interest of the assignee. The interest covered in the transaction under consideration usually remains the same, or at least such as was contemplated when the policy issued. The only effect is to render the assignee the appointee to receive payment in case of loss. The cases illustrating

this rule have usually been based upon a transfer of the policy as collateral security for a debt directly secured by the property covered.

Bergson v. Builders' Ins. Co., 38 Cal. 541; *Wakefield v. Martin*, 3 Mass. 558; *Fogg v. Middlesex Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 337; *Phillips v. Merrimack Mut. Fire Ins. Co.*, Id. 350; *Commonwealth v. National Ins. Co.*, 113 Mass. 514; *Merrill v. Colonial Mut. Fire Ins. Co.*, 169 Mass. 10, 47 N. E. 439, 61 Am. St. Rep. 268; *Grosvenor v. Atlantic Fire Ins. Co.*, 17 N. Y. 891; *Delahunt v. Aetna Ins. Co.*, 97 N. Y. 537; *Frink v. Hampden Ins. Co.*, 45 Barb. (N. Y.) 384, 31 How. Prac. 80, 1 Abb. Prac. (N. S.) 843; *Brown v. Commercial Fire Ins. Co.*, 21 App. D. C. 325; *Shotwell v. Jefferson Ins. Co.*, 18 N. Y. Super. Ct. 247; *Southern Fertilizer Co. v. Reams*, 105 N. C. 283, 11 S. E. 467; *State Mut. Fire Ins. Co. v. Roberts*, 31 Pa. 438; *Gourdon v. Insurance Co. of N. A.*, 3 Yeates (Pa.) 827; *Insurance Co. of Pa. v. Phoenix Ins. Co.*, 71 Pa. 31; *Stainer v. Royal Ins. Co.*, 6 Northum. Co. R. (Pa.) 862. See, also, *Whiting v. Burkhardt*, 178 Mass. 535, 60 N. E. 1, 52 L. R. A. 788, 86 Am. St. Rep. 503, where the assignment was by a mortgagee to whom the loss was made payable.

An assignment of the property to a receiver in bankruptcy, followed by an assignment of the policy with the company's consent, has been treated, not as a collateral assignment, but as an absolute one, operating as a new contract.

In *re Hamilton* (D. C.) 102 Fed. 683; *Dube v. Mascoma Mut. Fire Ins. Co.*, 64 N. H. 527, 15 Atl. 141, 1 L. R. A. 57.

But in *Fuller v. New York Fire Ins. Co.*, 67 N. E. 879, 184 Mass. 12, it was said that, while failure to obtain the company's consent to a transfer of the policies to the trustee in bankruptcy might forfeit them, yet it would not render the transfer invalid; a statement not easily reconcilable with the theory of absolute assignment. The case, however, turns on the fact that the loss occurred prior to the transaction.

(b) Insurance running with the property.

Since an assignment of the policy to the purchaser of the property with the consent of the company is in effect a new contract, and since the consent of the company is essential to the validity of the assignment, it follows that a policy of insurance will not run with the subject insured, and a purchaser of the property as such has no rights in the insurance.

King v. Preston, 11 La. Ann. 95; *Wilson v. Hill*, 3 Metc. (Mass.) 66; *Doggett v. Blanke*, 70 Mo. App. 499; *Lahiff v. Ashuelot Ins. Co.*,

60 N. H. 75; Wyman v. Prosser, 36 Barb. (N. Y.) 368; Walker v. Firemen's Ins. Co., 2 Handy, 256, 12 Ohio Dec. 431; Gilbert v. Port, 28 Ohio St. 276; Olyphant Lumber Co. v. Peoples' Mut. Live Stock Ins. Co., 4 Pa. Super. Ct. 100.

Rev. Codes N. D. 1899, § 4494, provides that the transfer of the property insured suspends the policy until the same person becomes the owner of both the policy and the thing insured.

And the same principle has been held applicable to a transfer of the mortgage by a mortgagee, to whom the loss has been made payable (Kase v. Hartford Fire Ins. Co., 58 N. J. Law, 34, 32 Atl. 1057).

It is commonly provided in fire policies that the insurance shall inure to the legal representatives of the person named as insured.

In the standard policies of Maine, Massachusetts, and Minnesota, the policy states that the company "does insure ——— and ——— legal representatives." In the standard policies of New York, Connecticut, Iowa, Michigan, Missouri, New Jersey, North Carolina, North Dakota, Rhode Island, South Dakota, and Wisconsin, it is provided that, "where the word 'insured' occurs, it shall be held to include the legal representatives of the insured." And in Georgia it is provided by Code 1895, § 2106, that "a transfer of the property or policy by operation of law or under the order of the court will confer on the assignee all the rights of the assured."

But it has been held that the death of a member of a mutual assessment company, organized for the purpose of protecting its members in case of loss by fire, etc., and the protection of which was to continue so long as the insured continued to be a member and complied with the by-laws, terminated the insurance, so that the property was not protected in the hands of the member's son, to whom it had been devised (Cook v. Kentucky Growers' Ins. Co., 72 S. W. 764, 24 Ky. Law Rep. 1956).

(c) Necessity of consent by insurer.

It follows, from the nature of an assignment, that an assignment of the policy as such, without the consent of the insurer will be invalid. To hold otherwise would be to force the company into a new and separate contract, formed without the essential element of its consent.

Spare v. Home Mut. Ins. Co. (C. O.) 17 Fed. 568; Bergson v. Builders' Ins. Co., 38 Cal. 541; Traders' Ins. Co. v. Newman, 120 Ind. 54, 22 N. E. 428; Simeral v. Dubuque Mut. Fire Ins. Co., 18 Iowa, 319; Leavitt v. Western Marine & Fire Ins. Co., 7 Rob. (La.) 351; Lyford

v. Connecticut Fire Ins. Co., 58 Atl. 916, 99 Me. 273; Fogg v. Middlesex Mut. Fire Ins. Co., 10 Cush. (Mass.) 337; Tate v. Citizens' Mut. Fire Ins. Co., 18 Gray (Mass.) 79; White v. Robbins, 21 Minn. 370; New England Loan & Trust Co. v. Kenneally, 38 Neb. 895, 57 N. W. 759; Kase v. Hartford Fire Ins. Co., 58 N. J. Law, 34, 32 Atl. 1057; Hobbs v. Memphis Ins. Co., 1 Sneed (Tenn.) 444.

This rule has been held applicable to an assignment of the policy by a corporation, as a part of its total assets, to a new corporation having the same stockholders and continuing the business of the old corporation. It was pointed out, however, that the transaction was more than a mere change of name, since the old corporation still continued as a separate organization. (Miles Lamp Chimney Co. v. Erie Fire Ins. Co. [Ind. Sup.] 73 N. E. 107.)

But the rule requiring the consent of the company has no application where the policy is so framed as to cover the interest, not only of the person named as insured, but of any subsequent purchaser of the property to whom the policy may be subsequently assigned or transferred. Under such circumstances, the ordinary printed requirements for notice to the company of an assignment of the policy become inoperative.

Duncan v. China Mut. Ins. Co., 129 N. Y. 237, 29 N. E. 76, affirming (Super. N. Y.) 14 N. Y. Supp. 301; Rogers v. Traders' Ins. Co., 6 Paige (N. Y.) 583.

And where the contract was in effect an insurance against the nonpayment of a note, and was conditioned to be payable to "bearer," it was held that it made no difference when or in what manner the bearer came into possession of the policy (Ellicott v. United States Ins. Co., 8 Gill & J. [Md.] 166). So, also, where it was provided in the policy that the grantee of the property, having the policy assigned to him, might upon application have it ratified and confirmed to him within 30 days, it was held that the policy was applicable to the interest of the assignee, so as to cover a loss by fire occurring within 30 days following the sale of the property, but before the application for the confirmation of the assignment had reached the company. The company could not, the court argued, arbitrarily refuse its consent. (Boynton v. Farmers' Mut. Fire Ins. Co., 43 Vt. 256, 5 Am. Rep. 276.) And in Marshall v. Franklin Fire Ins. Co., 176 Pa. 628, 35 Atl. 204, 34 L. R. A. 159, it was held that the company could not arbitrarily refuse its consent to an assignment, to a purchaser of the property, of a policy effecting a perpetual insurance on the property, and that it was liable for

the cost of procuring other insurance in lieu of that wrongfully refused. But where the policy provided that it should be void if the policy was transferred without its consent, and also stipulated that the company might sign a consent to an assignment of the policy to a purchaser of the property, if it were asked within 10 days after a sale, it was held that the company was not precluded from taking advantage of the condition against alienation. The meaning was that consent to an assignment would be given 10 days after a sale to which the company has consented (*Home Ins. Co. v. Lindsey*, 26 Ohio St. 348).

In case of reinsurance, the original insured need, of course, look for consent to an assignment no further than the company with which he contracted (*Faneuil Hall Ins. Co. v. Liverpool & London & G. Ins. Co.*, 153 Mass. 83, 26 N. E. 244, 10 L. R. A. 423).

(d) Same—Collateral assignment.

In the absence of a special clause to the contrary, there is no reason why a collateral assignment without the consent of the company should not be valid as between the parties, operating, the courts say, as an "equitable assignment."

Bergson v. Builders' Ins. Co., 88 Cal. 541; *Wakefield v. Martin*, 8 Mass. 558; *Shotwell v. Jefferson Ins. Co.*, 18 N. Y. Super. Ct. 247; *Imperial Ins. Co. v. Wolf*, 21 Ohio Cir. Ct. R. 202, 11 O. C. D. 815; *Insurance Co. v. Phoenix Ins. Co.*, 71 Pa. 31. See, also, *Earl v. Shaw*, 1 Johns. Cas. (N. Y.) 318, 1 Am. Dec. 117; *O'Brien v. Prescott Ins. Co.*, 57 Hun, 589, 11 N. Y. Supp. 125, reversed on other grounds 134 N. Y. 28, 31 N. E. 265—cases in which it does not clearly appear whether the assignment was absolute or in the nature of an appointment.

It has, indeed, been held that a transfer as collateral is not an "assignment," within the meaning of a provision that an "assignment" would not be valid without the consent of the company.

Insurance Co. of Pennsylvania v. Phoenix Ins. Co., 71 Pa. 31, affirming 8 Phila. 32. See, also, *Whiting v. Burkhardt*, 178 Mass. 535, 60 N. E. 1, 52 L. R. A. 788, 86 Am. St. Rep. 503, where the assignment was by a mortgagee, to whom the loss was made payable.

Therefore a requirement that the consent of the company must be obtained to render valid any assignment to the purchaser of the policy has no application to a collateral assignment.

Phillips v. Merrimack Mut. Fire Ins. Co., 10 Cush. (Mass.) 350; *Bergson v. Builders' Ins. Co.*, 88 Cal. 541.

A pledge of a policy as security for a debt is similar in its effects to an assignment as collateral, and, like it, is valid without the consent of the company, even though such consent is necessary to the validity of an assignment (*Ellis v. Kreutzinger*, 27 Mo. 311, 72 Am. Dec. 270). And still less is the company's consent necessary where the pledge is made by a mortgagee or his assignee, to whom the loss has been made payable.

Dickey v. Pocomoke City Nat. Bank, 89 Md. 280, 43 Atl. 33; *Key v. Continental Ins. Co.*, 101 Mo. App. 344, 74 S. W. 162; *Breeyear v. Rockingham Farmers' Mut. Fire Ins. Co.*, 52 Atl. 860, 71 N. H. 445.

(c) Form and sufficiency of assignment.

So far as the assignment itself is concerned, a parol assignment will be sufficient in equity, though the by-laws require it to be in writing. A compliance with the by-law would be necessary to vest the complete legal title, but not to justify equitable relief.

Cannon v. Farmers' Mut. Fire Ass'n of Warren County, 58 N. J. Eq. 102, 43 Atl. 281. And see, also, *O'Brien v. Prescott*, 57 Hun, 589, 11 N. Y. Supp. 125, reversed on other grounds 134 N. Y. 28, 31 N. E. 265. It does not, however, clearly appear in such case whether the assignment was collateral or absolute.

But where it was provided by statute ¹ that a contract of insurance must be in writing, it was held that, since an assignment to a purchaser constituted a new contract between the company and the assignee, it also must be in writing (*St. Paul Fire & Marine Ins. Co. v. Brunswick Grocery Co.*, 39 S. E. 483, 113 Ga. 786).

An indorsement on the policy, making the loss payable to another than insured, will not transfer the insurance to the person so named, but will merely render him an appointee to receive the money.

Franklin Ins. Co. v. Wolff, 23 Ind. App. 549, 54 N. E. 772; *Fogg v. Middlesex Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 337; *Minturn v. Manufacturers' Ins. Co.*, 10 Gray (Mass.) 501; *Franklin Sav. Inst. v. Central Mut. Fire Ins. Co.*, 119 Mass. 240; *Griswold v. American Cent. Ins. Co.*, 70 Mo. 654, affirming 1 Mo. App. 97; *Froehly v. North St. Louis Mut. Fire Ins. Co.*, 32 Mo. App. 302; *Williamson v. Michigan Fire & Marine Ins. Co.*, 86 Wis. 393, 57 N. W. 46, 39 Am. St. Rep. 906. But see *Gilliat v. Pawtucket Mut. Fire Ins. Co.*, 8 R. I. 282, 91 Am. Dec. 229.

It has been held that such an indorsement will operate as a collateral assignment of the policy, if, indeed, there is any difference

¹ Civ. Code Ga. §§ 2022, 2089.

at all between the effect of such indorsement and a collateral assignment.

Glover v. Lee, 140 Ill. 102, 29 N. E. 680; *Same v. Wells*, 40 Ill. App. 350; *Keeler v. Niagara Fire Ins. Co.*, 16 Wis. 523, 84 Am. Dec. 714.

But a declaration merely setting out the policy, with such an indorsement on its back, without averring that the indorsement was made by the company, or that insured requested it or consented to it, was held in *Commercial Ins. Co. v. Treasury Bank*, 61 Ill. 482, 14 Am. Rep. 73, to be insufficient to show any right in plaintiff to maintain the action. An indorsement in blank has been held sufficient to relieve the company from liability to the insured; the company having paid the cancellation valuation of the policy to the person to whom it had been delivered by the insured (*Vanderslice v. Royal Ins. Co.*, 14 Montg. Co. Law Rep'r, 96, 7 Pa. Dist. R. 51). And an indorsement assigning "the interest of the insured as owner of property covered by the within policy" has been held to sufficiently show an intention to assign the insured's interest in the policy (*Rines v. German Ins. Co.*, 78 Minn. 46, 80 N. W. 839).

Where, without any actual assignment of the policy, it was agreed by the company that the insurance should inure to the benefit of the purchaser of the property, it was held that such agreement would not amount to an assignment within the meaning of a statute,² fixing the rights of the parties after an assignment and consent thereto by the directors (*Bodle v. Chenango County Mut. Ins. Co.*, 2 N. Y. 53). An agreement by a debtor to keep property in which his creditor has an interest insured, followed by the taking out of a policy in the name of a third person, with assurance to the creditor that his interest would be protected, has been deemed not to amount to an equitable assignment of the policy (*Dickenson v. Phillips*, 1 Barb. [N. Y.] 454).

An assignment generally of all property for the benefit of creditors will carry with it the insurance policies of the debtor.

Fuller v. N. Y. Fire Ins. Co., 184 Mass. 12, 67 N. E. 879; *Dube v. Mascoma Mut. Fire Ins. Co.*, 64 N. H. 527, 15 Atl. 141, 1 L. R. A. 57; *In re Preston's Estate*, 1 Chest. Co. Rep. (Pa.) 517. See, also, *In re Hatfield's Estate*, 12 Pa. Co. Ct. R. 251, 2 Pa. Dist. R. 17.

But in *Kitts v. Massasoit Ins. Co.*, 56 Barb. (N. Y.) 177, a sale of all the interest of the vendor in partnership assets was held not

² Laws N. Y. 1836, c. 41.

to carry with it the insurance policies; no mention being made of them either in the instrument of sale or in the mortgage to the vendor. And in *Jackson v. Millspaugh*, 103 Ala. 175, 15 South. 576, a conveyance of the "furniture, rights, contracts, and effects" owned by the vendors in connection with their hotel was deemed not to amount to a sale of the policies with an obligation on the vendor's part to procure the company's consent thereto. Delivery, however, is not essential to an assignment as security for a debt (*Spring v. South Carolina Ins. Co.*, 8 Wheat. 268, 5 L. Ed. 614). Likewise, in *McDonald v. Daskam*, 116 Fed. 276, 53 C. C. A. 554, a recital in a note that a policy already payable to the payee of the note as a mortgagee was deposited with the payee as collateral, was held, when taken in connection with a prior agreement of all the parties, to constitute an equitable assignment of the policy, rather than a pledge, requiring actual delivery as an essential to its validity. But an assignment of a policy as security for a debt will fall within a statute,³ providing that every contract by which the possession of personal property is transferred as security only is to be deemed a pledge (*Savings Bank v. Middlekauff*, 113 Cal. 463, 45 Pac. 840).

(f) Sufficiency of consent.

The consent of the secretary of the company to an assignment of the policy will bind the company, at least where such act is ratified by an acceptance of the premium note; and this will be true, though it is provided that all policies should be signed by the president (*New England Marine Ins. Co. v. De Wolf*, 8 Pick. [Mass.] 56). So, also, though the company is mutual, and the charter requires a ratification by the directors of all transactions, the secretary may nevertheless be considered as the agent of the directors (*Durar v. Hudson County Ins. Co.*, 24 N. J. Law, 171). But in *Farmers' Mut. Ins. Ass'n of Georgia v. Price*, 37 S. E. 427, 112 Ga. 264, where the company had no notice of a sale until long afterwards, it was held that the consent of the president to the assignment was entirely ineffectual to render valid in the hands of the assignee a policy requiring the directors to give consent to such assignment.

A local agent, with power to effect contracts of insurance, can bind the company by his consent to an assignment (*German Ins. Co. v. Rounds*, 35 Neb. 752, 53 N. W. 660). And it has been held that, in the absence of a special restriction on the agent's power, this

³ Civ. Code Cal. § 2987.

will be true, though there was a lapse of time between the transfer of the property and the indorsement of the consent to the assignment (*Imperial Fire Ins. Co. v. Dunham*, 117 Pa. 460, 12 Atl. 668, 2 Am. St. Rep. 686). On the other hand, an agent authorized merely to solicit insurance cannot bind the company by a consent to an assignment.

Tate v. Citizens' Mut. Fire Ins. Co., 13 Gray (Mass.) 79; *Stringham v. St. Nicholas Ins. Co.*, *42 N. Y. 280, 4 Abb. Dec. 315, 37 How. Prac. 365, 5 Abb. Prac. N. S. 80.

But, of course, such an agent may be made the medium of communication with the insured, so that his acts will be in reality the acts of the company, and binding upon it (*Medearis v. Anchor Mut. Fire Ins. Co.*, 104 Iowa, 88, 73 N. W. 495, 65 Am. St. Rep. 428). A broker, who is shown not to have been the agent of the company, cannot bind the company, though it is provided by statute * that an agent of the company shall bind the company in all matters relating to insurance (*Richmond v. Phoenix Assur. Co.*, 88 Me. 105, 33 Atl. 786).

The unearned premium has been considered as sufficient consideration for the new contract effected by the company's consent to an assignment (*Wilson v. Hill*, 44 Mass. 66). Where, however, by the rules of the company, the execution of a new premium note or guarantee was required before the issuance to the assignee of the policy with the company's consent, it was held that the property was not insured while the policy was being retained by the company, pending the execution of such obligation.

Mays v. Continental Ins. Co., 7 Ky. Law Rep. 524; *Cranberry Mut. Fire Ins. Co. v. Hawk* (N. J. Ch.) 14 Atl. 745.

But, if the acts of the directors indicate that it was so intended, the original deposit note given by the assignor may be regarded as the security "to the satisfaction of the directors," required to be given by the assignee (*Durar v. Hudson County Ins. Co.*, 24 N. J. Law, 171).

Though the policy is forfeitable at the time of the assignment by reason of the nonpayment of the premium note, yet, if the company agrees to the assignment on the promise of the purchaser to pay such premium, the contract will be founded on a valid consideration

* Rev. St. Me. 1883, c. 49.

(*Hughson v. Hardy*, 62 Minn. 209, 64 N. W. 389). And it has been held that, even though the insurance had become nonexistent by a lapse of time between a transfer of the property and the obtaining of consent to an assignment of the policy, yet the company, by giving its consent, would be estopped to urge that there was a lack of consideration therefor.

Pratt v. New York Central Ins. Co., 55 N. Y. 505, 14 Am. Rep. 304, affirming 64 Barb. 589. See, also, *In re Hamilton* (D. C.) 102 Fed. 683, *Manchester v. Guardian Assur. Co.*, 151 N. Y. 88, 45 N. E. 381, 56 Am. St. Rep. 600, and *Imperial Fire Ins. Co. v. Dunham*, 117 Pa. 460, 12 Atl. 668, 2 Am. St. Rep. 686.

But in *McCluskey v. Providence Washington Ins. Co.*, 126 Mass. 306, it was held that, where a policy is void in its beginning for lack of insurable interest, a consent to an assignment to one who purchased the property prior to the issuance of the policy is without consideration; and this is true, though at the time of the assignment the company knew that the sale had been made prior to the issuance of the policy.

A consent to a transfer of the property will not amount to a consent to the transfer of the policy, so as to give it effect in the hands of the purchaser, unless the company was informed that such was the purpose of the assignor and assignee (*Moffit v. Phenix Ins. Co.*, 11 Ind. App. 233, 38 N. E. 835). But, where the consent to the transfer of the policy was given, it was held to inure to the benefit of a co-owner of the assignee, though his name was not expressly mentioned (*Palatine Ins. Co. v. Boyd* [Tex. Civ. App.] 50 S. W. 643). An indorsement of a policy, making the loss payable to another than insured, may, if so intended, operate as a consent to an assignment of the policy, so that thereafter it will cover the interest of the assignee (*Queen Ins. Co. of America v. Block*, 58 S. W. 471, 22 Ky. Law Rep. 626). But consent to such indorsement, in and of itself, does not bind the company to an assignment as to a purchaser (*Minturn v. Manufacturers' Ins. Co.*, 10 Gray [Mass.] 501); and it is incumbent on the assignee to show that the company when making such indorsement, understood that the assignee was a purchaser, and that it was the intention that the purchaser should thereafter be covered (*Fogg v. Middlesex Mut. Fire Ins. Co.*, 10 Cush. [Mass.] 337). So, where the policy at the request of the insured was indorsed, "Loss, if any, payable to F.," who was a mortgagee, and subsequently the property was sold to G., and an entry made in the policy register, "Transfer to G.," it

was held that the company had accepted G. in the place of the insured, rather than in place of the appointee, F. (*Griswold v. American Cent. Ins. Co.*, 70 Mo. 654, affirming 1 Mo. App. 97).

A consent to an assignment, supposing it to be an absolute assignment, will not operate as a consent to an assignment as collateral; the policy providing that a special form shall be used for such purpose (*Lynde v. Newark Fire Ins. Co.*, 139 Mass. 57, 29 N. E. 222). But, in *Hoyt v. Hartford Fire Ins. Co.*, 26 Hun (N. Y.) 416, a transfer of the legal title to personal property worth less than the amount of the debt was held to constitute a sale, so that the form prescribed for an absolute assignment was properly used. And, where there was no provision as to the form of consent to a collateral assignment, consent to an absolute assignment was held sufficient to cover a collateral assignment.

Merrill v. Colonial Mut. Fire Ins. Co., 169 Mass. 10, 47 N. E. 439; *Imperial Ins. Co. v. Wolf*, 21 Ohio Cir. Ct. R. 202, 11 O. C. D. 815.

Where there was no requirement for a written consent to the assignment, acceptance by the company of the assignee in the place of the original insured, and the collection of premiums from him, was a sufficient consent to bind the company (*Wood v. Rutland & Addison Mut. Fire Ins. Co.*, 31 Vt. 552). And where the form adopted indicated the assent of the insurer, and a subsequent assessment was made on the assignee, it was held that the company was bound, though the form adopted did not follow the policy stipulation (*Davis v. Farmers' Mut. Fire Ins. Ass'n*, 45 S. E. 955, 134 N. C. 60). But, in *American Ins. Co. v. Gallagher*, 50 Ind. 209, the receipt of an installment of premium from the assignee by the local agent was deemed not to bind the company; it being understood that there were charges to be paid when the formal assignment was made on the policy.

It has been held that, under the doctrine of equitable estoppel, the company will be liable as for a breach of contract for a failure to comply with its promise to indorse on the policy its consent to the assignment (*Manchester v. Guardian Assur. Co.*, 45 N. E. 381, 151 N. Y. 88, 56 Am. St. Rep. 600). So, also, allegations of a promise to indorse the consent, and of a waiver of a written indorsement, have been considered sufficient (*German-American Ins. Co. v. Sanders*, 17 Ind. App. 134, 46 N. E. 535). But, in *Equitable Ins. Co. v. Cooper*, 60 Ill. 509, a mere promise to indorse the consent, without any statement that it need not be indorsed, was held insufficient.

And the mere fact that there is a blank form of assignment on the policy, and that the company has always before approved the assignments, does not constitute a contract by the company with an assignee of the policy (*Lyford v. Connecticut Fire Ins. Co.*, 58 Atl. 916, 99 Me. 273).

It should be noted that the whole question of the validity and sufficiency of the consent by the company to the assignment, such consent having been given after a forfeiture of the policy, either by a transfer of the property and unauthorized assignment of the policy or otherwise, has arisen most frequently in cases of forfeiture, and of waiver and estoppel as related thereto, and will be found more fully discussed in the briefs dealing with those questions.

(g) Effect of assignment—Right to maintain action.

A vendee of the property, to whom the policy has been assigned with the consent of the company, can maintain an action thereon in his own name.

Fogg v. Middlesex Mut. Fire Ins. Co., 10 Cush. (Mass.) 337; *Bullman v. North British & Mercantile Ins. Co.*, 159 Mass. 118, 34 N. E. 169; *Bodle v. Chenango County Mut. Ins. Co.*, 2 N. Y. 53 (decided under Laws 1836, c. 41, incorporating mutual companies); *Fowler v. New York Indemnity Ins. Co.*, 23 Barb. (N. Y.) 143 (decided under the statute giving a right of action to the real party in interest); *Harley v. Lebanon Mut. Ins. Co.*, 120 Pa. 182, 13 Atl. 833.

But see *Gilliat v. Pawtucket Mut. Fire Ins. Co.*, 8 R. I. 282, 91 Am. Dec. 229, *New England Fire & Marine Ins. Co. v. Wetmore*, 32 Ill. 221, and *Granger v. Howard Ins. Co.*, 5 Wend. (N. Y.) 200.

A similar holding was made in *Rollins v. Columbian Mut. Fire Ins. Co.*, 25 N. H. 200, where the contract was assigned to the mortgagee; he being substituted in the place of the mortgagor originally insured.

So, also, an assignment with the consent of the company to a mortgagee as collateral security will give such mortgagee a right of action in his own name.

Brown v. Commercial Fire Ins. Co., 21 App. D. C. 325; *Fogg v. Middlesex Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 337; *Phillips v. Merrimack Mut. Fire Ins. Co.*, Id. 350; *Merrill v. Colonial Mut. Fire Ins. Co.*, 169 Mass. 10, 47 N. E. 439; *Marts v. Cumberland Mut. Fire Ins. Co.*, 44 N. J. Law, 478 (decided under Revision, p. 85, § 19, providing that any agreement for the payment of money shall be assignable); *Southern Fertilizer Co. v. Reams*, 105 N. C. 283, 11 S. E. 467.

But see *Wood v. Rutland & Addison Mut. Fire Ins. Co.*, 31 Vt. 552, and *Powers v. New England Fire Ins. Co.*, 69 Vt. 494, 38 Atl. 148.

That an assignee can maintain action is a statutory provision in New Hampshire (Pub. St. c. 170) and Pennsylvania (P. & L. Dig. 1894, col. 2377, § 73). See, also, Sand. & H. Dig. (Ark.) § 4142, as amended by Laws 1897, Act No. 24.

Likewise an indorsement by the company after an issuance of the policy, making the loss payable to a mortgagee "as his interest may appear," has been held, under the statute requiring actions to be prosecuted by the real party in interest, to give a mortgagee, whose debt exceeds the amount of the insurance, a right of action in his own name; the mortgagor being joined as party defendant (*Franklin Ins. Co. v. Wolff*, 23 Ind. App. 549, 54 N. E. 772). And an assignment of the policy to the purchaser, and its reissuance to the vendor as security for the purchase money, will enable the original insured to maintain the action in his own name.

Kingsley v. New England Mut. Fire Ins. Co., 8 Cush. (Mass.) 398. See, also, *Duncan v. China Mut. Ins. Co.*, 129 N. Y. 237, 29 N. E. 76, affirming (Super. N. Y.) 14 N. Y. Supp. 301.

But where a policy is pledged to an appointee to receive payment, the proper person to bring action is the insured, or his receiver in case of insolvency (*Baughman v. Camden Mfg. Co.*, 65 N. J. Eq. 546, 56 Atl. 376). And in *Imperial Ins. Co. v. Wolf*, 21 Ohio Cir. Ct. R. 202, 11 O. C. D. 815, it was stated that the insured might join in the action with the mortgagee, to whom the policy had been collaterally assigned.

Where there was an agreement by the company that the policy should inure to the benefit both of the insured and one who had purchased a portion of the property without having any actual assignment of the policy, it was held that the action must be brought in the name of the original insured (*Bodle v. Chenango County Mut. Ins. Co.*, 2 N. Y. 53). And, of course, an assignment without the company's consent will confer no right of action in his own name on the assignee.

Tate v. Citizens' Mut. Fire Ins. Co., 13 Gray (Mass.) 79; *Wood v. Rutland & Addison Mut. Fire Ins. Co.*, 31 Vt. 552; *Powers v. New England Fire Ins. Co.*, 69 Vt. 494, 38 Atl. 148.

Where there has been an unauthorized assignment by the mortgagee, to whom the loss has been made payable, the mortgagee can maintain an action in his own name, though it is provided by the

company that an action shall be brought in the name of the real party in interest (*Key v. Continental Ins. Co.*, 101 Mo. App. 344, 74 S. W. 162).

(h) Same—Equities and defenses.

Any set-off or equity in existence at the time of the assignment of the policy as collateral security is available to the insurer as against the assignee.⁵

Spring v. South Carolina Ins. Co., 8 Wheat. 268, 5 L. Ed. 614; *Bergson v. Builders' Ins. Co.*, 38 Cal. 541; *Rousset v. Insurance Co. of North America*, 1 Bin. (Pa.) 429; *Gourdon v. Insurance Co. of North America*, 3 Yeates (Pa.) 327; *State Mut. Fire Ins. Co. v. Roberts*, 81 Pa. 438; *Commonwealth v. National Ins. Co.*, 113 Mass. 514. See, also, *Johnston v. Phoenix Ins. Co.*, 39 Md. 233, where the assignment was after a loss, and *Cleveland v. Clap*, 5 Mass. 201, where an assignee, whether collateral or absolute not appearing, was held chargeable by way of set-off with premiums on other policies for which his assignor was liable at the time of the assignment; the policy assigned particularly providing that sums due from the insured as premiums were to be deducted from any loss arising under the policy.

So, also, an assignee will take a policy subject to the defense of barratry.

Paradise v. Sun Mut. Ins. Co., 6 La. Ann. 596; *Waters v. Allen*, 5 Hill (N. Y.) 421.

And a policy, void at its inception on the ground of ultra vires, cannot be vitalized by a subsequent consent by the company to an assignment intended by the parties as a transfer of the policy to the purchaser (*Froehly v. North St. Louis Mut. Fire Ins. Co.*, 32 Mo. App. 302). It has been intimated, however, that if the company, at the time of a collateral assignment, knew of its equitable rights in the premises and kept silence, it could not rely thereon afterwards, but would be in the same position as an obligor of a bond under similar circumstances (*Gourdon v. Insurance Co. of North America*, 3 Yeates [Pa.] 327).

(i) Questions of practice.

A complaint in an action on a policy issued in the name of a husband, which joins the wife as a party, without averring that she ever

⁵ As to defenses arising from the breach by the assignor of the policy stipulations, see post, pp. 1231 and 1530.

As to priorities in rights to proceeds of the policy, see post, vol. 4, p. 3712.

acquired an interest in the policy, fails to state a cause of action (*Traders' Ins. Co. v. Newman*, 120 Ind. 554, 22 N. E. 428). And an assignee for the benefit of creditors cannot recover, in an action based on a policy issued to his assignor, for a breach of a verbal contract to extend the benefits of the policy to him as assignee (*Northam v. Dutchess County Mut. Ins. Co. of Poughkeepsie*, 69 N. E. 222, 177 N. Y. 73). Conversely, one suing as assignee under a policy allowing a purchaser or assignee to maintain an action in his own name must aver that he has become the purchaser or assignee of the subject insured (*Granger v. Howard Ins. Co.*, 5 Wend. [N. Y.] 200). And one who has assigned the policy to an intending purchaser, with a reservation of the insurance as to the interest remaining in himself, cannot recover under a declaration as owner of the property and holder of the policy (*Bonefant v. American Fire Ins. Co.*, 76 Mich. 653, 43 N. W. 682).

In the following cases, the complaint was held to sufficiently allege an absolute assignment.

Fowler v. New York Indemnity Ins. Co., 23 Barb. (N. Y.) 143; *Harley v. Lebanon Mut. Ins. Co.*, 120 Pa. 182, 13 Atl. 833; *Bank of River Falls v. German-American Ins. Co.*, 72 Wis. 535, 40 N. W. 506.

But, in *Commercial Ins. Co. v. Treasury Bank*, 61 Ill. 482, 14 Am. Rep. 73, the mere setting out of an indorsement on the policy making the loss payable to plaintiff, without any allegation as to how it came there, was held insufficient to show plaintiff's right to maintain the action.

In *Breckinridge v. American Central Ins. Co.*, 87 Mo. 62, the peculiar form of defendant's denial of its agent's authority to consent to an assignment was held to amount to an admission that the agents were its regular agents, and did consent in writing, and that the signatures evidencing such consent were genuine.

2. ASSIGNMENT OF LIFE INSURANCE POLICIES—RIGHT TO ASSIGN.

- (a) What law governs.
- (b) Assignability in general.
- (c) Assignability of mutual benefit certificates.
- (d) Assignment by husband and wife.
- (e) Same—Statutes protecting policies from creditors.
- (f) Assignment by insured.
- (g) Assignment by beneficiary.

(a) What law governs.

It is a general rule that the validity of an assignment must be determined by the law of the place of the assignment.

Newcomb v. Mutual Life Ins. Co., 18 Fed. Cas. 47; *Union Cent. Life Ins. Co. v. Woods*, 11 Ind. App. 335, 37 N. E. 180, *Criswell v. Whitney*, 13 Ind. App. 67, 41 N. E. 78; *Succession of Miller v. Manhattan Life Ins. Co.*, 110 La. 652, 34 South. 723; *Robinson v. Hurst*, 78 Md. 59, 28 Atl. 956, 20 L. R. A. 761, 44 Am. St. Rep. 266; *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24, 52 Am. Rep. 245; *Brick v. Campbell*, 122 N. Y. 337, 25 N. E. 493, 10 L. R. A. 259, reversing 55 N. Y. Super. Ct. 569, which affirmed 54 N. Y. Super. Ct. 305; *Miller v. Campbell*, 140 N. Y. 457, 35 N. E. 651, affirming 22 N. Y. Supp. 388, 2 Misc. Rep. 518; *Fuller v. Kent*, 13 App. Div. 529, 43 N. Y. Supp. 649; *Pratt v. Globe Mut. Life Ins. Co.*, 8 Tenn. Cas. 174, 17 S. W. 352. See, also, *Barry v. Equitable Life Assur. Soc.*, 59 N. Y. 587, where the policy and assignment were executed in the same state, and *Connecticut Mut. Life Ins. Co. v. Westervelt*, 52 Conn. 586, where the question was left undecided as between the *lex fori* and the law of the place of assignment.

Under this rule an assignment has been held governed by a statute¹ of the state where executed, though such statute in terms only applied to policies "issued" within the state (*Spencer v. Myers*, 150 N. Y. 269, 44 N. E. 942, 34 L. R. A. 175, 55 Am. St. Rep. 675, affirming 73 Hun, 274, 26 N. Y. Supp. 371). And in *Barry v. Equitable Life Assur. Soc.*, 59 N. Y. 587, an assignment to one living in another state was considered as completed at the place where the assignment was deposited in the mail.

It has, however, been intimated that the *lex fori* should govern where all the interested parties were citizens of the state where the action was brought.

McGrotty v. Fletcher (C. C.) 96 Fed. 264; *Appeal of Brown*, 125 Pa. 303, 17 Atl. 419, 11 Am. St. Rep. 900. See, also, *Cannon v. North-*

¹ Laws N. Y. 1879, c. 248.

western Mut. Life Ins. Co., 29 Hun (N. Y.) 470, where emphasis was placed upon the *lex fori*, as opposed to the law of the domicile of the company, but where the assignment also apparently took place in the state where the action was tried.

The law of the place where the action is brought will determine the assignee's right to maintain action in his own name (*Nederland Life Ins. Co. v. Hall*, 84 Fed. 278, 27 C. C. A. 390). Obviously, also, the law under which a foreign corporation has been organized may be used to determine the rights of the beneficiary, as affecting the validity of an assignment (*Mutual Reserve Fund Life Ass'n v. Cleveland Woolen Mills*, 82 Fed. 508, 27 C. C. A. 212). And in *Bloomington v. Lisberger*, 24 Hun, 355, effect was given to a New York statute as to the manner of assignment, for the reason that the company was organized and the contract of insurance completed in that state. The place of the completion of the contract of insurance has, indeed, in a few cases, been held the controlling factor in determining the law governing the validity of the assignment.

Pomeroy v. Manhattan Life Ins. Co., 40 Ill. 398; *Germania Life Ins. Co. v. Brown*, 5 Lanc. Law Rev. (Pa.) 394. See, also, *Mutual Life Ins. Co. v. Terry*, 62 How. Prac. (N. Y.) 825, where the *lex contracti*, *lex solutioni*, and *lex fori* all concurred.

In *Lambert v. Pennsylvania Mut. Life Ins. Co.*, 50 La. Ann. 1027, 24 South. 16, where the validity of the assignment was dependent on the contract rights of the beneficiary, it was held that the law of the state declared to be the place of contract should govern. Also a stipulation in the policy that the loss should be paid in a certain state "in conformity with the statute" has been held controlling as to its assignability (*Milhous v. Johnson*, 51 Hun, 639, 4 N. Y. Supp. 199). But, in *Robinson v. Hurst*, 26 Atl. 956, 78 Md. 59, 20 L. R. A. 761, 44 Am. St. Rep. 266, a direct stipulation that the contract should be governed by the laws of New York was held not to subject the validity of an assignment of the policy to the laws of that state; the application having been made in Maryland, and the assignment having been executed in that state between residents thereof.

(b) Assignability in general.

Aside from any question of insurable interest, a life insurance policy is assignable as any other chose in action.

Reference may be made to *New York Mut. Life Ins. Co. v. Armstrong*, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997; *Ford v. Travelers' Ins.*

Co., 6 Mackey (D. C.) 384; Newcomb v. Mutual Life Ins. Co., 18 Fed. Cas. 47; Collins v. Dawley, 4 Colo. 138, 34 Am. Rep. 72; Steele v. Gatlin, 115 Ga. 929, 42 S. E. 253, 59 L. R. A. 129; Pomeroy v. Manhattan Life Ins. Co., 40 Ill. 398; State v. Tomlinson, 16 Ind. App. 662, 45 N. E. 1116, 59 Am. St. Rep. 335; Union Cent. Life Ins. Co. v. Woods, 11 Ind. App. 335, 37 N. E. 180, 39 N. E. 205; Farmers' & Traders' Bank v. Johnson, 118 Iowa, 282, 91 N. W. 1074; Succession of Hering, 26 La. Ann. 326; Pilcher v. New York Life Ins. Co., 33 La. Ann. 322; Stuart v. Sutcliffe, 46 La. Ann. 240, 14 South. 912; New York Life Ins. Co. v. Flack, 3 Md. 341, 56 Am. Dec. 742; Rittler v. Smith, 70 Md. 261, 16 Atl. 890, 2 L. R. A. 844; Hewlett v. Home for Incurable, etc., 74 Md. 350, 24 Atl. 324, 17 L. R. A. 447; Valton v. National Fund Life Assur. Co., 20 N. Y. 32, affirming 22 Barb. 9; Travelers' Ins. Co. v. Healey, 164 N. Y. 607, 58 N. E. 1093, affirming on opinion of lower court 49 N. Y. Supp. 29, 25 App. Div. 53; Cannon v. Northwestern Mut. Life Ins. Co., 29 Hun (N. Y.) 470; St. John v. American Mut. Life Ins. Co., 9 N. Y. Super. Ct. 419; Eckel v. Renner, 41 Ohio St. 232; Mutual Protection Ins. Co. v. Hamilton, 5 Sneed. (Tenn.) 269; Scobey v. Waters, 10 Lea (Tenn.) 551; Archibald v. Mutual Life Ins. Co., 38 Wis. 542; Bursinger v. Bank of Watertown, 67 Wis. 75, 30 N. W. 290, 58 Am. St. Rep. 848.

So, also, it may be mortgaged or assigned as collateral security.

Reference to the following cases is deemed sufficient: Robinson v. Mutual Ben. Life Ins. Co., 20 Fed. Cas. 1036; Collins v. Dawley, 4 Colo. 138, 34 Am. Rep. 72; Farmers' & Traders' Bank v. Johnson, 118 Iowa, 282, 91 N. W. 1074; Succession of Risley, 11 Rob. (La.) 298; Hays v. Lapeyre, 48 La. Ann. 749, 19 South. 821, 35 L. R. A. 647; Emerick v. Coakley, 35 Md. 188; Dungan v. Mutual Reserve Life Ins. Co., 46 Md. 469; New York Life Ins. Co. v. Rosenheim, 56 Mo. App. 27; St. John v. American Mut. Life Ins. Co., 9 N. Y. Super. Ct. 419; Palmer v. Mut. Life Ins. Co., 77 N. Y. Supp. 869, 38 Misc. Rep. 318; Dusenberry v. Mutual Life Ins. Co., 188 Pa. 454, 41 Atl. 736.

The doctrine of Palmer v. Merrill, 6 Cush. (Mass.) 282, 52 Am. Dec. 782, that an assignment, to be good, must be of the whole claim, was overruled in Richardson v. White, 167 Mass. 58, 44 N. E. 1072. And it has been held that, though the legal title does not pass by such an assignment, yet it will be valid and enforceable in equity.

Pomeroy v. Manhattan Life Ins. Co., 40 Ill. 398. See, also, Tremblay v. Aetna Life Ins. Co., 97 Me. 547, 55 Atl. 509, 94 Am. St. Rep. 521, and Bond v. Bunting, 78 Pa. 210.

A provision in a policy that, in case of assignment, notice shall be given the company, has been held to amount to a contract that the policy may be assigned by giving such notice (*Meadows' Guardian v. Meadows' Adm'r*, 13 Ky. Law Rep. 495). And even though it is provided that the policy shall not be assigned, it is a provision that the company only can take advantage of, and if the company consents the assignment will be valid as against third persons (*Lee v. Murrell*, 9 Ky. Law Rep. 104).

(c) Assignability of mutual benefit certificates.

Under the general rule that a beneficiary in a certificate of a mutual benefit association must be within the class designated in the fundamental law of the order as those for whose benefit the mortuary fund is to be collected and paid, an assignment of a certificate to one not within such class is invalid.

Briggs v. Earl, 139 Mass. 473, 1 N. E. 847; *Anthony v. Massachusetts Ben. Ass'n*, 158 Mass. 322, 33 N. E. 577; *Lyon v. Rolfe*, 76 Mich. 146, 42 N. W. 1094; *Richardson v. Kentucky Grangers' Mut. Ben. Soc.*, 4 Ky. Law Rep. 735; *Kentucky Grangers' Mut. Ben. Soc. v. Howe's Adm'r*, 9 Ky. Law Rep. 198; *Odd Fellows' Beneficial Ass'n v. Diebert*, 2 Ohio Cir. Ct. R. 462, 1 O. C. D. 589; *Harman v. Lewis* (C. C.) 24 Fed. 97.

In *Dietrich v. Madison Relief Ass'n*, 45 Wis. 79, a similar decision was reached as to the effect of an assignment to the association itself, whose sole object was declared to be "to afford relief to the widows and children," etc. The majority of the court held that under such provision the association was disqualified to receive the assignment as collateral security for a loan to the member. *Ryan, C. J.*, dissented, being of opinion that the only question was as to the ability of the member to make the assignment.

The rule as to the inability of a member to divert the fund from its specified objects is especially applicable where the constitution or rules of the order expressly provide either against any assignment of the certificate or against its assignment to one not qualified to take as a beneficiary.

Stoelker v. Thornton, 88 Ala. 241, 6 South. 680, 6 L. R. A. 140; *Dale v. Brumbly*, 96 Md. 674, 54 Atl. 655; *Supreme Conclave Improved Order of Heptasophs v. Dailey*, 61 N. J. Eq. 145, 47 Atl. 277.

But see *Coleman v. Anderson* (Tex. Civ. App.) 82 S. W. 1057, where a provision of the by-laws against an assignment to secure a debt was held not available to any one except the company.

And obviously the same result will follow from an express statutory provision.

Dale v. Brumbly, 96 Md. 674, 54 Atl. 655. See, also, *Crocker v. Hugin*, 103 Iowa, 243, 72 N. W. 411, where, however, the point at issue was whether the association came within the purview of the statute.

It has, however, been held that the beneficiary named can assign his or her contingent interest to one not falling within the designated class, and that, the company not objecting, it will be valid between the parties.

Jarvis v. Binkley, 69 N. E. 582, 206 Ill. 541, affirming 102 Ill. App. 59; *Kimball v. Lester*, 59 N. Y. Supp. 540, 43 App. Div. 27, affirmed without opinion 167 N. Y. 570, 60 N. E. 1113; *Dexter v. Supreme Council Royal Templars of Temperance*, 90 N. Y. Supp. 292, 97 App. Div. 545. See, also, *Klinckhamer Brewing Co. v. Cassman*, 21 Ohio Cir. Ct. R. 465, 12 O. C. D. 141, and *Brett v. Warnick*, 44 Or. 511, 75 Pac. 1061, touching the assignability of the certificate by the beneficiary to outsiders, but without mention of this phase of the question.

And where the association is authorized to issue a certificate in which the insured himself is named as beneficiary, an assignment by the insured so named as beneficiary will carry the equitable interest (*Brierly v. Equitable Aid Union*, 170 Mass. 218, 48 N. E. 1090, 64 Am. St. Rep. 297).

The cases are conflicting as to the effect of an assignment to a creditor of the member, when the object of the association is stated to be the payment of a fund to certain dependents and "beneficiaries," or "legatees." In Kentucky it has been held that a creditor is neither a dependent nor primarily a "beneficiary," and that therefore such an assignment will be invalid (*Basye v. Adams*, 81 Ky. 368, reversing *Throckmorton's Adm'r v. National Mut. Ben. Ass'n*, 4 Ky. Law Rep. 61). But in Maryland the assignment was held good (*Clogg v. McDaniel*, 89 Md. 416, 43 Atl. 795), while in Illinois it was treated as an informal change of beneficiary, of whose defects only the company could take advantage (*Martin v. Stubblings*, 126 Ill. 387, 18 N. E. 657, 9 Am. Rep. 620, affirming 27 Ill. App. 121).

A statute² providing that the assignment of an instrument declared by its terms to be unassignable shall nevertheless be valid has been held to do away with the effect of a provision against as-

² McClain's Code Iowa, § 3262.

signment in the certificate (*Crocker v. Hogin*, 72 N. W. 411, 103 Iowa, 243). And a direct stipulation in the certificate that it might be assigned was, in *Jackson v. Anderson*, 9 Ky. Law Rep. 165, 4 S. W. 326, considered effectual, at least as to the assignee, who was no longer in a position to place the assignor in statu quo.

By payment of the money into court under plea of interpleader, an association admits nothing as to the validity of an alleged assignment forbidden by its constitution (*Supreme Conclave Improved Order of Heptasophs v. Dailey*, 61 N. J. Eq. 145, 47 Atl. 277). But a mere by-law, not based on charter or statutory limitations, to the effect that not more than one-half the amount of the certificate shall be payable to any one in accordance with a contract with insured, may be waived by the company, so as to validate a contract of assignment by the insured and beneficiary (*Swedish Christian Mission Society v. Lawrence*, 79 Minn. 124, 81 N. W. 756). And in *McFarland v. Creath*, 35 Mo. App. 112, where the money had been paid into court, and where the statute under which it was claimed the assignment was invalid was clearly fatal to plaintiff's claim as administrator of insured, it was pointed out that plaintiff could not win by merely showing the invalidity of the assignment.

(d) Assignment by husband and wife.

A wife, beneficially interested in a policy of insurance, has, in the absence of special statutory restrictions, the same rights as to its assignment that she has in relation to the control of any other portion of her separate estate.

Wirgman v. Miller, 98 Ky. 620, 83 S. W. 937; *Travelers' Ins. Co. v. Healey*, 44 N. Y. Supp. 1043, 19 Misc. Rep. 584, judgment modified 49 N. Y. Supp. 29, 25 App. Div. 53; *Klinckhamer Brewing Co. v. Cassman*, 21 Ohio Cir. Ct. R. 465, 12 O. C. D. 141; *Bond v. Bunting*, 78 Pa. 210; *Hendricks v. Reeves*, 2 Pa. Super. Ct. 545; *Supreme Assembly of Royal Society of Good Fellows v. Campbell*, 17 R. I. 402, 22 Atl. 307, 13 L. R. A. 601; *Scobey v. Waters*, 10 Lea (Tenn.) 551; *Archibald v. Mutual Life Ins. Co.*, 38 Wis. 542.

In New Jersey it is provided by statute (Laws 1875, p. 78) that a wife may assign the policy with her husband's consent. And see the following subdivision for a similar New York statute, enacted as a part of a series of statutes dealing with the subject.

In the absence of a contrary statute, an assignment by the wife to secure the debt of her husband is valid.

Mente v. Townsend, 68 Ark. 391, 59 S. W. 41; *Collins v. Dawley*, 4 Colo. 138, 34 Am. Rep. 72; *Pomeroy v. Manhattan Life Ins. Co.*, 40 Ill. 402; *Emerick v. Coakley*, 35 Md. 188; *Charter Oak Life*

Ins. Co. v. Brant, 47 Mo. 419, 4 Am. Rep. 828; *Baker v. Young*, 47 Mo. 453; *Windhorst v. Wilhelms*, 1 O. C. D. 17; *Herr v. Reinoehl*, 209 Pa. 483, 58 Atl. 862.

The Pennsylvania statute,³ providing that a married woman may not become "grantee or surety" for another, does not apply to an assignment of a policy on a husband's life to secure his debt.

Dusenberry v. Mutual Life Ins. Co., 188 Pa. 454, 41 Atl. 736; *Herr v. Reinoehl*, 209 Pa. 483, 58 Atl. 862.

But a statutory provision⁴ against "any contract of suretyship" has been held effective to prevent such an assignment (*Union Cent. Life Ins. Co. v. Woods*, 11 Ind. App. 335, 37 N. E. 180); and so, too, has a provision against the binding or sale of her separate estate in extinguishment of her husband's debts, or by an assumption thereof⁵ (*Smith v. Head*, 75 Ga. 755).

A husband may assign a policy payable to himself or his estate without the wife's joining in the assignment.

Box v. Lanier (Tenn. Sup.) 79 S. W. 1042, 64 L. R. A. 458; *Hendricks v. Reeves*, 2 Pa. Super. Ct. 545; *Appeal of Colburn*, 74 Conn. 463, 51 Atl. 189, 92 Am. St. Rep. 231 (where an assignment direct from husband to wife was held valid only by reason of 1 Supp. Gen. St. Mass., p. 270, c. 197, giving the wife the full benefit of a policy so assigned).

The validity of an assignment by the husband of his own interest, or that of his estate, is not affected by statutes designed to protect the interest of the wife in policies taken out for her benefit (*Travelers' Ins. Co. v. Healey*, 164 N. Y. 607, 58 N. E. 1093, affirming on opinion of lower court 49 N. Y. Supp. 29, 25 App. Div. 53). Nor is such right affected by statutes giving her a fixed interest in the proceeds of policies not disposed of before the death of the husband (*Rison v. Wilkerson & Co.*, 3 Sneed [Tenn.] 565). But, in *Bickel v. Bickel*, 25 Ky. Law Rep. 1945, 79 S. W. 215, it was held that, under a statute⁶ providing against a disposition by a husband of his personal property so as to intentionally commit a fraud on the wife, the husband should not dispose of a policy on his life without reference to a mortgage of the real estate in which the wife had joined, conveying away her dower interest therein. She had

³ P. L. Pa. 1893, p. 344, § 2.

⁴ Rev. St. Ind. 1881, § 5119.

⁵ Code Ga. 1873, § 1783; Code 1895, § 2488.

⁶ Ky. St. 1903, §§ 2127, 2128.

a right to require the application of the policy to the payment of such debts, in order that she might realize her dower interest. And an agreement by a husband to assign insurance policies to his wife, and to support her and her children, in consideration that she should live separate and apart from him, is void as against public policy (*Baum v. Baum*, 109 Wis. 47, 85 N. W. 122, 53 L. R. A. 650, 83 Am. St. Rep. 854). It has also been held in Louisiana that, if an assignment by a husband to a wife of a policy payable to his estate could be considered an onerous contract founded on a moral obligation to provide for the wife, it would fall within the general prohibition of the Code against such contracts between husband and wife, and not be a dation en paiement for a "legitimate cause," as provided by Code, art. 2446. The "legitimate cause" authorizing a dation en paiement cannot be an obligation subject to such a condition as the predecease of the husband (*Succession of Miller v. Manhattan Life Ins. Co.*, 110 La. 652, 34 South. 723).

(e) Same—Statutes protecting policies from creditors.

It is a general rule that a statutory provision that the proceeds of a policy of insurance on the life of a husband for the benefit of the wife shall inure to her use, free and independent of her husband or his creditors, does not interfere with an assignment by the wife of her interest, which otherwise is within her power as a married woman.

Newcomb v. Mutual Life Ins. Co., 18 Fed. Cas. 47 (St. Mass. 1864, c. 197; St. N. Y. 1840, c. 80); *Wirgman v. Miller*, 98 Ky. 620, 33 S. W. 937 (Ky. St. § 654); *Mente v. Townsend*, 68 Ark. 391, 59 S. W. 41 (Sand. & H. Dig. § 4944); *Emerick v. Coakley*, 35 Md. 188 (Code, art. 45, §§ 8, 9); *Baker v. Young*, 47 Mo. 453 (Wag. St. p. 936, §§ 15, 18). See, also, *Charter Oak Life Ins. Co. v. Brant*, 47 Mo. 419, 4 Am. Rep. 323.

The rule is otherwise in New York and Wisconsin. The controlling Wisconsin case is *Ellison v. Straw*, 116 Wis. 207, 92 N. W. 1094, interpreting Rev. St. 1898, § 2347, and following a long line of New York cases interpreting Laws N. Y. 1840, c. 80.

Eadie v. Slimmon, 26 N. Y. 9, 82 Am. Dec. 395; *Barry v. Equitable Life Assur. Soc.*, 59 N. Y. 587, affirming 14 Abb. Prac. N. S. 385; *Same v. Brune*, 71 N. Y. 261, affirming 8 Hun, 395; *Wilson v. Lawrence*, 76 N. Y. 585, affirming 13 Hun, 238; *Brummer v. Cohn*, 86 N. Y. 11, 40 Am. Rep. 503, affirming 57 How. Prac. 386; *Baron v. Brummer*, 100 N. Y. 372, 3 N. E. 474; *Frank v. Mutual Life Ins. Co.*, 102 N. Y. 266, 6 N. E. 667, 55 Am. Rep. 807, affirming 12 Daly, 267;

Brick v. Campbell, 122 N. Y. 337, 25 N. E. 493, 10 L. R. A. 259, reversing 55 N. Y. Super. Ct. 569, which affirmed 54 N. Y. Super. Ct. 305; *Miller v. Campbell*, 140 N. Y. 457, 35 N. E. 651; *Barry v. Mutual Life Ins. Co.*, 49 How. Prac. 504; *Fowler v. Butterly*, 53 How. Prac. 471, 44 N. Y. Super. Ct. 148, affirmed on other grounds 78 N. Y. 68, 34 Am. Rep. 507; *Mutual Fire Ins. Co. v. Terry*, 62 How. Prac. 325; *De Jonge v. Goldsmith*, 46 N. Y. Super. Ct. 181; *Germania Fire Ins. Co. v. Brown*, 5 Lanc. Law Rev. (Pa.) 894.

The leading New York case is *Eadie v. Slimmon*, 26 N. Y. 9, 82 Am. Dec. 395. In that case the court said: "We think the intent of the statute was to make these policies a security to the family of any married man, and a provision for their use and benefit, and that this intent would be defeated if they were held to be assignable by the wife, like ordinary choses in action belonging to her own right as her separate property." On rehearing, the act, which also authorized insurance to be taken by a wife on the life of her husband, was spoken of as an enabling act, and it was intimated that the reason the wife could not assign the policy was merely that the power was not given in the statute. This theory was also noted in *Brick v. Campbell*, 122 N. Y. 337, 25 N. E. 493, 10 L. R. A. 259. It would seem, however, that the rule must rest on the idea that the statute was equivalent to a positive declaration against assignment: for, in *Barry v. Equitable Life Assur. Soc.*, 59 N. Y. 587, it was held that the subsequent legislation enlarging the legal status of a married woman did not affect the prior law, but that it was still operative. So, also, in *Dannhauser v. Wallenstein*, 169 N. Y. 199, 62 N. E. 160, reversing 65 N. Y. Supp. 219, 2 App. Div. 312, it was said that the "legislative intent" to make nonassignable the policy rested wholly in judicial construction.

A policy falling within the description of the act has been held nonassignable, though not referring to the act in terms (*Brummer v. Cohn*, 86 N. Y. 11, 40 Am. Rep. 503; *Id.*, 62 How. Prac. 171, affirming 58 How. Prac. 239, which affirmed 57 How. Prac. 386). And a covenant by the wife that the assignment was valid did not make it good.

Brick v. Campbell, 122 N. Y. 337, 25 N. E. 493, 10 L. R. A. 259, reversing 55 N. Y. Super. Ct. 569; *De Jonge v. Goldsmith*, 46 N. Y. Super. Ct. 181.

Nor was it of any advantage to let the policy lapse after the assignment, and issue a new one in its place (*Barry v. Mutual Life Ins. Co.*, 49 How. Prac. 504). It was held, in *Frank v. Mut. Life*

Ins. Co., 102 N. Y. 266, 6 N. E. 667, affirming 12 Daly, 267, that it was not necessary that the premiums be paid by the husband or insured in order to bring the policy within the provision of the act. Prior to an amendment by Laws 1866, c. 656, making the insurance payable to the wife "in case of her surviving said period or term," rather than "in case of her surviving her husband," as it read in the original act, the act was not applicable to an endowment policy issued on a husband's life (*Living v. Domett*, 26 Hun, 150). But since such amendment it has been held applicable during the running of the policy, even in case of endowment contracts.

Brummer v. Cohn, 86 N. Y. 11, 40 Am. Rep. 503, affirming 57 How. Prac. 386; *Miller v. Campbell*, 140 N. Y. 457, 85 N. E. 651, affirming 22 N. Y. Supp. 388, 2 Misc. Rep. 518.

By subsequent statute, however, the wife, if without living children, was given the right to assign a policy issued for the benefit of herself or children (Laws 1873, c. 821), and afterwards the right was given to assign any policy in her favor with the consent of her husband (Laws 1879, c. 248), or other insured (Laws 1896, c. 272, § 22). And it has been held that neither under these statutes nor the act of 1840, modified by them, was an informal pledge by the wife of her interest forbidden (*Travelers' Ins. Co. v. Healey*, 44 N. Y. Supp. 1043, 19 Misc. Rep. 584). This case, however, was modified, though not reversed, on this point, in 49 N. Y. Supp. 29, 25 App. Div. 53, affirmed on opinion of Appellate Division in 164 N. Y. 607, 58 N. E. 1093, where the pledge was held valid as a pledge of the husband's interest as "holder" of the policy. The restrictions of the statute do not cover the case of a policy originally issued to the husband's representatives and afterwards assigned to the wife.

Dannhauser v. Wallenstein, 169 N. Y. 199, 62 N. E. 160, reversing 65 N. Y. Supp. 219, 52 App. Div. 312. See, also, *Morschauser v. Pierce*, 72 N. Y. Supp. 328, 64 App. Div. 558.

And this is true, though the policy assigned by the wife is a paid-up policy, issued to the wife in lieu of the original policy, which had been assigned to her (*Dannhauser v. Wallenstein*, 169 N. Y. 199, 62 N. E. 160, reversing 65 N. Y. Supp. 219, 52 App. Div. 312). It was, indeed, stated in the *Dannhauser Case* that the act of 1879, referring in terms to all policies "issued * * * upon the lives of husbands for the benefit and use of their wives," and permitting assignments with the consent of the husband in such cases, covers all policies which, prior to the act, were nonassignable under the

act of 1840. And in *Rathborne v. Hatch*, 85 N. Y. Supp. 775, 90 App. Div. 161, it was intimated that, though the assignment was not valid, as an absolute assignment, for a failure to secure the written consent of the insured, as stipulated by the law of 1896, yet it would be sufficient to pass any right of the beneficiary therein, a holding difficult to reconcile with the earlier decisions fixing the law on which the act of 1896 was superimposed.

Laws 1873, c. 821, directly providing that the interest of a married woman without children might pass by her will, and that a person to whom the policy was transferred should have the same rights as testatrix, gave the wife's executor the right to dispose of the policy without the husband's consent, though by law of 1879, dealing with the rights of the wife without regard to whether there were children living, it was provided that the wife's legal representative might dispose of the policy with the husband's written consent (*Harvey v. Van Cott*, 71 Hun, 394, 25 N. Y. Supp. 25). So, also, it was held, in *Brick v. Campbell*, 8 N. Y. St. Rep. 98, 54 N. Y. Super. Ct. 305, that the clause permitting her, if without living children, to assign a policy issued in her favor or in that of her children, in the same manner as she could pass her dower rights, applied to a policy issued in her favor alone. The case was reversed in the Court of Appeals, on the ground that, since there was a child alive at the time of the assignment, it was invalid, and neither the subsequent death of the child nor the passage of Laws 1879, c. 248, removing restrictions as to living children, validated the invalid assignment.

Brick v. Campbell, 122 N. Y. 337, 25 N. E. 493, 10 L. R. A. 259, reversing 55 N. Y. Super. Ct. 569, 54 N. Y. Super. Ct. 305. See, also, *Miller v. Campbell*, 140 N. Y. 457, 35 N. E. 651, affirming 2 Misc. Rep. 518, 22 N. Y. Supp. 388.

Where the wife ratified a similar assignment after the passage of the act of 1879, but did not agree to the arrangement that it should stand as security for the husband's debt, it was held that the assignment was valid only to the extent of the premiums paid by the assignee (*Connecticut Mut. Life Ins. Co. v. Van Campen*, 57 Hun, 592, 11 N. Y. Supp. 103).

The requirement of the law of 1879 for the written consent of the husband is not met by an oral consent and the application by him of the proceeds to the support of the family.

Dannhauser v. Wallenstein, 65 N. Y. Supp. 219, 52 App. Div. 312, reversing 60 N. Y. Supp. 50, 28 Misc. Rep. 690. For reversal on other point, see 169 N. Y. 199, 62 N. E. 160.

Nor is the statute satisfied by the fact that the husband and wife each signed the note to secure which the policy was assigned.

Milhous v. Johnson, 51 Hun, 639, 4 N. Y. Supp. 199. See, also, *Travelers' Ins. Co. v. Healey*, 164 N. Y. 607, 58 N. E. 1093, affirming on opinion of Appellate Division, 49 N. Y. Supp. 29, 25 App. Div. 53, which modified 44 N. Y. Supp. 1043, 19 Misc. Rep. 584. For opinion on former appeal, see (Sup.) 28 N. Y. Supp. 478, reversed 86 Hun, 524, 33 N. Y. Supp. 911.

But it will be sufficient if the husband join the wife in the execution of the assignment (*Anderson v. Goldsmidt*, 103 N. Y. 617, 9 N. E. 495, affirming 38 Hun, 360); or if each execute a separate assignment as a part of the same transaction (*Sherman v. Allison*, 80 N. Y. Supp. 148, 77 App. Div. 49, affirmed without opinion 69 N. E. 1131, 177 N. Y. 574).

(f) Assignment by insured.

It is the general rule that an ordinary life policy, containing no right in the insured to change the beneficiary, cannot be assigned without the consent of the beneficiary. The delivery of the policy vests an interest in the beneficiary, which no act of the company or insured can divest.¹

Robinson v. Duvall, 79 Ky. 83, 42 Am. Rep. 208; *Meadows' Guardian v. Meadows' Adm'r*, 13 Ky. Law Rep. 495; *Putnam v. New York Life Ins. Co.*, 42 La. Ann. 739, 7 South. 602; *Lambert v. Penn Mut. Life Ins. Co.*, 50 La. Ann. 1027, 24 South. 16; *Tremblay v. Aetna Life Ins. Co.*, 97 Me. 547, 55 Atl. 509, 94 Am. St. Rep. 521; *Mutual Ben. Life Ins. Co. v. Wayne County Sav. Bank*, 68 Mich. 116, 35 N. W. 853; *Allis v. Ware*, 28 Minn. 166, 9 N. W. 666, following *Ricker v. Charter Oak Life Ins. Co.*, 27 Minn. 193, 6 N. W. 771, 38 Am. Rep. 289; *Norfolk Nat. Bank v. Flynn*, 58 Neb. 253, 78 N. W. 505; *Lockwood v. Bishop*, 51 How. Prac. (N. Y.) 221; *City Sav. Bank v. Whittle*, 63 N. H. 587, 8 Atl. 645; *Ferndon v. Canfield*, 39 Hun (N. Y.) 571, affirmed 104 N. Y. 143, 10 N. E. 146; *Gosling v. Caldwell*, 1 Lea (Tenn.) 454, 27 Am. Rep. 774; *Scobey v. Waters*, 10 Lea (Tenn.) 551; *Pratt v. Globe Mut. Life Ins. Co.*, 3 Tenn. Cas. 174, 17 S. W. 352; *Irwin v. Travelers' Ins. Co.*, 16 Tex. Civ. App. 683, 39 S. W. 1097; *Opitz v. Karel*, 118 Wis. 527, 95 N. W. 948, 62 L. R. A. 982, 99 Am. St. Rep. 1004.

But see *Mente v. Townsend*, 68 Ark. 391, 59 S. W. 41, where, the right to change beneficiaries having been reserved by the insured, an assignment, in which, however, the beneficiary joined, was spoken of as such a change.

¹ See, also, post, vol. 4, p. 3755.

Such a rule is particularly applicable where there has been a consummated gift of the policy to the beneficiary (*McGlynn v. Curry*, 81 N. Y. Supp. 855, 82 App. Div. 431); or where there is a statute expressly providing that the interest of any beneficiary, or of such a beneficiary as is named in the policy, shall not be changed by the act of the insured.

Jackson Bank v. Williams, 77 Miss. 398, 26 South. 965, 78 Am. St. Rep. 530; *Stokell v. Kimball*, 59 N. H. 13 (Laws 1850, c. 967, § 1); *Ellison v. Straw*, 116 Wis. 207, 92 N. W. 1094, overruling statement in *Strike v. Wisconsin Odd Fellows' Mut. Life Ins. Co.*, 95 Wis. 583, 70 N. W. 819 (Rev. St. 1898, § 2347); *Gosling v. Caldwell*, 1 Lea (Tenn.) 454, 27 Am. Rep. 774 (Code, §§ 2294, 2478). And see, also, *Unity Mut. Life Assur. Ass'n v. Dugan*, 118 Mass. 219, where both Gen. St. c. 58, § 62, and a stipulation in the policy protected the interest of the beneficiary.

The right of the beneficiary cannot be divested by assignment without his or her consent, even though the contract be an endowment policy payable to the beneficiary only in case the insured fails to live the stipulated period, so as to receive the money himself.

Union Cent. Life Ins. Co. v. Woods, 11 Ind. App. 385, 37 N. E. 180, 89 N. E. 205; *Hubbard v. Stapp*, 32 Ill. App. 541; *Fowler v. Butterly*, 78 N. Y. 68, 34 Am. Rep. 507, affirming 53 How. Prac. 471.

But an assignment by the insured of his contingent interest in an endowment policy is valid, without regard to the validity of the assignment as against the contingent interest of the beneficiary.

Pierce v. Charter Oak Life Ins. Co., 188 Mass. 151; *Miller v. Campbell*, 140 N. Y. 457, 85 N. E. 651, affirming 2 Misc. Rep. 518, 22 N. Y. Supp. 388. See, also, *Windhorst v. Wilhelms*, 1 O. C. D. 17, where the beneficiary died prior to the assignment and to the expiration of the period.

Where the policy provided that it should be convertible into cash at the option of the "holder" at any time after the expiration of 15 years, it was held that the insured, who took out the policy and paid the premium, was the "holder," and that an assignment by him of such right, even before the expiration of the period, was valid. The assignment by him and the exercise of the option by the assignee, who became the "holder," was as effectual to cut off the contingent right of the beneficiaries as though the policy had

provided for the payment to the insured of a fixed sum at a fixed date.

Travelers' Ins. Co. v. Healey, 164 N. Y. 607, 58 N. E. 1093, affirming on opinion of lower court 49 N. Y. Supp. 29, 25 App. Div. 53, which modified 44 N. Y. Supp. 1043, 19 Misc. Rep. 584.

But see *Entwistle v. Travelers' Ins. Co.*, 17 Pa. Super. Ct. 180, where, there being a primary and contingent beneficiary, the primary beneficiary was considered "holder," and *Stevens v. Germania Life Ins. Co.*, 26 Tex. Civ. App. 156, 62 S. W. 824, where it was held under a similar policy that there was no "assured" to demand tontine dividends so long as the beneficiary was not definitely fixed.

A policy payable to the insured himself, or to his "assigns," "executors," "administrators," or "legal representatives," may be assigned by the insured without the consent of any other person.

In *re Holden*, 114 Fed. 650, 52 C. C. A. 346; *Meadows' Guardian v. Meadows' Adm'r*, 18 Ky. Law Rep. 495; *New York Life Ins. Co. v. Flack*, 3 Md. 341, 56 Am. Dec. 742; *Robinson v. Hurst*, 78 Md. 59, 26 Atl. 956, 20 L. R. A. 761, 44 Am. St. Rep. 266; *Edington v. Aetna Life Ins. Co.*, 13 Hun, 543, reversed on other grounds 77 N. Y. 564; *Scobey v. Waters*, 10 Lea (Tenn.) 551; *Hancock v. Fidelity Mut. Life Ins. Co.* (Tenn. Ch. App.) 53 S. W. 181.

So, also, insured may assign the contingent interest represented by a promise to pay his executors or assigns in case the first-named beneficiary fails to survive the insured (*Box v. Lanier* [Tenn. Sup.] 79 S. W. 1042, 64 L. R. A. 458). The Supreme Court of the United States has held that an endowment policy payable to assured or his assigns if he should live to a specified time, or if he should die before that time to his legal representatives, was not divisible, in the sense that an assignment by the insured passed only the endowment feature. The term "legal representatives" was sufficiently broad to cover any one standing in the place of the insured. (*New York Mut. Life Ins. Co. v. Armstrong*, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997.)

A mutual benefit certificate can be assigned without the consent of the beneficiary. This follows from the nature of the contract, by which the member is permitted to change the beneficiary at will among those designated in the charter as proper recipients of the fund. Obviously a beneficiary has no vested right in such a contract.

Nederland Life Ins. Co. v. Hall, 84 Fed. 278, 27 C. C. A. 390; *Mutual Reserve Fund Life Ass'n v. Cleveland Woolen Mills*, 82 Fed. 508, 27 C. C. A. 212; *Milner v. Bowman*, 119 Ind. 448, 21 N. E. 1094, 5

L. R. A. 95; *Anthony v. Massachusetts Benefit Ass'n*, 158 Mass. 322, 33 N. E. 577; *Strike v. Wisconsin Odd Fellows' Life Ins. Co.*, 95 Wis. 583, 70 N. W. 819.

Nor is a statute protecting the rights of certain classes of beneficiaries from creditors of the insured applicable to prevent the assignment by the insured of a mutual benefit certificate, in which by the laws of the order the beneficiary has no vested interest.

Strike v. Wisconsin Odd Fellows' Mut. Life Ins. Co., 95 Wis. 583, 70 N. W. 819 (Rev. St. § 2347). See, also, *Anthony v. Massachusetts Ben. Ass'n*, 158 Mass. 322, 33 N. E. 577.

But, where nothing appeared to indicate that the insured had any right to change the beneficiary, it was held that the stipulation in the certificate permitting an assignment with the consent of the company was meant to apply only to an assignment by the beneficiary (*Block v. Valley Mut. Ins. Ass'n*, 52 Ark. 201, 12 S. W. 477, 20 Am. St. Rep. 166).

Where an insured made an assignment, "with full power to the insured to change or alter or cancel the assignment at any time," the subsequent assignment by insured without the consent of the prior assignee was valid, and passed full title to the policy as against the prior assignee (*Penn Mut. Life Ins. Co. v. Union Trust Co.* [C. C.] 83 Fed. 891). And even though there may have been some question as to whether a policy did not pass by a prior assignment, yet, where the insured retained the policy and paid the premiums until a subsequent assignment, it could not be objected by the insured's administratrix that the subsequent assignee could not maintain an action for the proceeds, on account of the prior assignment (*Hurlbut v. Hurlbut*, 49 Hun, 189, 1 N. Y. Supp. 854).

(g) Assignment by beneficiary.

An assignment by an infant beneficiary of his rights under the policy is, of course, void under the general rule as to infant's contracts (*Scobey v. Waters*, 10 Lea [Tenn.] 551). And where a policy was payable to a beneficiary, "her administrator or assigns," an assignment by the administrator of the beneficiary to the insured, made without consideration, was invalid and void (*Sterrit v. Lee*, 52 N. Y. Supp. 1132, 24 Misc. Rep. 324, affirmed without opinion 58 N. Y. Supp. 1149, 38 App. Div. 599). Nor can a beneficiary be compelled in equity to assign to the insured, though the insured er-

roneously believed that his policy permitted him to change the beneficiary at will (*Potter v. Spilman*, 117 Mass. 322).

The same principle which forbids an assignment of the policy by the insured without the consent of the beneficiary forbids an assignment by a beneficiary, named to take only in case of surviving the insured, of the interest of those named to take in case the primary beneficiary dies before the insured.

Connecticut Mut. Life Ins. Co. v. Burroughs, 34 Conn. 305, 91 Am. Dec. 725; *Mutual Life Ins. Co. v. Hagerman*, 72 Pac. 889; *Appeal of Brown*, 125 Pa. 303, 17 Atl. 419, 11 Am. St. Rep. 900.

This is especially true where it is provided by statute ⁸ that the insurance shall inure to the benefit of the wife and children named as beneficiaries (*Knickerbocker Life Ins. Co. v. Weitz*, 99 Mass. 157). And in *Ellison v. Straw*, 116 Wis. 207, 92 N. W. 1094, it was held that, under a statute ⁹ providing that a policy for the benefit of a married woman shall inure to her separate use and that of her children, a married woman named as beneficiary, with no mention of a contingent beneficiary, has no more right to divest the benefits of the policy from her children than she would have, had they been named as contingent beneficiaries. Nor is a right given a wife to dispose of the interest of the children named as contingent beneficiaries, by a statute ¹⁰ providing that a policy for the benefit of the wife may be assigned by her (*Travelers' Ins. Co. v. Healey*, 86 Hun, 524, 33 N. Y. Supp. 911).

The mere contingent right of the primary beneficiary to take in case of surviving the insured is, of course, assignable, without regard to the secondary or contingent beneficiary (*Anderson v. Goldsmidt*, 103 N. Y. 617, 9 N. E. 495, affirming 38 Hun, 360). But the question as to whether the right to demand a tontine dividend or a cash endowment fund is assignable by the primary beneficiary is dependent on the question as to whether such right inheres in such primary beneficiary or elsewhere. Thus, in *Stevens v. Germania Life Ins. Co.*, 26 Tex. Civ. App. 156, 62 S. W. 824, a holding that a provision giving the "assured" a right to demand a tontine dividend did not vest such right in the primary beneficiary was followed as of course by a holding that the right could not be assigned by such beneficiary. But where it was decided that the primary beneficiary was the "holder" of a policy, within a provision giving the

⁸ Gen. St. Mass. c. 58, § 62; Laws N. Y. 1866, c. 656.

⁹ Rev. St. Wis. 1898, § 2347.

¹⁰ Laws N. Y. 1879, c. 248.

holder the right to demand the cash surrender value, it was further held that the primary beneficiary might assign the right (*Entwistle v. Travelers' Ins. Co.*, 17 Pa. Super. Ct. 180). In this connection attention should also be called to *Travelers' Ins. Co. v. Healey*, 164 N. Y. 607, 58 N. E. 1093, affirming on opinion of Appellate Division 49 N. Y. Supp. 29, 25 App. Div. 53, where the insured in such a policy was held to be the "holder."

The contingent interest of the beneficiary named in a mutual benefit certificate has been held a proper subject of assignment or pledge.

Reference may be made to *Jarvis v. Binkley*, 206 Ill. 541, 69 N. E. 582, affirming 102 Ill. App. 59; *Dexter v. Supreme Council Royal Templars of Temperance*, 90 N. Y. Supp. 292, 97 App. Div. 545; *Coleman v. Anderson* (Tex. Civ. App.) 82 S. W. 1057; *Klinckhamer Brewing Co. v. Cassman*, 21 Ohio Cir. Ct. R. 465, 12 O. C. D. 141.

See, contra, *Carpenter v. Knapp*, 101 Iowa, 712, 70 N. W. 764, 38 L. R. A. 128.

So, also, an assignment by the beneficiary was, in *Northwestern Masonic Aid Ass'n v. Marshall*, 10 Pa. Co. Ct. R. 270, spoken of as an irregularity, of which only the company could take advantage, though the certificate in that case expressly provided against assignments, and that only the insured could effect a change of beneficiary. And, in *Block v. Valley Mut. Ins. Co.*, 52 Ark. 201, 12 S. W. 477, 20 Am. St. Rep. 166, where the action was upon a mutual benefit certificate, but where nothing appeared as to any right in the insured to change the beneficiary, it was held that a provision in the certificate authorizing assignment with the company's consent, referred to an assignment by the beneficiary.

It has even been held that a direct reservation in the contract of a right to a change of beneficiaries by the insured, will not deprive the beneficiary named of an assignable interest, subject of course to defeat by the exercise of his right by the insured (*Lawler v. National Life Ass'n of Hartford*, 83 Hun, 393, 31 N. Y. Supp. 875). But in *Smith v. Head*, 75 Ga. 755, a statute ¹¹ providing that no other person than insured could defeat his direction as to whom the proceeds should be paid, was held to render invalid an assignment by the beneficiary.

¹¹ Code Ga. 1882, § 2820; Code 1895, § 2116.

3. REQUISITES, CONSTRUCTION, AND EFFECT OF ASSIGNMENTS OF LIFE POLICIES.

- (a) Requisites in general.
- (b) Necessity for written assignment—Formal requisites.
- (c) Delivery.
- (d) Consent of insurer.
- (e) Fraud as between parties.
- (f) Fraud as against creditors.
- (g) Construction in general.
- (h) Right to redeem—Surrender and conversion.
- (i) Equities and defenses.
- (j) Rights growing out of assignment by assignee.
- (k) Pleading and practice.

(a) Requisites in general.

The question whether a transaction sufficiently shows an intention to vest in the alleged assignee the right to the policy, or to a portion of the proceeds thereof, is dependent on the general rules governing the interpretation of contracts and gifts.

In the following cases an assignment was held to have been effected: *Hill v. United Life Ins. Ass'n*, 154 Pa. 29, 25 Atl. 771, 35 Am. St. Rep. 807 (tontine assignment for benefit of survivors); *Swift v. Railway Passenger & Freight Conductors' Mut. Aid & Benefit Ass'n*, 96 Ill. 309 (execution of instrument for valid consideration whereby insured undertook to make his policy read "for the benefit" of assignee); *Cockrell v. Cockrell*, 79 Miss. 569, 31 South. 203 (release of interest by beneficiary and agreement between her and insured that insured should effect a change of beneficiary); *Hiserodt v. Hamlett*, 74 Miss. 37, 20 South. 143 (assignment as collateral to creditor, with directions as to distribution of balance after payment of debt); *Hewitt v. Provident Life & Trust Co.*, 10 Ohio Dec. 53, 18 Wkly. Law Bul. 220 (blank indorsement of policy and note to executor stating that policy had been assigned); *Northwestern Mut. Life Ins. Co. v. Roth*, 118 Pa. 329, 12 Atl. 283 (delivery of policy with blank indorsement "for collection" held good as against company which paid the person whose name was filled in the blank).

But in the following it was held that there was no assignment: *Price v. First Nat. Bank*, 62 Kan. 742, 64 Pac. 637, 84 Am. St. Rep. 419 (assignment providing for the payment of a judgment having no legal existence); *Bartlett v. Goodrich*, 91 Hun, 642, 36 N. Y. Supp. 770 (uncompleted draft of assignment among papers of deceased and proof that he at one time meant to assign); *St. Clair County Benev. Soc. v. Flitsam*, 97 Ill. 474 (indorsement on policy showing disposition insured wished made of proceeds); *Evans v. Bulman*,

91 Md. 84, 46 Atl. 315 (retention of possession by collateral assignee after payment of debt, but failure to show any new debt).

It is a general rule that where a company makes no objection to an assignment on account of a failure to comply with its rules in relation thereto, and the assignment is otherwise valid as between the parties in interest, no objection can be raised by any of them on account of such formal deficiencies.

Reference may be made to the following cases in addition to others cited under specific heads: *Conway v. Supreme Council Catholic Knights of America*, 131 Cal. 437, 68 Pac. 727; *Diffenbach v. New York Life Ins. Co.*, 61 Md. 370; *Hewlett v. Home for Incurables*, 74 Md. 350, 24 Atl. 324, 17 L. R. A. 447; *Brierly v. Equitable Aid Union*, 170 Mass. 218, 48 N. E. 1090, 64 Am. St. Rep. 297; *Burges v. New York Life Ins. Co.* (Tex. Civ. App.) 53 S. W. 602; *Kendall v. Morrison* (Tex. Civ. App.) 77 S. W. 81. See, also, *New York Life Ins. Co. v. Rosenheim*, 56 Mo. App. 27, where the decision was placed rather on the ground of estoppel.

But see, contra, *Hotel Men's Mut. Ben. Ass'n v. Brown* (C. C.) 83 Fed. 11, where a failure to comply with rules of the company as to a change of beneficiaries was held to invalidate an attempted assignment.

And this is particularly true where the party objecting has failed to show in himself any interest in the fund (*Maynard v. Life Ins. Co. of Virginia*, 132 N. C. 711, 44 S. E. 405).

So, also, an assignment may be treated as an attempt to change the beneficiary, and valid between the parties, though not in accordance with the rules of the order as to the method of effecting such change.

Moore v. Chicago Guaranty Fund Life Soc., 178 Ill. 202, 52 N. E. 882, affirming 76 Ill. App. 433; *Kimball v. Lester*, 59 N. Y. Supp. 540, 43 App. Div. 27, affirmed 167 N. Y. 570, 60 N. E. 1113.

Similarly, a request by the insured, to whose executors the policy was made payable, directed to the company, requesting it to pay the proceeds to a certain person, has been held an assignment.

Grogan v. United States Industrial Ins. Co., 36 N. Y. Supp. 687, 90 Hun, 521; *State v. Tomlinson*, 16 Ind. App. 662, 45 N. E. 1116, 59 Am. St. Rep. 335.

And a delivery to the assignee of a properly filled form for the designation of a beneficiary has been held to have the same effect

(*O'Grady v. Prudential Ins. Co.*, 3 Pa. Super. Ct. 548). In *Stoll v. Mutual Ben. Life Ins. Co.*, 92 N. W. 277, 115 Wis. 558, an instrument in which the persons to take "for value received" were spoken of as "beneficiaries," but which was delivered to a third person with directions to make fully effective, was held an assignment, rather than a mere designation of beneficiary. But in the same case another paper merely directing that the balance of the money should be paid to certain minors, named as "beneficiaries," and of which the company had no knowledge until after the death of insured, was held to be merely a designation of beneficiaries, and not sufficient to prevent a disposition of the fund by will. Similarly, in *Alvord v. Luckenbach*, 82 N. W. 535, 106 Wis. 537, a letter from the insured to the insurer, requesting that the insurance be made payable in case of his death to his son, was held not to constitute an assignment, since the insured still retained dominion over the insurance, and with the consent of the insurer could still cancel or modify the policy.

It has been held that, where a husband and wife were each adjudged bankrupt, policies of insurance on the life of the husband, having a cash surrender value and payable to the wife if she survived him, and to his personal representative if he survived her, passed to the trustees under Bankr. Act July 1, 1898, c. 541, § 70a, cl. 5, 30 Stat. 565, U. S. Comp. St. 1901, p. 3451 (*In re Holden*, 114 Fed. 650, 52 C. C. A. 346). So, also, a policy of life insurance payable to the "heirs, executors, administrators, or assigns" of the insured has been held to pass as a chose in action to his assignee for the benefit of creditors (*Shenk v. Franke*, 10 Lanc. Bar [Pa.] 146). And in *Larue's Assignee v. Larue's Adm'r*, 96 Ky. 326, 28 S. W. 790, though the question as to whether a life policy passed under an assignment for the benefit of creditors was considered as dependent on the nature of the debt and the intention of the assignor in the procurement of the policy, yet, as the policy in suit was made payable to the insured, his order, or creditors, and was used by the insured as a basis for credit, it was held that the policy passed under the assignment. But under the Florida statutes, as in force in 1874, providing that, when one insured his life for the benefit of his estate, creditors could not take an interest to the exclusion of a wife or child, unless it appeared affirmatively from the policy that such was the intention, it was held that an assignee in bankruptcy of the insured acquired no interest (*Pace v. Pace*, 19 Fla. 438). And in

White v. Robbins, 21 Minn. 370, a policy was deemed not to be "personal property" within the meaning of that term as used in an assignment for the benefit of creditors.

A seal attached to an assignment of a policy of insurance, as elsewhere, imports a consideration.

Von Schuckmann v. Heinrich (Sup.) 87 N. Y. Supp. 673; *Mutual Protection Ins. Co. v. Hamilton*, 5 Sneed (Tenn.) 269. See, also, *McDonough v. Aetna Life Ins. Co.*, 78 N. Y. Supp. 217, 38 Misc. Rep. 625.

And in *Gary v. Northwestern Masonic Aid Ass'n* (Iowa) 50 N. W. 27, it was held that the same presumption would be entertained as to an assignment in writing. But in Louisiana it has been held that, where no consideration is recited, the assignment must be considered a donation (*Mutual Life Ins. Co. v. Houchins*, 52 La. Ann. 1137, 27 South. 657).

The extension of a further credit to the beneficiary has been deemed to constitute a consideration for an assignment by the insured and beneficiary (*New York Life Ins. Co. v. Rosenheim*, 56 Mo. App. 27); as has also an extension of credit to a husband for an assignment by the wife, named as beneficiary (*Windhorst v. Wilhelms*, 1 O. C. D. 17). And in *Dusenberry v. Mutual Life Ins. Co. of New York*, 188 Pa. 454, 41 Atl. 736, a sufficient consideration for an assignment by a wife of a policy on her husband's life was found in the fact that it relieved him from liability, civil and criminal, for his default as an officer of the corporation, and secured payment of the debt thereby incurred. A mere moral obligation of a husband to provide for his wife will not, however, operate as a consideration for an assignment between them (*Succession of Miller v. Manhattan Life Ins. Co.*, 110 La. 652, 34 South. 723).

Where heirs who did not know to whom insurance policies were made payable, entered into an agreement providing that the proceeds of the policies should be shared equally among them, regardless as to whom the insurance might be made payable, the mutuality of the contract was considered a sufficient consideration therefor (*Supreme Assembly of Royal Society of Good Fellows v. Campbell*, 17 R. I. 402, 22 Atl. 307, 13 L. R. A. 601). And in *Hewlett v. Home for Incurables of Baltimore*, 74 Md. 350, 24 Atl. 324, 17 L. R. A. 447, an assignment was held supported by a promise of the assignee to care for the beneficiary during the remainder of her life.

(b) Necessity for written assignment—Formal requisites.

A delivery of the policy, with the intention on the part of both parties of thereby transferring certain rights, will operate as an assignment of such rights, without the formality of a written contract.

Bushnell v. Bushnell, 92 Ind. 602; *Id.*, 503; *Meadow's Guardian v. Meadow's Adm'r*, 13 Ky. Law Rep. 495; *Embry's Adm'r v. Harris*, 107 Ky. 61, 52 S. W. 958; *Lockett v. Lockett*, 26 Ky. Law Rep. 800, 80 S. W. 1152; *Evans v. Bulman*, 91 Md. 84, 46 Atl. 815, 816; *Hewins v. Baker*, 161 Mass. 320, 37 N. E. 441; *Crittenden v. Phoenix Mut. Life Ins. Co.*, 41 Mich. 442, 2 N. W. 657; *Cockrell v. Cockrell*, 79 Miss. 569, 31 South. 203; *Travelers' Ins. Co. v. Grant*, 54 N. J. Eq. 208, 33 Atl. 1060; *Marcus v. St. Louis Mut. Life Ins. Co.*, 68 N. Y. 625, reversing 7 Hun, 5; *Travelers' Ins. Co. v. Healey*, 164 N. Y. 607, 58 N. E. 1093, affirming on opinion of lower court 49 N. Y. Supp. 29, 25 App. Div. 53; *Phlipard v. Phlipard*, 8 N. Y. Supp. 728, 55 Hun, 433; *Barnett v. Prudential Ins. Co.*, 91 App. Div. 435, 86 N. Y. Supp. 842; *In re Dunn*, 8 N. Y. St. Rep. 766; *In re Babcock*, 12 N. Y. St. Rep. 841; *In re Hallstead's Estate*, 2 Kulp (Pa.) 508; *Appeal of Madeira (Pa.)* 4 Atl. 908; *Hani v. Germania Life Ins. Co.*, 197 Pa. 276, 47 Atl. 200, 80 Am. St. Rep. 819; *Macaulay v. Central Nat. Bank*, 27 S. C. 215, 3 S. E. 193; *Barron v. Williams*, 58 S. C. 280, 36 S. E. 561, 79 Am. St. Rep. 840; *Hancock v. Fidelity Mut. Life Ins. Co. (Tenn.)* 53 S. W. 181; *Box v. Lanier (Tenn.)* 79 S. W. 1042, 64 L. R. A. 458; *Lord v. New York Life Ins. Co.*, 95 Tex. 216, 66 S. W. 290, 56 L. R. A. 596, 93 Am. St. Rep. 827.

But see, contra, *Steele v. Gatlin*, 42 S. E. 253, 115 Ga. 929, 59 L. R. A. 129, where the court, in interpreting Civ. Code, §§ 2089, 2177, 3077, follows the doctrines that an "assignment" implies writing, and that there is no distinction in principle between an assignment of a fire and a life policy.

No objection can be raised by either party to an otherwise valid assignment on the ground that the contract of insurance provides that any assignment must be in writing. Such objection is one which is open only to the company.

Embry's Adm'r v. Harris, 107 Ky. 61, 52 S. W. 958; *Hewins v. Baker*, 161 Mass. 320, 37 N. E. 441; *Griffin v. Prudential Ins. Co. of America*, 60 N. Y. Supp. 79, 43 App. Div. 499; *McGlynn v. Curry*, 81 N. Y. Supp. 855, 82 App. Div. 431; *Opitz v. Karel*, 118 Wis. 527, 95 N. W. 948, 62 L. R. A. 982, 99 Am. St. Rep. 1004.

In *Haigh v. Mentor Council*, No. 907, *Legion of Honor*, 17 Phila. (Pa.) 71, 42 Leg. Int. 374, the oral transfer was held invalid as against the association.

This does not mean that nothing more than delivery is needed to effect an assignment. There must be an intent to pass some

right under the policy, and no presumption as to such intent arises from the mere manual possession of the policy by another than the one named as insured.

Cyrenius v. Mutual Life Ins. Co., 145 N. Y. 576, 40 N. E. 225, affirming 78 Hun, 365, 26 N. Y. Supp. 248; *Richardson v. Drug Co.* (Mo. App.) 69 S. W. 398.

An assignment vesting title at once in the assignee, but conditioned to be void in case the assignor should survive the assignee, is not a testamentary instrument requiring the formalities of a will to render it valid (*Burges v. New York Life Ins. Co.* [Tex. Civ. App.] 53 S. W. 602). But an assignment without consideration must be executed in accordance with the legal requirements of the state as to the acknowledgment of donations.

Lambert v. Penn Mut. Life Ins. Co., 50 La. Ann. 1036, 24 South. 16; *Mutual Life Ins. Co. v. Houchins*, 52 La. Ann. 1137, 27 South. 637; *Succession of Miller v. Manhattan Life Ins. Co.*, 110 La. 652, 84 South. 723.

In Kentucky it has been held that a policy of insurance having no surrender value is not personal property, within a statute¹ providing that an assignment of personal property between husband and wife must be in writing, acknowledged and recorded as chattel mortgages are recorded.

Morehead's Adm'r v. Mayfield, 109 Ky. 51, 58 S. W. 473; *Steeley's Creditors v. Steeley*, 64 S. W. 642, 23 Ky. Law Rep. 906.

And in *Wirgman v. Miller*, 98 Ky. 620, 33 S. W. 937, under the direct requirements of a statute,² it was held that subjection of a married woman's personalty, including an insurance policy, to the debt of another, might be accomplished "either by deed of mortgage or other conveyance." In Illinois it has been decided that a policy of insurance did not fall within the terms "goods and chattels," as used in a statute³ providing that a transfer of goods and chattels between husband and wife must be acknowledged and recorded (*Cole v. Marple*, 98 Ill. 58, 38 Am. Rep. 83). Nor need a wife acknowledge a transfer executed in Tennessee or Pennsylvania.

Mutual Reserve Fund Life Ass'n v. Cleveland Woolen Mills, 82 Fed. 508, 27 O. C. A. 212; *Parker v. Same*, Id.; *Bond v. Bunting*, 78 Pa. 210.

¹ Ky. St. § 2128.

² Ky. St. § 2127.

³ Rev. St. 1874, c. 68, § 9.

But in North Carolina an assignment of a life policy is considered as an impairment of the "body" or "capital" of the wife's estate, and not, therefore, valid, unless acknowledged as required by the statute dealing with that subject * (Sydnor v. Boyd, 119 N. C. 481, 26 S. E. 92, 37 L. R. A. 734).

It seems that the revenue act of Congress, in force July 1, 1898 (Act June 13, 1898, c. 448, 30 Stat. 448 [U. S. Comp. St. 1901, p. 2286]) did not require a revenue stamp to be affixed to an assignment of an insurance policy (Steeley's Creditors v. Steeley, 23 Ky. Law Rep. 996, 64 S. W. 642). And, even though the statute be considered applicable, no objection could be raised to the instrument, where it appeared that, immediately upon attention being called to the matter, the assignee affixed the stamps and canceled them in the name of the assignor (Farmers' & Traders' Bank v. Johnson, 118 Iowa, 282, 91 N. W. 1074).

(c) Delivery.

An assignment of a policy as collateral is not valid, in the absence of a delivery of the policy or a notice of the attempted assignment given to the assignee.

Succession of Riskey, 11 Rob. (La.) 298; Dexter Sav. Bank v. Copeland, 77 Me. 263. But see Hewitt v. Provident Life & Trust Co., 10 Ohio Dec. 53, 18 Wkly. Law Bul. 220, where an assignment indorsed on a policy and a written statement by insured that it was assigned were held sufficient.

But, where the assignee has been notified of the transfer, it has been held valid in equity, though there was no actual transfer of the policy or assignment.

Richardson v. White, 44 N. E. 1072, 167 Mass. 58, overruling Palmer v. Merrill, 6 Cush. (Mass.) 282, 52 Am. Dec. 782; Janes v. Falk, 50 N. J. Eq. 468, 26 Atl. 138, 35 Am. St. Rep. 783, reversing 49 N. J. Eq. 484, 23 Atl. 813.

It is evident that the principles in relation to gifts inter vivos render the rule requiring either a delivery of the policy or an acceptance of the assignment particularly applicable to voluntary assignments.

In re Webb's Estate, 49 Cal. 542; Williams v. Chamberlain, 165 Ill. 210, 46 N. E. 250, reversing 62 Ill. App. 423; Weaver v. Weaver, 182 Ill. 287, 55 N. E. 338, 74 Am. St. Rep. 173, reversing 80 Ill. App. 370

* Code, § 1836.

(former appeal 73 Ill. App. 301); *In re Trough's Estate*, 75 Pa. 115, reversing 8 Phila. 214; *Scott v. Dickson*, 108 Pa. 6, 56 Am. Rep. 192; *Spooner's Adm'r v. Hilbish's Ex'r*, 92 Va. 333, 23 S. E. 751.

And mere loose statements of the donor to the donee of the donor's intention or design that the donee should have the benefit of the insurance will not operate as an assignment and acceptance, doing away with the necessity of an actual delivery of the policy.

In re Webb's Estate, 49 Cal. 542; *Williams v. Chamberlain*, 165 Ill. 210, 46 N. E. 250, reversing 62 Ill. App. 423; *Weaver v. Weaver*, 182 Ill. 287, 55 N. E. 338, 74 Am. St. Rep. 173, reversing 80 Ill. App. 370 (former appeal 73 Ill. App. 301); *Meadow's Guardian v. Meadow's Adm'r*, 13 Ky. Law Rep. 495.

Of course, any relinquishment of dominion over the policy in favor of the donee may operate as a delivery thereof.

Crittenden v. Phoenix Mut. Life Ins. Co., 41 Mich. 442, 2 N. W. 657 (actual delivery); *Appeal of Madeira (Pa.)* 4 Atl. 908 (actual delivery, but with papers which still belonged to insured); *Phlipard v. Phlipard*, 8 N. Y. Supp. 723, 55 Hun, 433 (delivery of key to deposit box); *Cockrell v. Cockrell*, 79 Miss. 569, 31 South. 203 (delivery to another to have changed in donee's favor); *Lord v. New York Life Ins. Co.*, 95 Tex. 216, 66 S. W. 290, 56 L. R. A. 596, 93 Am. St. Rep. 827 (delivery by a brother, who acted as agent for his sister, to a third person for safe-keeping, with statement that it belonged to sister, such delivery being followed by a redelivery to the brother).

And where there is an actual assignment, and it is delivered to an agent or representative of the donee, the vesting of title will be complete.

New York Life Ins. Co. v. Flack, 3 Md. 341, 56 Am. Dec. 742. See, also, *Bond v. Bunting*, 78 Pa. 210.

So, also, an execution of an assignment by the donor and an acceptance of the gift by the donee or his representative has been held sufficient, without any actual delivery, either of the policy or assignment.

Appeal of Colburn, 51 Atl. 139, 74 Conn. 463, 92 Am. St. Rep. 231; *Otis v. Beckwith*, 49 Ill. 121; *Kulp v. March*, 181 Pa. 627, 37 Atl. 913, 59 Am. St. Rep. 687.

As to the effect of a delivery of a copy of the assignment to the company the authorities are not harmonious. In Illinois and Vir-

ginia it has been held that such a delivery does not operate as a delivery to the donee or validate a gift otherwise imperfectly executed.

Weaver v. Weaver, 55 N. E. 338, 182 Ill. 287, 74 Am. St. Rep. 178, reversing 80 Ill. App. 370 (former appeal 73 Ill. App. 301); *Spooner's Adm'r v. Hilbish's Ex'r*, 92 Va. 333, 23 S. E. 751.

In Texas a contrary conclusion has been reached (*Burges v. New York Life Ins. Co.* [Tex. Civ. App.] 53 S. W. 602). And in New York it has been argued that, if any presumption should be indulged from the fact that a copy of the assignment was on file with the company, it should be that the assignee filed it for his protection. Even if the assignor filed the assignment, it should be presumed to have been done for the benefit of the assignee (*McDonough v. Aetna Life Ins. Co.*, 78 N. Y. Supp. 217, 38 Misc. Rep. 625). And in an earlier New York case (*Hurlbut v. Hurlbut*, 49 Hun, 189, 1 N. Y. Supp. 854), containing, however, the element of notice to the assignee, practically the same conclusion was reached.

(d) Consent of insurer.

The reasons which render the validity of an assignment of a fire policy to a purchaser of the property dependent on the consent of the company do not exist as to the assignment of a life policy. In the absence of contrary provisions, either in the contract or statute, an assignment of a life policy is valid, though no notice thereof is given the company.

Mutual Protection Ins. Co. v. Hamilton, 5 Sneed (Tenn.) 269; *New York Life Ins. Co. v. Flack*, 3 Md. 341, 56 Am. Dec. 742; *Robinson v. Cator*, 78 Md. 72, 26 Atl. 959; *Klinckhamer Brewing Co. v. Cassman*, 21 Ohio Cir. Ct. R. 465, 12 O. C. D. 141.

And see *Richardson v. White*, 167 Mass. 58, 44 N. E. 1072, modifying *Palmer v. Merrill*, 6 Cush. (Mass.) 282, 52 Am. Dec. 782, where the validity of a partial assignment of the policy, unaccompanied by a transfer of the policy, was made to depend on the consent of the company.

In *Moore v. Chicago Guaranty Fund Life Soc.*, 178 Ill. 202, 52 N. E. 882, affirming 76 Ill. App. 433, it was held that a policy providing that an assignment should not be valid without the consent of the company, that claims by an assignee should be subject to proofs of interest, and that a change of beneficiary might be made in a certain designated form, did not require the consent of the company to an assignment, the effect of which was virtually to change the beneficiary.

Nor is an assignment rendered invalid, as between the parties thereto, by a stipulation in the policy or by-laws of the company that an assignment shall not be valid without the consent of the company. Such a provision is inserted in the contract solely for the benefit of the company, and if it does not choose to take advantage thereof it is not open to any one else to make the objection.

Chamberlain v. Williams, 62 Ill. App. 423; *Hewins v. Baker*, 161 Mass. 320, 37 N. E. 441; *Richardson v. White*, 167 Mass. 58, 44 N. E. 1072; *Hogue v. Minnesota Packing & Provision Co.*, 59 Minn. 39, 60 N. W. 812; *Brown v. Mansur*, 64 N. H. 39, 5 Atl. 768; *Travelers' Ins. Co. v. Grant*, 54 N. J. Eq. 208, 33 Atl. 1060; *Fuller v. Kent*, 43 N. Y. Supp. 649, 13 App. Div. 529; *Northwestern Masonic Aid Ass'n v. Marshall*, 10 Pa. Co. Ct. R. 270; *Ramsay v. Myers*, 6 Pa. Dist. R. 468; *Mutual Protection Ins. Co. v. Hamilton*, 5 Sneed (Tenn.) 269; *Opitz v. Karel*, 118 Wis. 527, 95 N. W. 948, 62 L. R. A. 982, 99 Am. St. Rep. 1004. See, also, *O'Brien v. Continental Casualty Co.*, 184 Mass. 584, 69 N. E. 308, where an attempted, but ineffectual, change of beneficiaries was treated as a valid assignment between the parties.

But see *Harman v. Lewis* (C. C.) 24 Fed. 97, opinion on rehearing (C. C.) 24 Fed. 530, and *Stevens v. Warren*, 101 Mass. 564. In the latter case, however, special emphasis was placed on the fact that the assignee had no insurable interest in the life.

Payment of the money into court by the company, without objecting to the claim of the assignee, is a waiver of a failure of the parties to first obtain its consent.

Chamberlain v. Williams, 62 Ill. App. 423; *Brown v. Mansur*, 64 N. H. 39, 5 Atl. 768; *Fuller v. Kent*, 43 N. Y. Supp. 649, 13 App. Div. 529; *Northwestern Masonic Aid Ass'n v. Marshall*, 10 Pa. Co. Ct. R. 270; *Opitz v. Karel*, 118 Wis. 527, 95 N. W. 948, 62 L. R. A. 982, 99 Am. St. Rep. 1004.

Where it is provided in the policy that it shall be assigned only with the consent of the company, an assignment without such consent is of no force as against the company.

Moise v. Mutual Reserve Fund Life Ass'n, 45 La. Ann. 736, 18 South. 170; *Wallace v. Bankers' Life Ass'n*, 80 Mo. App. 102, 2 Mo. App. Rep'r, 536; *National Mut. Aid Soc. v. Lupold*, 101 Pa. 111; *Corcoran v. Mutual Life Ins. Co.*, 36 Atl. 203, 179 Pa. 132.

Contra, *Marcus v. St. Louis Mut. Life Ins. Co.*, 68 N. Y. 625 (not reported in full), reversing 7 Hun, 5.

But a letter from the company, in which it stated that it would place the assignment "on file for such attention as it may deserve when such policy becomes a claim," has been held a sufficient indi-

cation of the company's assent to the assignment (*Tremblay v. Aetna Life Ins. Co.*, 97 Me. 547, 55 Atl. 509, 94 Am. St. Rep. 521). And where no particular time was specified within which notice of assignment was to be given, two days from the assignment was held sufficiently early, though the assured had died in the meantime (*New York Life Ins. Co. v. Flack*, 3 Md. 341, 56 Am. Dec. 742). The company may, even as against itself, waive the particular form of notice or consent required by the contract.

Corcoran v. New York Mut. Life Ins. Co., 183 Pa. 443, 39 Atl. 50; *Anthony v. Massachusetts Ben. Ass'n*, 158 Mass. 322, 33 N. E. 577.

While a statement by the secretary that, if copies of the assignment were furnished, it would file them as notice of the claim, coupled with a direction to communicate with the general agent, has been held not to constitute a waiver of a requirement for the filing of copies (*Corcoran v. Mutual Life Ins. Co.*, 179 Pa. 132, 36 Atl. 203), yet, on the second appeal of the same case, it was held that the effect of a presentation of the assignment at the company's office, the making of entries therefrom in a book, and the return of the assignment to the assignee's messenger was properly left to the jury (*Corcoran v. New York Mut. Life Ins. Co.*, 183 Pa. 443, 39 Atl. 50).

Mere acknowledgment by the company of the receipt of the assignment does not amount to an acknowledgment of liability to the assignee.

Morrill v. Manhattan Life Ins. Co., 55 N. E. 656, 183 Ill. 280, affirming 82 Ill. App. 410; *Pierce v. Charter Oak Life Ins. Co.*, 188 Mass. 151.

(c) Fraud as between parties.

An assignment of a policy, obtained while the insured is incapacitated to transact business, is void (*Bickel v. Bickel*, 25 Ky. Law Rep. 1945, 79 S. W. 215). So, also, in *Plant v. Plant*, 76 Miss. 560, 25 South. 151, an assignment obtained by the father, who exercised great influence over his invalid son, was set aside as obtained by undue influence. In *Bursinger v. Bank of Watertown*, 67 Wis. 75, 30 N. W. 290, 58 Am. Rep. 848, it was held that the assignor of a policy need not have the assignment set aside in equity before bringing action to recover the policy or its value on the ground that he was incapacitated by drunkenness to make the assignment. An assignment from a wife to her husband is particularly open to an imputation of undue influence.

Fowler v. Butterly, 53 How. Prac. 471, affirmed 78 N. Y. 63, 34 Am. Rep. 507; *Way v. Union Central Life Ins. Co.*, 61 S. C. 501, 39 S. E. 742.

An assignment, signed in blank at the request of her husband, by a woman who was entirely ignorant of business and who received no consideration for the assignment, has been held invalid, though used as collateral for a debt of the husband (*Mutual Benefit Life Ins. Co. v. Wayne County Sav. Bank*, 68 Mich. 116, 35 N. W. 853). So, also, in *Connecticut Mut. Life Ins. Co. v. Westervelt*, 52 Conn. 586, where the assignment was signed by the wife in blank, it was held invalid, in so far as used for the purpose of securing a pre-existing debt not in contemplation of the wife when the instrument was executed. Similarly, in *McKeldin v. McKeldin*, 104 Ky. 345, 47 S. W. 246, an assignment by the mother of insured to insured's wife was held invalid, it having been obtained by false representations as to the health of insured and the rights of the beneficiary.

On the other hand, an assignment procured by fraud on the wife of insured has been held valid as against a creditor of the husband who in good faith advanced money on the strength thereof (*Mente v. Townsend*, 68 Ark. 391, 59 S. W. 41). And in *Holt v. Agnew*, 67 Ala. 360, it was said that equity would not disturb an assignment voluntarily executed by the wife of a defaulter for the purpose of saving the good name of the family. So, also, the mere fact that a wife was induced by the persuasions of her husband to execute an assignment was held not to avoid it (*Connecticut Mut. Life Ins. Co. v. Ryan*, 8 Mo. App. 535). Similarly, advice by a physician, not amounting to an influence substituting the will of the physician for that of the patient, was deemed not to invalidate an assignment induced by such advice (*Penn Mut. Life Ins. Co. v. Union Trust Co.* [C. C.] 83 Fed. 891). In *Washington Life Ins. Co. v. Lawrence*, 53 Barb. (N. Y.) 307, an assignment executed by insured's fiancée, who did not ask its object, but stated that she had confidence in insured, was held valid as to a third person, to whom the benefit was transferred, though insured at the time falsely stated that he wished the assignment in order to renew the policy. In the following cases the evidence, which was somewhat complicated, was held not sufficient to show that the assignment was procured by fraud:

Terry v. Mutual Life Ins. Co., 116 Ala. 242, 22 South. 532; *Clogg v. MacDaniel*, 89 Md. 416, 43 Atl. 795; *Morschauser v. Pierce*, 72 N. Y. Supp. 328, 64 App. Div. 558; *Pioso v. Bitzer*, 58 Atl. 891, 209 Pa. 508.

An assignment is not vitiated by the mere fact that the assignee has been acting as the agent of the insurer (*Peck v. Washington Life Ins. Co.*, 87 N. Y. Supp. 210, 91 App. Div. 597); nor by the fact

that he is an officer of the association for whose benefit the insurance was to have been taken (*Tate v. Commercial Bldg. Ass'n*, 97 Va. 74, 33 S. E. 382, 45 L. R. A. 243, 75 Am. St. Rep. 770).

Acquiescence in an assignment for many years, with knowledge that the assignee was paying premiums to keep it alive, has been held to estop the assignor from avoiding it on the ground of duress (*Walker v. Larkin*, 127 Ind. 100, 26 N. E. 684). But a statement of the assignor that the assignment was procured by fraud has been held not to estop him from afterwards showing that it was in fact procured while he was drunk (*Bursinger v. Bank of Watertown*, 67 Wis. 75, 30 N. W. 290, 58 Am. Rep. 848).

(f) Fraud as against creditors.

Where one is solvent when he assigns a policy of insurance on his life, and there is no intention on his part to defraud his creditors, the assignment is valid, whether executed for a valuable consideration or as a gift (*King v. Cram*, 185 Mass. 103, 69 N. E. 1049). The rule is otherwise, however, where the insured at the time of the assignment is insolvent. An assignment under such circumstances and without consideration, the policy having a tangible value, is invalid. (*Planters' State Bank v. Willingham's Assignee*, 111 Ky. 64, 63 S. W. 12.) The same principle has been applied, also, in cases in which it does not clearly appear whether or not at the time of the assignment there was any present value in the policy.

Friedman v. Fennell, 94 Ala. 570, 10 South. 649; *Catchings v. Manlove*, 39 Miss. 655; *Ionia County Savings Bank v. McLean*, 84 Mich. 625, 48 N. W. 159.

But in *Steeley's Creditors v. Steeley*, 23 Ky. Law Rep. 996, 64 S. W. 642, it was held that the assignment by a debtor to his wife of a life policy that had no vendible value was not fraudulent as to creditors. The same principle was recognized in *Johnson v. Alexander*, 125 Ind. 575, 25 N. E. 706, 9 L. R. A. 660, where an assignment was held valid, in view of the value of the policy at the time of the assignment. So, also, in *State v. Tomlinson*, 16 Ind. App. 662, 45 N. E. 1116, 59 Am. St. Rep. 335, an assignment to a wife and child was held not in fraud of creditors, except as to the premiums paid and interest thereon. And where the total value of insured's property, including the policy, did not exceed his exemption, it was held that a gift of the policy was not fraudulent (*Barron v. Williams*, 58 S. C. 280, 36 S. E. 561, 79 Am. St. Rep. 840). Nor could

the creditors of the assignor object to an assignment by a married woman, where the policy was procured under a statute ⁶ providing that the benefit of the insurance should absolutely inure to her, free, even, from the claim of the assignee (*Smillie v. Quinn*, 90 N. Y. 492).

Where a transfer of a policy to the members of insured's family is otherwise fraudulent as to creditors, it is not validated by a statute permitting the husband to insure his life for the benefit of his wife and children, free from the claims of his creditors.

Ionia County Savings Bank v. McLean, 84 Mich. 625, 48 N. W. 159 (How. Ann. St. § 4238); *Friedman v. Fennell*, 94 Ala. 570, 10 South. 649 (Code 1886, § 2356). But see, contra, *Cole v. Marple*, 98 Ill. 58, 38 Am. Rep. 83, where it was held that Rev. St. Ill. 1874, c. 73, § 54, permitting a wife to insure her husband's life and hold the proceeds against his creditors, less premiums fraudulently paid by him, operated as well upon a policy procured by the husband on his own life and assigned to her.

Obviously, the rule will not apply where the statute expressly permits the husband to assign an existing policy to his wife, free from the liens of creditors.

Morehead's Adm'r v. Mayfield, 22 Ky. Law Rep. 580, 109 Ky. 51, 58 S. W. 473 (interpreting Ky. St. § 654); *Elllott v. Bryan*, 64 Md. 368, 1 Atl. 614 (interpreting Acts 1862, c. 9).

Where, however, the statute ⁶ authorizing a husband to insure for the benefit of his wife, free from creditors, or to assign in the same manner, provides, further, that any premiums paid on such policy in fraud of creditors shall be allowed, with interest, to the creditors, such provision applies as well to a policy originally made payable to insured's estate, and afterwards assigned, as to one in which the wife is originally named as beneficiary (*Morehead's Adm'r v. Mayfield*, 22 Ky. Law Rep. 580, 109 Ky. 51, 58 S. W. 473). And in *Child v. Graham*, 7 Wkly. Law Bul. 43, 8 Ohio Dec. 294, it was even held that similar statutes ⁷ had no application to a policy assigned with an actual fraudulent intent, but that such an assignment was entirely void.

(g) Construction in general.

An assignment conditioned as "interest may appear," and based on an agreement of the assignee to "keep the insured from want," is not absolute, but the assignor, on the failure of the assignee to

⁶ Laws N. Y. 1840, c. 80. ⁶ Ky. St. § 654. ⁷ Rev. St. §§ 3623, 3629, 6344.

comply with the agreement, may maintain a bill in equity for a re-assignment of the policy on payment of the sums actually advanced (*Bohleber v. Waelden*, 150 N. Y. 405, 44 N. E. 1041, reversing 30 N. Y. Supp. 312, 80 Hun, 349, which in turn reversed 23 N. Y. Supp. 391, 69 Hun, 79). An assignment to one, "his executors, administrators, and assigns, as their interest may appear," is a qualified, rather than an absolute, assignment (*Barrett v. Northwestern Mut. Life Ins. Co.*, 99 Iowa, 637, 68 N. W. 906). The right to redeem a policy from an assignment based on an agreement that the assignee should pay the premiums and receive the benefit, has been held to render the transaction a mortgage, though under the agreement there was no absolute obligation resting on the assignee to pay such premiums (*Matthews v. Sheehan*, 69 N. Y. 585). So, also, an agreement that a policy held by another should be retained by him, with a right to reimburse himself for premiums paid, and that, in case of the redemption of the policy by the repayment of the premiums prior to the policy's maturity, he should assign it to the insured or his "legal representatives," did not amount to an absolute divestiture of the interest of the beneficiary. The term "legal representatives" was broad enough to embrace whomsoever might at the time be the beneficiary. (*Hirsch v. Mayer*, 165 N. Y. 236, 59 N. E. 89, affirming 54 N. Y. Supp. 1075, 31 App. Div. 627.)

In the following cases the construction of the assignment as absolute or as collateral was based on the peculiar circumstances and the wording of the assignment: The assignments were either held to have been collateral only, or findings to that effect were held justified in *Clarke v. Fast*, 61 Pac. 72, 128 Cal. 422 (lack of consideration for absolute assignment); *Baldwin v. Haydon*, 24 Ky. Law Rep. 900, 70 S. W. 300 (advancement of money by the assignee from time to time); *Roller v. Moore's Adm'r*, 86 Va. 512, 10 S. E. 241, 6 L. R. A. 136 (verbal agreement and subsequent letters); *Marsh v. McNair*, 48 Hun, 117 (action for reformation, form made absolute to meet supposed requirements of company).

But in *Cunningham v. Smith's Adm'r*, 70 Pa. 450, the evidence was held to conclusively show an intention to effect an absolute assignment.

Where, on the face of the assignment, the policy appears to have been transferred without any limitation, one claiming that it was in fact assigned merely as collateral has the burden of proof (*Lance v. Bonnell*, 58 N. J. Eq. 259, 43 Atl. 288). The same case stated the further principle that limitations will commence to run against such a claim from the payment of the debt, rather than from the death of insured, and that a silence for 17 years, during which the assignee

continued to pay the premiums, was sufficient to bar the claim on the ground of laches. But, even though an assignment be absolute on its face, it may by a separate instrument for reconveyance be shown to be in fact but a mortgage (*Filon v. Knowles*, 2 Wkly. Notes Cas. [Pa.] 226). And it has also been held that the purpose of the written assignment may be shown by parol, although the assignment is absolute in terms.

Kendall v. Equitable Life Assur. Soc., 171 Mass. 568, 51 N. E. 464; *Matthews v. Sheehan*, 69 N. Y. 585; *Clarke v. Adam*, 30 Tex. Civ. App. 66, 69 S. W. 1016; *Westbury v. Simmons*, 57 S. O. 467, 35 S. E. 764.

(h) Right to redeem—Surrender and conversion.

Where a policy has been assigned as collateral security, and the debt is paid and the policy returned prior to any breach of the contract, the title to the policy again vests in the assignor by operation of law, without any reassignment in writing (*Alabama Gold Life Ins. Co. v. Garmany*, 74 Ga. 51). But, before a pledgor or assignor can redeem from the assignment, he must pay, in addition to the debt, the premiums paid by the transferee to keep the policy in existence.

Kendall v. Equitable Life Assur. Soc. of the United States, 171 Mass. 568, 51 N. E. 464; *Dungan v. Mutual Ben. Life Ins. Co.*, 46 Md. 469; *Brown v. Equitable Life Assur. Soc.*, 75 Minn. 412, 78 N. W. 108. But see decision on reargument 79 N. W. 968, 75 Minn. 412, where case was reversed on other grounds.

In *Upshaw v. Mutual Loan Ass'n*, 60 N. Y. Supp. 242, 29 Misc. Rep. 143, where a wife made a general assignment of a policy in her favor on her husband's life, as collateral for a loan, and the transferee afterwards advanced an additional sum on the policy to her husband on his application alone, it was held that the beneficiary was entitled to a reassignment only after the payment of both loans.

In general, a renewal of a note is not a payment of the debt, so as to destroy an assignment collateral to the note.

Kendall v. Equitable Life Assur. Soc., 171 Mass. 568, 51 N. E. 464; *Corcoran v. New York Mut. Life Ins. Co.*, 39 Atl. 50, 183 Pa. 443.

In the *Kendall Case*, though the debt was the debt of the husband alone, it was held that the wife, who was the beneficiary, was not a surety, in the sense that a renewal of the note without her knowledge would release the assignment. The same conclusion may, perhaps, be drawn from the *Corcoran Case*, though it does not clearly

appear from the report whether or not the assignment was to secure a debt for which the husband alone was liable. It was, however, clearly held, in *Allis v. Ware*, 28 Minn. 166, 9 N. W. 667, that, where a wife joined in an assignment of a policy as security for her husband's sole debt, her rights were those of a surety, and the policy was released by an extension of the notes to which she did not give assent. And in *Washington Life Ins. Co. v. Gooding*, 19 Tex. Civ. App. 490, 49 S. W. 123, the same effect was given to the barring of the debt by limitations. The *Gooding Case* also held that a failure of the company to comply with its agreement to retain a certain amount of the insured's salary as payment of the debt would release the policy as to the beneficiary after a lapse of time sufficient to extinguish the debt, had they so applied the salary. But there is, of course, no release where the beneficiary assents to the renewal (*Mechanics' Nat. Bank v. Comins*, 72 N. H. 12, 55 Atl. 191).

Where a life policy is pledged for a debt, and the debt is not paid at maturity, the pledgee may dispose of the policy in the manner agreed upon, thereby cutting off the right to redeem. Therefore, where the pledge was to the insurer under an agreement giving it the power to cancel the policy on default, applying the proceeds to the debt, and paying any balance to insured, and this was done, the insured had no right to redemption and reinstatement of the policy. (*Palmer v. Mutual Life Ins. Co.*, 77 N. Y. Supp. 869, 38 Misc. Rep. 318.) But an assignment sufficient only to carry the right of the beneficiary to receive the money in case of surviving the insured gives the assignee no right or power to surrender the policy and receive its surrender value (*Rathborne v. Hatch*, 85 N. Y. Supp. 775, 90 App. Div. 161). In *Frank v. Mutual Life Ins. Co.*, 102 N. Y. 266, 6 N. E. 667, 55 Am. Rep. 807, it was held that the surrender of the policy to the company by one holding under an assignment insufficient to pass the interest of the assignor, a married woman, rendered him liable for the money received from the company on such surrender. And where an endowment policy was assigned as security for a demand note, without any agreement for the surrender or sale of the policy, it was held that a surrender of the policy before maturity was unauthorized. Nor was such surrender justified, because made at the request of the holder of a prior assignment and to enable him to realize thereon. (*Manton v. Robinson* [R. I.] 37 Atl. 8.) So, also, in *Wheeler v. Pereles*, 43 Wis. 332, a surrender to the insurer of a policy assigned "to hold as security"

was held a conversion. The assignment as security of the "right, title, and interest in and to the policy," gave the power, but not the right, as against the assignee, to surrender the policy and take another in its stead. And while it was held, in *Dungan v. Mutual Benefit Life Ins. Co.*, 38 Md. 242, that a receipt of a collateral assignee, stating that the assignment should continue for his sole use if the note was not paid at maturity, rendered the transaction a mortgage, rather than a pledge, and that, therefore, insured could not maintain trover for the subsequent surrender of the policy, yet, on a second action between the same parties, it was held that the assignee had no right as against the assignor, even after the maturity of the debt, to surrender the policy without due notice and an opportunity to redeem (*Dungan v. Mutual Benefit Life Ins. Co.*, 46 Md. 469). Similarly, where one, who had waived the right to exact a strict performance of his contract rights to surrender the policy and receive its value, made such a surrender without notice to the pledgor a few days before insured's death, such action was held a conversion, for which the measure of damages was the face of the policy less the amount of the debt (*Bailey v. American Deposit & Loan Co.*, 65 N. Y. Supp. 330, 52 App. Div. 402). But in *Frank v. Mutual Life Ins. Co.*, 102 N. Y. 266, 6 N. E. 667, 55 Am. Rep. 807, where the assignment was held insufficient under Acts 1840, c. 80, forbidding assignments by married women, it was further held that the mere stamping of the policy as "paid" by the company, on its surrender by the assignee, worked the assignor no wrong. She might, had she chosen, have continued to pay the premiums, thus keeping the policy in force in spite of the surrender. And an assignee who has received money from a third person with which to pay the premiums, without, however, agreeing so to do, is not liable in damages for permitting the policy to lapse by a failure to so apply the money (*Killoran v. Sweet*, 72 Hun, 194, 25 N. Y. Supp. 295, judgment affirmed on opinion of court below 144 N. Y. 703, 39 N. E. 857).

(1) Equities and defenses.

As a rule questions relating to the right of the company to enforce against an assignee defenses arising under the policy are questions of forfeiture or avoidance, and will be found treated under the briefs dealing with such topics. A few cases have, however, arisen, which do not seem to properly belong to those subjects. Thus it has been held that the defense arising from the murder of the insured

by the beneficiary is as available against the assignee as against the beneficiary (*Schmidt v. Northern Life Ass'n*, 112 Iowa, 41, 83 N. W. 800, 51 L. R. A. 141, 84 Am. St. Rep. 323), as is also the defense arising from a suicide by the insured, contemplated at the time of taking out the policy (*Smith v. National Benefit Society*, 123 N. Y. 85, 25 N. E. 197, 9 L. R. A. 616, affirming 4 N. Y. Supp. 521, 51 Hun, 575). And an agreement by the company, the insured, and the beneficiary for a scaling down of the amount named in the policy has been considered binding also on an assignee of the policy (*Leonard v. Charter Oak Life Ins. Co.*, 65 Conn. 529, 33 Atl. 511). So, also, it has been held that the company could enforce a provision that, in case of an assignment to creditors, the policy should be void as to all sums in excess of the debt; and this, though the assignment, which was only as collateral, was made with the consent of the company and was followed after the death of insured by a reassignment to the beneficiary (*McQuillan v. Mutual Reserve Fund Ass'n*, 87 N. W. 1069, 112 Wis. 665, 56 L. R. A. 233, 88 Am. St. Rep. 986, rehearing denied 88 N. W. 925, 112 Wis. 665, 56 L. R. A. 233, 88 Am. St. Rep. 986).

But where the insured and the company, without the consent of the beneficiary, substituted the insured in place of the beneficiary, and the insured subsequently assigned the policy to an innocent third person, it was held that the company could not set up against the assignee the invalidity of the change of beneficiaries (*Pilcher v. New York Life Ins. Co.*, 33 La. Ann. 322). Nor can the company introduce against an assignee statements by the insured as to her age, made after she had signed the policy; the purpose of such evidence being to scale down the policy on the ground of misrepresentations as to insured's age (*Barnett v. Prudential Ins. Co.*, 91 App. Div. 435, 86 N. Y. Supp. 842).

(j) Rights growing out of assignment by assignee.

Where a life policy was assigned to an indorser for the insured as security, and the indorser transferred the assignment to the creditor to secure the same debt, it was held that the title vested in the latter, so as to enable him to hold the policy as collateral security for the debt (*Corcoran v. New York Mut. Life Ins. Co.*, 183 Pa. 443, 39 Atl. 50). And the interest of a collateral assignee of a fraternal benefit certificate has been held valid, under a statute ^a authorizing

^a Rev. St. 1895, art. 308.

an assignment by an assignee of any interest he might have in a nonnegotiable written instrument (*Coleman v. Anderson* [Tex. Civ. App.] 82 S. W. 1057).

But, since the policy of insurance is not a negotiable instrument, an assignee of an assignee, in the absence of conduct estopping the parties interested from asserting their rights, will take no further rights than those possessed by the one from whom he secured the transfer.

Lambert v. Penn Mut. Life Ins. Co., 50 La. Ann. 1027, 24 South. 16; *Brown v. Equitable Life Assur. Soc. of United States*, 75 Minn. 412, 78 N. W. 103, 671, 79 N. W. 968; *Culmer v. American Grocery Co.*, 48 N. Y. Supp. 431, 21 App. Div. 556; *Dexter v. Supreme Council Royal Templars of Temperance*, 90 N. Y. Supp. 292, 97 App. Div. 545; *Westbury v. Simmons*, 57 S. C. 467, 35 S. E. 764.

Thus it has been held that where an assignment conditioned "as interest may appear" was based on the agreement of the assignee to support the assignor, and such agreement was not fulfilled, the assignor might maintain a bill to redeem the policy on repayment of money advanced, though there had been a subsequent assignment to a third person (*Bohleber v. Waelden*, 150 N. Y. 405, 44 N. E. 1041, reversing 30 N. Y. Supp. 312, 80 Hun, 349, which in turn reversed 23 N. Y. Supp. 391, 69 Hun, 79). And in *Culmer v. American Grocery Co.*, 48 N. Y. Supp. 431, 21 App. Div. 556, the rule that a subsequent assignee can take no more than the rights of the original assignee from whom he derives his title was given effect, though the subsequent assignment was effected by a cancellation of the original assignment and the execution of a new one from the original assignor to the subsequent assignee. The original assignee held in part as trustee, and the indirect method of effecting the transfer could not divest the rights of the other parties interested.

Where, however, the insured, who had assigned the policy as collateral for a loan which was never effected, neglected for 11 years to pay the premiums or take any steps to recover the policy, it was held that he was estopped to assert any rights as against an assignee of the original assignee (*Brown v. Equitable Life Ins. Soc. of United States*, 79 N. W. 968, 75 Minn. 412, reversing 75 Minn. 412, 78 N. W. 103). And in *Kendall v. Morrison* (Tex. Civ. App.) 77 S. W. 31, an assignor, who had received the full benefit of the agreement under which the policy was assigned and of the subsequent disposition made of its proceeds, was held estopped to assert

the invalidity of such agreement on formal grounds. Nor can those who have released their interest in the policy, which has been subsequently assigned, set up a want of consideration for such release (*Lee v. Page* [Ky.] 2 S. W. 503).

Under like principles it has been held that, where a collateral assignment was absolute in form, the assignee was authorized to pass to another his lien for premiums advanced to keep the policy alive (*Brown v. Equitable Life Assur. Soc. of United States*, 75 Minn. 412, 78 N. W. 103). And in *Dungan v. Mutual Benefit Life Ins. Co.*, 46 Md. 469, it was said that an assignee holding as under a mortgage might, after default and due notice, sell the policy without the delay of bringing a bill for foreclosure. Whatever the rule may be as to the effect of clothing another with the muniments of title and indicia of ownership, it will not operate where the consideration for the subsequent assignment is an antecedent debt and possession of the policy itself is retained as against such subsequent assignee (*Culmer v. American Grocery Co.*, 48 N. Y. Supp. 431, 21 App. Div. 556).

(k) Pleading and practice.

Where the assignee of a life policy, who has obtained the assignment by collusion with the husband, commences an action against the company on such policy in one state after having appeared and answered in an action in another state, brought by the wife to have the policy adjudged hers, the court in the latter state will enjoin the husband from collecting or attempting to collect such insurance, or in any manner enforcing any judgment he may recover in his action in the former state (*Barry v. Mutual Life Ins. Co.*, 49 How. Prac. [N. Y.] 504).

Under the common-law procedure, action on an assigned life insurance policy must be brought in the name of the original beneficiary.

Nederland Life Ins. Co. v. Hall, 84 Fed. 278, 27 C. C. A. 390; *United States Life Ins. Co. v. Ludwig*, 103 Ill. 305; *Pierce v. Charter Oak Life Ins. Co.*, 138 Mass. 151.

But in Pennsylvania, under the direct provision of a statute,* an assignee of a life policy may sue in his own name (*O'Grady v. Prudential Ins. Co.*, 3 Pa. Super. Ct. 548). This statute does not, however, apply to an assignment to which the company has not given

* Act March 14, 1878 (P. L. 46).

assent (*National Mut. Aid Soc. v. Lupold*, 101 Pa. 111). And it has been intimated in a Massachusetts case that, if the company promises to pay the assignee, the action might be brought in his name (*Pierce v. Charter Oak Life Ins. Co.*, 138 Mass. 151).

Under code procedure the real party in interest can, of course, always bring the action.

Michael v. Insurance Co., 17 Mo. App. 23; *Grogan v. United States Industrial Ins. Co.*, 90 Hun, 521, 36 N. Y. Supp. 687; *Archibald v. Mutual Life Ins. Co.*, 38 Wis. 542. See, also, *Mutual Protection Ins. Co. v. Hamilton*, 5 Sneed (Tenn.) 269.

It has, however, been held in Missouri that, where a part only of the policy has been assigned, the assignor should bring the action (*Michael v. Insurance Co.*, 17 Mo. App. 23). But in New York the assignor is not a necessary party, even in the case of a collateral assignment to secure a debt of a less sum than the amount of the policy (*Lawler v. National Life Ass'n of Hartford*, 83 Hun, 393, 31 N. Y. Supp. 875).

A bill by an administrator in his fiduciary capacity and as creditor of the estate to collect a policy on his decedent's life, and to set aside as fraudulent an alleged assignment thereof by decedent during his life, has been held not to be multifarious (*Spooner's Adm'r v. Hilbish's Ex'r*, 92 Va. 333, 23 S. E. 751). And an averment in the alternative that an assignment was wrongfully obtained without consideration, or was made as security for a loan, does not necessarily make the pleading bad (*Hasberg v. Moses*, 80 N. Y. Supp. 867, 81 App. Div. 199). Since a contract is presumed to rest in parol unless otherwise alleged, a complaint failing to state whether an assignment is in writing or parol is not subject to a motion to make more specific (*Walker v. Larkin*, 127 Ind. 100, 26 N. E. 684).

A slight variance between the actual and alleged name of the assignee has been held immaterial.

Aetna Life Ins. Co. v. J. B. Parker & Co., 96 Tex. 287, 72 S. W. 621. See, also, *Clarke v. Adam*, 80 Tex. Civ. App. 66, 69 S. W. 1016, where the complaint alleged an assignment to a partnership, and the proof showed an assignment to one of the partners.

And an assignment by insured to a third person, prior to an acquisition of any rights by plaintiff's intestate, can be shown by the company under an answer denying information sufficient to form a belief as to whether plaintiff's intestate was the owner of

the policy in suit at the time of her death (*McDonough v. Ætna Life Ins. Co.*, 78 N. Y. Supp. 217, 38 Misc. Rep. 625). But fraud or mistake in the assignment must be alleged in order to be proved. (*Dusenberry v. Mutual Life Ins. of New York*, 188 Pa. 454, 41 Atl. 736).

An action to recover an insurance policy claimed to have been assigned under duress is not triable by the jury under the provisions of a statute¹⁰ providing for the trial of actions for the recovery of money or of specific personal property (*Windhorst v. Wilhelm*, 1 O. C. D. 17). The question as to the fraudulent intent of an assignor to defeat creditors was, however, in *Hurlbut v. Hurlbut*, 49 Hun, 189, 1 N. Y. Supp. 854, held to be for the jury under direct statutory provisions.¹¹

In the following cases decisions were made as to the admissibility of evidence to prove or disprove the validity of the assignment.

In these the evidence was held admissible: *St. John v. American Mut. Life Ins. Co.*, 9 N. Y. Super. Ct. 419 (assignment coming from possession of proper person, admissible upon proof of its being genuine, without proof of its actual execution at time of its date); *Grogan v. United States Industrial Ins. Co.*, 90 Hun, 521, 36 N. Y. Supp. 687 (proof of execution by other than absent subscribing witness); *Texas Mut. Life Ins. Co. v. Brown & Co.*, 2 Posey, Unrep. Cas. 160 (parol proof of contents of lost assignment); *Lilley v. Mutual Ben. Life Ins. Co. of Newark*, 92 Mich. 153, 52 N. W. 631 (oral evidence of assignee, illegally taken in probate court, admissible to prove nature of assignment); *Clarke v. Adam*, 30 Tex. Civ. App. 68, 69 S. W. 1016 (admission of evidence of transaction with deceased person, showing assignment to have been collateral, as indicated by evidence of opposing party, held not reversible error); *Continental Nat. Bank v. Moore*, 82 N. Y. Supp. 302, 83 App. Div. 419 (admissions against interest to prove debt, in action by creditor to set aside fraudulent assignment).

In these the evidence was held inadmissible: *Tennant v. Dudley*, 144 N. Y. 504, 39 N. E. 644, reversing 22 N. Y. Supp. 876, 68 Hun, 225 (compromise offer by the assignee as evidence that the assignment was only collateral); *Wienecke v. Arbin*, 88 Md. 182, 40 Atl. 709, 44 L. R. A. 142 (evidence touching the execution of the assignment offered by the assignor as against the assignee's administrator).

In *Smith v. Hawthorn*, 22 Pa. Co. Ct. R. 519, the evidence was held sufficient to show the execution of the assignment; and in *Continental Nat. Bank v. Moore*, 82 N. Y. Supp. 302, 83 App. Div. 419, it was held that an indebtedness to the attacking creditor was

¹⁰ Rev. St. Ohio, § 5130.

¹¹ 3 Rev. St. (6th Ed.) 145, § 4.

sufficiently shown. But in *Wienecke v. Arbin*, 88 Md. 182, 40 Atl. 709, 44 L. R. A. 142, the evidence was considered insufficient to prove the alleged assignment, as it was in *Evans v. Bulman*, 91 Md. 84, 46 Atl. 315, to prove that there had been a pledge of the policy.

A charge that the beneficiary in a policy could assign his interest, "subject to the same limitations as provided for and conditioned on in the contract," was in *Crosswel v. Connecticut Indemnity Ass'n*, 51 S. C. 103, 28 S. E. 200, held not to ignore the conditions relative to assignments printed in the policy.

**X. AVOIDANCE OF CONTRACT FOR CONCEALMENT,
MISREPRESENTATION, OR BREACH OF WAR-
RANTY OR CONDITION PRECEDENT—
INSURANCE OF PROPERTY.**

1. Distinction between warranties, representations, and conditions precedent.
 - (a) Scope of discussion.
 - (b) Warranties and representations defined and distinguished in general.
 - (c) General characteristics of warranties and representations.
 - (d) Statements contained in or made part of the policy.
 - (e) Sufficiency of reference to make statements part of the policy.
 - (f) Statements made by third persons.
 - (g) Application of general rules of construction.
 - (h) Inconsistent recitals.
 - (i) Same—Reference to statements as representations.
 - (j) Qualified recitals.
 - (k) Same—Character dependent on materiality.
 - (l) Same—Statements made on knowledge and belief.
 - (m) Nonresponsive or partial answers—Failure to answer.
 - (n) Failure to make representation as to facts required by conditions of policy.
 - (o) Conditions precedent.
2. Effect of misrepresentation or breach of warranty or condition precedent as dependent on materiality and on knowledge and intent of applicant.
 - (a) Effect of breach of warranty.
 - (b) Same—Materiality of facts warranted.
 - (c) Breach of warranty as affected by knowledge and intent of applicant.
 - (d) Misrepresentations and effect thereof.
 - (e) Same—Materiality of facts represented.
 - (f) Misrepresentation as affected by intent of applicant.
 - (g) Statements based on knowledge and belief.
 - (h) Statutory provisions limiting effect of breach of warranty or misrepresentation.
 - (i) Breach of condition precedent.
 - (j) Misrepresentation and breach of warranty or condition as avoiding policy ipso facto.
 - (k) Misrepresentation and breach of warranty or condition as to part of the property insured.
3. Pleading and practice with reference to misrepresentation or breach of warranty or condition in general.
 - (a) Pleading truth of representations and warranties and performance of condition.
 - (b) Pleading misrepresentation or breach of warranty or condition.
 - (c) Same—Form and sufficiency of plea.

3. Pleading and practice with reference to misrepresentation and breach of warranty or condition in general—(Cont'd).
 - (d) Same—Amendment.
 - (e) Subsequent pleadings.
 - (f) Issues and proof.
 - (g) Evidence—Presumptions and burden of proof.
 - (h) Same—Admissibility.
 - (i) Same—Weight and sufficiency.
 - (j) Trial and judgment in general.
 - (k) Questions for jury.
 - (l) Instructions.
 - (m) Review.
4. Statutory provisions relating to avoidance of policy for misrepresentation or breach of warranty.
 - (a) Statutory provisions qualifying strict rules.
 - (b) Operation of statutes as dependent on materiality and intent.
 - (c) Validity of stipulations intended to evade the operation of the statutes.
 - (d) Pleading and practice.
5. Effect of misrepresentation or breach of warranty as dependent on time and circumstances.
 - (a) Statements true when made, but false when policy takes effect.
 - (b) Circumstances on which effect of false statements may be dependent.
 - (c) Statements made after issuance of policy.
 - (d) Applications to other companies.
 - (e) Renewals based on original applications.
6. Concealment and its effect on the policy.
 - (a) Concealment defined.
 - (b) Duty to make disclosure.
 - (c) Same—Knowledge of facts.
 - (d) Same—Materiality of facts.
 - (e) Duty to disclose as dependent on character of facts.
 - (f) Same—Expectations, fears, and rumors.
 - (g) Same—Matters arising after application is made.
 - (h) Same—Facts known to insurer.
 - (i) Necessity of making inquiry and effect of failure to inquire.
 - (j) Same—Special provisions of policy.
 - (k) Same—Facts putting insurer on inquiry.
 - (l) General and specific inquiries.
 - (m) Failure to answer—Partial answers.
 - (n) Effect of concealment as dependent on materiality of facts concealed.
 - (o) Effect of concealment as dependent on knowledge and intent of applicant.
 - (p) Pleading.
 - (q) Evidence.
 - (r) Questions for jury and instructions.

7. Persons affected by misrepresentation, breach of warranty, or concealment.
 - (a) Policy payable to mortgagee as interest may appear.
 - (b) Rights of mortgagee under "union mortgage clause."
 - (c) Same—Qualification of rule.
 - (d) Same—Policy issued at instance of mortgagee.
 - (e) Effect as to rights of assignees.
 - (f) Creditors.
8. Effect of concealment, misrepresentation, or breach of warranty in marine policies in general.
 - (a) In general.
 - (b) Loss of vessel.
 - (c) Condition of vessel.
 - (d) Nationality and neutrality of vessel.
 - (e) Location of risk.
 - (f) Time and place of sailing.
 - (g) Character of cargo in general.
 - (h) Nationality and neutrality of cargo.
 - (i) Time and place of loading cargo.
 - (j) Value of vessel or cargo.
 - (k) Title or interest of insured—Incumbrances—Other insurance.
 - (l) Pleading.
 - (m) Evidence—Presumption and burden of proof.
 - (n) Same—Admissibility.
 - (o) Same—Weight and sufficiency.
 - (p) Questions for jury and instructions.
9. Warranty of seaworthiness and effect of breach thereof.
 - (a) Nature of warranty in general.
 - (b) Warranty implied.
 - (c) Same—Time policies.
 - (d) Scope of warranty.
 - (e) When warranty becomes operative.
 - (f) Necessity of disclosure as to seaworthiness.
 - (g) What constitutes seaworthiness in general.
 - (h) Age and condition of vessel.
 - (i) Equipment, stores, and cargo.
 - (j) Competency and sufficiency of officers and crew.
 - (k) Employment of pilot.
 - (l) Effect of misrepresentation, concealment, or breach of warranty.
 - (m) Conclusiveness of survey showing ship to be rotten or unsound.
 - (n) Questions of practice—Pleading.
 - (o) Same—Presumptions.
 - (p) Same—Burden of proof.
 - (q) Same—Admissibility and sufficiency of evidence.
 - (r) Same—Trial and review.
10. Effect of misdescription of property insured in general.
 - (a) Matter of description as warranty or representation.
 - (b) Description of building insured.
 - (c) Same—Location.

10. Effect of misdescription of property insured in general—(Cont'd).
 - (d) Same—Material and construction.
 - (e) Same—Age of building.
 - (f) Description of personal property.
 - (g) Same—Location.
 - (h) Same—Description of building.
 - (i) Pleading and practice.
11. Effect of misrepresentation, breach of warranty, or concealment as to use and occupancy of premises.
 - (a) Effect of false statements in general.
 - (b) Failure to disclose use and occupancy.
 - (c) Effect of false statement or concealment as dependent on intent and materiality.
 - (d) Truth or falsity of statements as to use and occupancy.
 - (e) Same—Dwelling house.
 - (f) Use and occupancy of building containing personal property insured.
 - (g) Pleading and practice.
12. Effect of misrepresentation, breach of warranty, or concealment as to vicinity of other buildings and use of adjacent property.
 - (a) Statements as warranties or representations.
 - (b) Effect of false statements or concealment.
 - (c) Same—Materiality.
 - (d) Same—Knowledge and intent of applicant.
 - (e) Truth or falsity of statements.
 - (f) Same—Doctrine of *Gates v. Madison County Mut. Ins. Co.*
 - (g) Same—Knowledge of insured.
 - (h) Same—Character and distance of exposure.
 - (i) Same—Construction of questions and answers.
 - (j) Insurance on personal property.
 - (k) Questions of practice.
13. Effect of misrepresentation or breach of warranty as to amount and value of insured property.
 - (a) Statements of value as warranties or representations.
 - (b) Same—Qualified warranties.
 - (c) Same—Value as matter of opinion.
 - (d) Effect of overvaluation.
 - (e) Same—Materiality—Open or valued policies.
 - (f) Same—Intent of insured.
 - (g) Same—Statutory provisions limiting effect of false statements.
 - (h) Same—Valuation compared with amount of insurance.
 - (i) Same—Amount or value of property not covered by policy.
 - (j) Failure to disclose value.
 - (k) What constitutes an overvaluation.
 - (l) Questions of practice—Pleading.
 - (m) Same—Evidence.
 - (n) Same—Trial and review.
 - (o) Conclusion.

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- 14. Effect of concealment, misrepresentation, or breach of warranty or condition as to title to or interest in property insured.**
 - (a) Statements as to title and interest as representations or warranties.
 - (b) Stipulations in the nature of conditions precedent.
 - (c) Same—Condition as to sole and unconditional ownership.
 - (d) Necessity of disclosure of title or interest.
 - (e) Same—Under provisions of policy.
 - (f) Effect of false statements, concealment, or breach of condition in general.
 - (g) Effect of false statements or concealment as dependent on materiality.
 - (h) Effect of false statements as dependent on knowledge and intent of the insured.
 - (i) Statutory provisions limiting the effect of misrepresentations.
- 15. Construction and sufficiency of disclosures as to title to or interest in the property insured.**
 - (a) Sufficiency of disclosure in general.
 - (b) General principles of construction of conditions and representations.
 - (c) Ownership which will support the policy—Absolute ownership and title in fee simple.
 - (d) Defective or defeasible title.
 - (e) Equitable title or interest.
 - (f) Same—Vendee under contract of purchase.
 - (g) Property subject to lien—Title of mortgagor or mortgagee.
 - (h) Same—Personal property held under conditional sale.
 - (i) Property held in trust.
 - (j) Leaseholds—Building on leased land.
 - (k) Property held under joint or several title.
 - (l) Partnership or corporate property.
 - (m) Property of husband and wife.
- 16. What constitutes breach of condition as to sole and unconditional ownership of property insured.**
 - (a) Construction of phrase "sole and unconditional ownership."
 - (b) Sufficiency of disclosure in general.
 - (c) What constitutes sole and unconditional ownership in general.
 - (d) Defective and defeasible titles and fraudulent conveyances.
 - (e) Title of lessor or lessee.
 - (f) Vendor under contract of sale.
 - (g) Equitable title—Vendee under contract of purchase.
 - (h) Property subject to lien—Interest of mortgagor and mortgagee.
 - (i) Partnership or corporate property.
 - (j) Property of husband and wife.
 - (k) Personal property—Conditional sales—Chattel mortgages.
- 17. Pleading and practice with reference to misrepresentation, concealment, and breach of warranty or condition as to title or interest.**
 - (a) Complaint, petition, or declaration.
 - (b) Plea, answer, or affidavit of defense.
 - (c) Subsequent pleadings and stipulations.
 - (d) Issues and proof.

17. Pleading and practice with reference to misrepresentation, concealment, and breach of warranty or condition as to title or interest—(Cont'd).
 - (e) Evidence—Presumptions—Burden of proof.
 - (f) Same—Admissibility.
 - (g) Same—Weight and sufficiency.
 - (h) Questions for jury.
 - (i) Instructions.
 - (j) Trial and review.
18. Effect of concealment, misrepresentation, or breach of warranty or condition as to existing incumbrances on the property insured.
 - (a) Statements as to incumbrances as representations or warranties.
 - (b) Conditions in policy.
 - (c) Necessity of disclosure of incumbrances.
 - (d) Same—Under conditions of policy.
 - (e) Effect of false statements, concealment, or breach of condition.
 - (f) Same—As dependent on materiality.
 - (g) Same—As dependent on knowledge and intent.
 - (h) Same—Statutory provisions limiting effect of false statements.
 - (i) Questions of practice—Pleading.
 - (j) Same—Evidence.
 - (k) Same—Trial and review.
19. Construction of statements and sufficiency of disclosure as to existence and amount of incumbrances.
 - (a) In general.
 - (b) What constitutes an incumbrance.
 - (c) Same—Mortgages.
 - (d) Same—Liens.
 - (e) Same—Judgments.
20. Effect of concealment, misrepresentation, or breach of warranty as to special circumstances affecting the risk, and precautions against loss.
 - (a) Special circumstances affecting the risk.
 - (b) Same—Use of appliances for heating and light.
 - (c) Same—Keeping and use of hazardous articles.
 - (d) Same—Proximity of dangerous premises.
 - (e) Same—Character of property as an insurable risk.
 - (f) Same—Previous fires and danger from incendiaries.
 - (g) Precautions against loss.
 - (h) Casualty insurance.
 - (i) Questions of practice.
21. Effect of concealment, misrepresentation, or breach of warranty or condition as to prior insurance.
 - (a) Statements as to prior insurance as representations or warranties.
 - (b) Stipulations in the nature of conditions precedent.
 - (c) Necessity of disclosure as to prior insurance.
 - (d) Effect of false statement, concealment, or breach of condition as dependent on materiality.
 - (e) Same—As dependent on knowledge and intent.

21. Effect of concealment, misrepresentation, or breach of warranty or condition as to prior insurance—(Cont'd).
 - (f) Same—As to other insurance maintained.
 - (g) Breach of condition—Suspension of risk.
 - (h) Construction and sufficiency of disclosure in general
 - (i) What constitutes prior insurance.
 - (j) Same—Concurrent insurance.
 - (k) Insurance on other interest.
 - (l) Validity of prior policy.
 - (m) Prior policy rendered void by policy in suit.
 - (n) Voidable policy.
 - (o) Cancellation, expiration, or surrender of prior policy.
 - (p) Questions of practice—Pleading.
 - (q) Same—Evidence.
 - (r) Same—Trial and review.
22. Effect of misrepresentation, breach of warranty, or concealment as dependent on relation to cause of loss.
 - (a) Cause of loss related to fact misrepresented or concealed.
 - (b) Cause of loss not related to fact misrepresented or concealed.
 - (c) Statutory provisions.

1. DISTINCTION BETWEEN WARRANTIES, REPRESENTATIONS, AND CONDITIONS PRECEDENT.

- (a) Scope of discussion.
 - (b) Warranties and representations defined and distinguished in general
 - (c) General characteristics of warranties and representations.
 - (d) Statements contained in or made part of the policy.
 - (e) Sufficiency of reference to make statements part of the policy.
 - (f) Statements made by third persons.
 - (g) Application of general rules of construction.
 - (h) Inconsistent recitals.
 - (i) Same—Reference to statements as representations.
 - (j) Qualified recitals.
 - (k) Same—Character dependent on materiality.
 - (l) Same—Statements made on knowledge and belief.
 - (m) Nonresponsive or partial answers—Failure to answer.
 - (n) Failure to make representation as to facts required by conditions of policy.
 - (o) Conditions precedent
- (a) Scope of discussion.

The statements, stipulations, and conditions on which the contract of insurance is based, and which determine the character and extent of the risk assumed by the insurer, are, according to their nature and effect, distinguished as representations, warranties, or

conditions precedent. That a distinction exists is not questioned; but it is difficult to draw an exact line of demarkation between representations and warranties on the one hand and warranties and conditions precedent on the other, which will in all cases be satisfactory. As said in *Protection Ins. Co. v. Harmer*, 2 Ohio St. 452, 59 Am. Dec. 684, the distinction is easily comprehended and regarded as well settled so far as contracts of marine insurance are concerned. The difficulty arises in its application to particular cases, and especially in construing contracts of fire insurance. The definitions and distinctions which were the outgrowth of the early conditions of marine insurance have been greatly modified in modern times in the application of the rules to fire insurance. In the following paragraphs the general principles on which the distinction between representations and warranties is based will be stated, followed by a discussion of the cases in which these general principles have been modified to meet modern conditions.

(b) Warranties and representations defined and distinguished in general.

Definitions of warranties and representations have been given in numerous cases. Though these differ in form, they are essentially alike in substance. As a result of the examination of the leading cases, a warranty in the law of insurance may be defined as a statement or stipulation in the policy as to the existence of a fact or a condition of the subject of the insurance, which, if untrue, will prevent the policy from attaching as the contract of the insurer.

Reference may be made to *Cady v. Imperial Ins. Co.*, 4 Fed. Cas. 984; *Wood v. Hartford Ins. Co.*, 13 Conn. 533, 35 Am. Dec. 92; *Indiana Farmers' Live Stock Ins. Co. v. Byrnett*, 9 Ind. App. 443, 36 N. E. 779; *Aetna Ins. Co. v. Simmons*, 49 Neb. 811, 69 N. W. 125; *Duncan v. Sun Ins. Co.*, 6 Wend. (N. Y.) 488, 22 Am. Dec. 539; *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389, 33 N. E. 475; *Mackie v. Pleasants*, 2 Bin. (Pa.) 363; *Lycoming Ins. Co. v. Mitchell*, 48 Pa. 367; *Lennox v. Greenwich Ins. Co.*, 9 Pa. Super. Ct. 171.

As said in *Ramer v. American Central Ins. Co.*, 70 Mo. App. 47, a warranty defines by way of particular stipulation and condition the precise limits of the obligation the insurer assumes, and no liability can arise except within these limits.

A representation has been defined as an oral or written statement, made by the insured to the insurer, of certain facts or condi-

tions tending to induce the insurer to assume the risk, by diminishing the estimate he would otherwise have formed of it.

This is substantially the definition given in *Commonwealth Ins. Co. v. Monninger*, 18 Ind. 352; *Indiana Farmers' Live Stock Ins. Co. v. Byrnett*, 9 Ind. App. 443, 36 N. E. 779; *Bryant v. Ocean Ins. Co.*, 22 Pick. (Mass.) 200; *Farmers' Ins. & Loan Co. v. Snyder*, 16 Wend. (N. Y.) 481, 30 Am. Dec. 118; *Pierce v. Empire Ins. Co.*, 62 Barb. (N. Y.) 637; *Protection Ins. Co. v. Harmer*, 2 Ohio St. 452, 59 Am. Dec. 684.

Though, as said in *Livingston v. Maryland Ins. Co.*, 7 Cranch, 506, 3 L. Ed. 421, to constitute a representation, there must be an affirmation or denial of some fact, yet, according to *Lycoming Ins. Co. v. Mitchell*, 48 Pa. 367, a representation is not an absolute agreement that the fact is as stated.

In view of the foregoing definitions, certain well-settled principles regarding the nature of warranties and representations may be deduced. Ignoring for the present the fact that in marine insurance certain warranties are implied, and restricting our use of the word "warranties" to express warranties, we may state that underlying the whole doctrine of warranties and representations is the fundamental principle that warranties are always a part of the completed contract, while representations precede, are collateral to, and are not necessarily a part of, the contract.

This principle is asserted in *Hearn v. Equitable Safety Ins. Co.*, 11 Fed. Cas. 965, affirmed *Equitable Fire Ins. Co. v. Hearne*, 20 Wall. 494, 22 L. Ed. 398; *Hazard v. New England Marine Ins. Co.*, 8 Pet. 557, 8 L. Ed. 1043; *Eddy St. Iron Foundry v. Hampden Stock & Mut. Fire Ins. Co.*, 8 Fed. Cas. 300; *Roth v. City Ins. Co.*, 20 Fed. Cas. 1255; *Pelican Ins. Co. v. Smith*, 92 Ala. 428, 9 South. 327; *Glen-dale Woolen Co. v. Protection Ins. Co.*, 21 Conn. 19, 54 Am. Dec. 309; *Merchants' & Mechanics' Ins. Co. v. Schroeder*, 18 Ill. App. 216; *Commonwealth's Ins. Co. v. Monninger*, 18 Ind. 352; *Williams v. New England Mut. Fire Ins. Co.*, 31 Me. 219; *Bryant v. Ocean Ins. Co.*, 22 Pick. (Mass.) 200; *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416, 59 Am. Dec. 192; *Ætna Ins. Co. v. Grube*, 6 Minn. 82 (Gil. 32); *Planters' Ins. Co. v. Myers*, 55 Miss. 479, 30 Am. Rep. 521; *Loehner v. Home Mutual Ins. Co.*, 17 Mo. 247; *Mers v. Franklin Ins. Co.*, 68 Mo. 127; *Walker v. Phoenix Ins. Co.*, 62 Mo. App. 209; *Deweese v. Manhattan Ins. Co.*, 34 N. J. Law, 244; *Jennings v. Chenango County Mut. Ins. Co.*, 2 Denio (N. Y.) 75; *Farmers' Ins. Co. v. Snyder*, 16 Wend. (N. Y.) 481, 30 Am. Dec. 118; *Burritt v. Saratoga County Mut. Fire Ins. Co.*, 5 Hill (N. Y.) 188, 40 Am. Dec. 345; *Pierce v. Empire Ins. Co.*, 62 Barb. (N. Y.) 637; *Walton v. Bethune*, 2 Brev. (S. C.) 453, 4 Am. Dec. 597.

A second distinction between warranties and representations arises from the different effect given to the falsity of a statement made. This will be discussed at length in a subsequent brief. It is sufficient to state the principle in general terms. As said in the leading case of *Ætna Ins. Co. v. Simmons*, 49 Neb. 811, 69 N. W. 125, a warranty is the statement of a fact on the literal truth of which the validity of the contract depends; but in the case of a representation the validity of the policy does not depend on the literal truth of the assertion. In other words, a warranty must be literally true, while a representation need be only substantially true.

Reference to the following cases is deemed sufficient: *Hazard v. New England Marine Ins. Co.*, 8 Pet. 557, 8 L. Ed. 1043; *Hearn v. Equitable Safety Ins. Co.*, 11 Fed. Cas. 965, affirmed *Equitable Fire Ins. Co. v. Hearne*, 20 Wall. 494, 22 L. Ed. 398; *Nicoll v. American Ins. Co.*, 18 Fed. Cas. 231; *Sayles v. Northwestern Ins. Co.*, 21 Fed. Cas. 609; *Fisher v. Crescent Ins. Co. (C. C.)* 33 Fed. 549; *Wood v. Hartford Ins. Co.*, 13 Conn. 533, 35 Am. Dec. 92; *Glendale Woolen Co. v. Protection Ins. Co.*, 21 Conn. 19, 54 Am. Dec. 809; *Waterbury v. Dakota Fire & Marine Ins. Co.*, 6 Dak. 468, 48 N. W. 697; *Commonwealth's Ins. Co. v. Monninger*, 18 Ind. 352; *Phoenix Ins. Co. v. Benton*, 87 Ind. 132; *Indiana Farmers' Live Stock Ins. Co. v. Bogeman*, 9 Ind. App. 399, 36 N. E. 927; *Golcoechea v. Louisiana State Ins. Co.*, 6 Mart. N. S. (La.) 51, 17 Am. Dec. 175; *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416, 59 Am. Dec. 192; *Ætna Ins. Co. v. Grube*, 6 Minn. 82 (Gil. 32); *Planters' Ins. Co. v. Myers*, 55 Miss. 479, 30 Am. Rep. 521; *Mers v. Franklin Ins. Co.*, 68 Mo. 127; *Carson v. Jersey City Ins. Co.*, 43 N. J. Law, 300, 39 Am. Rep. 584; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567; *Farmers' Ins. Co. v. Snyder*, 16 Wend. (N. Y.) 481, 30 Am. Dec. 118; *Delonguemare v. Tradesmen's Ins. Co.*, 2 N. Y. Super. Ct. 629; *Protection Ins. Co. v. Harmer*, 2 Ohio St. 452, 59 Am. Dec. 684; *Baker v. Central Ins. Co.*, 3 Ohio Dec. 478; *Ludlow v. Union Ins. Co.*, 2 Serg. & R. (Pa.) 119; *Mackie v. Pleasants*, 2 Bin. (Pa.) 363; *Lennox v. Greenwich Ins. Co.*, 9 Pa. Super. Ct. 171; *Lycoming Ins. Co. v. Mitchell*, 48 Pa. 367; *Phoenix Assur. Co. of London v. Munger Improved Cotton Mach. Mfg. Co.*, 92 Tex. 297, 49 S. W. 222, affirming (Tex. Civ. App.) 49 S. W. 271.

The language of the opinion of Mr. Justice Clifford, in *Cady v. Imperial Ins. Co.*, 4 Fed. Cas. 984, would seem to indicate that only substantial compliance is requisite in the case of warranties, but when this language is construed with other phrases of the opinion, and especially with the portion where it is indicated that the warranty should be reasonably construed, we are justified in assuming

that what was meant by "substantial compliance" was a compliance with the warranty as reasonably construed.

Another principle marking the distinction between warranties and representations is, as stated in *Waterbury v. Dakota Fire & Marine Ins. Co.*, 6 Dak. 468, 43 N. W. 697, that, in the absence of statutory provisions to the contrary, a warranty is of the nature of a condition precedent whereby the insured stipulates for the absolute truth of the statement made. On the other hand, a representation need be true only as to matters which influence the insurer in taking or rejecting the risk, or fixing the rate of premium. This is equivalent to the principle announced in many cases that in the case of warranties no question can be raised as to the materiality of the facts stated, while the effect of representations is dependent on whether they relate to material or immaterial facts.

This principle is illustrated in *Hazard v. New England Marine Ins. Co.*, 8 Pet. 557, 8 L. Ed. 1043; *Cady v. Imperial Ins. Co.*, 4 Fed. Cas. 984; *Hearn v. Equitable Safety Ins. Co.*, 11 Fed. Cas. 965; *James v. Lycoming Ins. Co.*, 13 Fed. Cas. 309; *Nicoll v. American Ins. Co.*, 18 Fed. Cas. 231; *Commonwealth's Ins. Co. v. Monninger*, 18 Ind. 352; *Phoenix Ins. Co. v. Benton*, 37 Ind. 182; *Indiana Farmers' Live Stock Ins. Co. v. Bogeman*, 9 Ind. App. 399, 36 N. E. 927; *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416, 59 Am. Dec. 192; *Ætna Ins. Co. v. Grube*, 6 Minn. 82 (Gil.) 32; *Planters' Ins. Co. v. Myers*, 55 Miss. 479, 30 Am. Rep. 521; *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247; *Mers v. Franklin Ins. Co.*, 68 Mo. 127; *Hubbard v. North British & Mercantile Ins. Co.*, 57 Mo. App. 1; *Ætna Ins. Co. v. Simmons*, 49 Neb. 811, 69 N. W. 125; *Deweese v. Manhattan Ins. Co.*, 34 N. J. Law, 244; *Jennings v. Chenango County Mut. Ins. Co.*, 2 Denio (N. Y.) 75; *Duncan v. Sun Fire Ins. Co.*, 6 Wend. (N. Y.) 488, 22 Am. Dec. 539; *New York Belting & Packing Co. v. Washington Fire Ins. Co.*, 23 N. Y. Super. Ct. 428; *Mead v. Northwestern Ins. Co.*, 7 N. Y. 530; *Chrisman v. State Ins. Co.*, 16 Or. 283, 18 Pac. 466.

As a corollary to the foregoing rules is the principle that a warranty excludes all argument in regard to its reasonableness or the probable intent of the parties.

This has been definitely stated in *Wood v. Hartford Ins. Co.*, 13 Conn. 533, 35 Am. Dec. 92, and *Carson v. Jersey City Ins. Co.*, 43 N. J. Law, 300, 39 Am. Rep. 584, though the language of *Cady v. Imperial Ins. Co.*, 4 Fed. Cas. 984, would seem to indicate that in that case the court took a different view.

(c) General characteristics of warranties and representations.

Warranties may be express, as when there is a direct allegation or stipulation, or implied, as the warranty of seaworthiness, proper

documentation, and as to the place of loading in marine insurance. So it may be said, as in *Evans v. Columbia Fire Ins. Co.*, 40 Misc. Rep. 316, 81 N. Y. Supp. 933, that there is an implied warranty in all policies that the representations as to material facts are true.

As to the existence of implied warranties, reference may be made to *Bullard v. Roger Williams Ins. Co.*, 4 Fed. Cas. 643; *Ohl v. Eagle Ins. Co.*, 18 Fed. Cas. 630; *Higgle v. American Lloyds* (D. C.) 14 Fed. 143; *Seaman v. Enterprise Fire & Marine Ins. Co.* (C. C.) 21 Fed. 778; *Guy v. Citizens' Mutual Ins. Co.* (D. C.) 80 Fed. 695; *Long Dock Mills & Elevator Co. v. Mannheim Ins. Co.* (D. C.) 116 Fed. 886; *Stocker v. Merrimack Marine & Fire Ins. Co.*, 6 Mass. 220; *Clark v. Higgins*, 132 Mass. 586; *Natchez Ins. Co. v. Stanton*, 2 Smedes & M. (Miss.) 340, 41 Am. Dec. 592; *Warren v. United Ins. Co.*, 2 Johns. Cas. (N. Y.) 231, 1 Am. Dec. 164; *Thebaud v. Great Western Ins. Co.*, 155 N. Y. 516, 50 N. E. 284; *Ludlow v. Union Ins. Co.*, 2 Serg. & R. (Pa.) 119.¹

Warranties in a policy of insurance may be affirmative or promissory. If the statement relates to an existing fact or condition, it is affirmative. If the stipulation requires the performance or omission of certain acts after the issuance of the policy, it is promissory.²

The distinction between affirmative and promissory warranties is pointed out in *Cady v. Imperial Ins. Co.*, 4 Fed. Cas. 984; *Cowan v. Phenix Ins. Co.*, 78 Cal. 181, 20 Pac. 408; *Indiana Farmers' Live Stock Ins. Co. v. Byrnett*, 9 Ind. App. 443, 36 N. E. 779; *Golcochea v. Louisiana State Ins. Co.*, 6 Mart. N. S. (La.) 51, 17 Am. Dec. 175; *United States Fire & Marine Ins. Co. v. Kimberly*, 34 Md. 224, 6 Am. Rep. 325; *Obermeyer v. Globe Mut. Ins. Co.*, 43 Mo. 573; *O'Neil v. Buffalo Fire Ins. Co.*, 3 N. Y. 122; *New York Belting & Packing Co. v. Washington Fire Ins. Co.*, 23 N. Y. Super. Ct. 428; *King v. Tloga County Patrons' Fire Relief Ass'n*, 54 N. Y. Supp. 1057, 35 App. Div. 58; *Baker v. Central Ins. Co.*, 3 Ohio Dec. 478; *Virginia Fire & Marine Ins. Co. v. Morgan*, 90 Va. 290, 18 S. E. 191; *Blumer v. Phoenix Ins. Co.*, 48 Wis. 535, 4 N. W. 674, 33 Am. Rep. 830.

A distinction has in some instances been drawn between affirmative and promissory representations, as, for instance, in *New Jersey Rubber Co. v. Commercial Union Assur. Co.*, 64 N. J. Law, 580, 46 Atl. 777, affirming 64 N. J. Law, 51, 44 Atl. 848. Chancellor Walworth, in *Alston v. Mechanics' Mut. Ins. Co.*, 4 Hill (N. Y.) 329, however, comes to the conclusion that there cannot be a promissory

¹ See Civ. Code Cal. § 2681.

discussed in subsequent briefs. See

² The nature of promissory warranties and the effect of a breach thereof are

post, pp. 1465 and 1482.

representation; but this question will be discussed at more length in a subsequent brief.

It is not necessary to use the word "warranty" in order to give a statement or stipulation the character of a warranty. As said in *Redman v. Hartford Ins. Co.*, 47 Wis. 89, 1 N. W. 393, 32 Am. Rep. 751, and *Lennox v. Greenwich Ins. Co.*, 9 Pa. Super. Ct. 171, no particular form of words is necessary. The use of the word "warranty," as remarked in *Wood v. Hartford Fire Ins. Co.*, 13 Conn. 533, 35 Am. Dec. 92, simply dispels all ambiguity and supersedes the necessity of construction.³

In view of the fact that nearly all cases defining warranties and distinguishing them from representations speak of warranties as statements in writing, we are justified in assuming the rule to be that a warranty must be in writing and cannot be based on oral statements.

This principle is supported by *Wheaton v. North British & Mercantile Ins. Co.*, 76 Cal. 415, 18 Pac. 758, 9 Am. St. Rep. 216; *Lycoming Fire Ins. Co. v. Jackson*, 83 Ill. 302, 25 Am. Rep. 386; *Western Assur. Co. v. Mason*, 5 Ill. App. 141; *Higginson v. Dall*, 13 Mass. 96; *Bardwell v. Conway Ins. Co.*, 122 Mass. 90; *Ahlberg v. German Ins. Co.*, 94 Mich. 259, 53 N. W. 1102; *Newman v. Springfield Fire & Marine Ins. Co.*, 17 Minn. 123 (Gil. 98); *Benninghoff v. Agricultural Ins. Co.*, 98 N. Y. 495; *Wytheville Ins. Co. v. Stultz*, 87 Va. 629, 18 S. E. 77.

A representation, on the other hand, may be either oral or in writing.

Higginson v. Dall, 13 Mass. 96; *Livingston v. Delafield*, 1 Johns. (N. Y.) 523.⁴

Generally speaking, the representations which may fairly be regarded as inducing the risk, and therefore collateral to the contract, are positive assertions of the existence of a fact or condition. Representations may, however, be of matters in expectation, as in *Rice v. New England Marine Ins. Co.*, 4 Pick. (Mass.) 439, or of matters of information, as in *Williams v. Delafield*, 2 Caines (N. Y.) 329, and *Tidmarsh v. Washington Fire & Marine Ins. Co.*, 23 Fed. Cas. 1197. On the other hand, it was said, in *Merchants' & Manufacturers' Mut. Ins. Co. v. Washington Mut. Ins. Co.*, 1 Handy, 408,

³ See Civ. Code Cal. § 2604; *Sanders' Civ. Code Mont.* § 3471.

⁴ See Civ. Code Cal. § 2571; *Rev. Codes N. D.* 1899, § 4474; *Rev. Civ. Code S. D.* 1903, § 1825.

12 Ohio Dec. 209, that there cannot be a representation as to intention, but only as to existing facts.

A distinction is to be drawn between warranties of fact and warranties which are, in effect, exceptions to the risk or exceptions from liability. This distinction is pointed out in *McCargo v. New Orleans Ins. Co.*, 10 Rob. (La.) 202, 43 Am. Dec. 180, where the policy contained a clause, "warranted free from insurrection." The court says that this is not a technical warranty, but is in the nature of an exception to the risk. This clause, though a warranty in form, is not a warranty in fact. So, too, the recital, "warranted free from detention and capture," is an exception to the risk. The distinction between warranties and exceptions to the risk in the form of warranties is also pointed out in *Conner v. Manchester Assur. Co.* (C. C. A.) 130 Fed. 743. The word is used, too, in the phrase "warranted free from average"; this being an exception of liability.

(d) Statements contained in or made part of the policy.

In accordance with the principle, discussed in subdivision (b), that warranties are part of the policy, it may be laid down as the well-settled rule that, subject to qualifications to be discussed hereafter, all statements regarding the risk, contained in or appearing on the face of the policy, are warranties.

Reference may be made to *Eddy-Street Iron Foundry v. Hampden Stock & Mut. Fire Ins. Co.*, 8 Fed. Cas. 300; *National Bank of D. O. Mills & Co. v. Union Ins. Co.*, 88 Cal. 497, 28 Pac. 509, 22 Am. St. Rep. 324; *Baker v. German Fire Ins. Co.*, 124 Ind. 490, 24 N. E. 1041; *Higginson v. Dall*, 13 Mass. 96; *Goltz v. Low*, 1 Johns. Cas. (N. Y.) 341; *Wall v. East River Ins. Co.*, 7 N. Y. 370; *Alexander v. Germania Ins. Co.*, 66 N. Y. 464, 23 Am. Rep. 76; *Burleigh v. Gebhard Fire Ins. Co.*, 90 N. Y. 220; *Illinois Mutual Fire Ins. Co. v. Marselles Mfg. Co.*, 1 Gilman (Ill.) 236.

As a necessary consequence of the foregoing rule it is also well settled that if the statement or stipulation, though not contained in the policy, but in an application or survey, is so referred to in the policy as to make it a part thereof, it becomes by force of such reference a warranty to the same extent as if actually appearing on the face of the instrument.

This principle is stated in numerous cases. Reference to the following is deemed sufficient: *Roberts v. Aetna Ins. Co.*, 58 Cal. 83; *Sun Fire Office v. Wich*, 6 Colo. App. 103, 39 Pac. 587; *Waterbury v. Dakota Fire & Marine Ins. Co.*, 6 Dak. 468, 43 N. W. 697; *Thomas*

v. Fame Ins. Co., 108 Ill. 91, affirming 10 Ill. App. 545; Cox v. Aetna Ins. Co., 29 Ind. 586; Phoenix Ins. Co. v. Benton, 87 Ind. 182; Farmers' & Drovers' Ins. Co. v. Curry, 13 Bush (Ky.) 812, 28 Am. Rep. 194; Germier v. Springfield Fire & Marine Ins. Co., 109 La. 341, 33 South. 361; Gould v. York County Mut. Fire Ins. Co., 47 Me. 403, 74 Am. Dec. 494; Tebbetts v. Hamilton Mut. Ins. Co., 1 Allen (Mass.) 305, 79 Am. Dec. 740; Abbott v. Shawmut Mut. Fire Ins. Co., 3 Allen (Mass.) 213; Taylor v. Aetna Ins. Co., 120 Mass. 254; Briggs v. Fireman's Fund Ins. Co., 65 Mich. 52, 31 N. W. 618; Oronin v. Fire Ass'n, 123 Mich. 277, 82 N. W. 45; Cerys v. State Ins. Co., 71 Minn. 338, 73 N. W. 849; Loehner v. Home Mutual Ins. Co., 17 Mo. 247; Mers v. Franklin Ins. Co., 68 Mo. 127; Carson v. Jersey City Ins. Co., 43 N. J. Law, 300, 39 Am. Rep. 584; Kennedy v. St. Lawrence County Mut. Ins. Co., 10 Barb. (N. Y.) 285; Chase v. Hamilton Mut. Ins. Co., 22 Barb. (N. Y.) 527; Smith v. Empire Ins. Co., 25 Barb. (N. Y.) 497; Pierce v. Empire Ins. Co., 62 Barb. (N. Y.) 636; Burritt v. Saratoga County Mut. Fire Ins. Co., 5 Hill (N. Y.) 188, 40 Am. Dec. 345; Duncan v. Sun Fire Ins. Co., 6 Wend. (N. Y.) 488, 22 Am. Dec. 539; Delonguemare v. Tradesmen's Ins. Co., 2 N. Y. Super. Ct. 629; King v. Tioga Co. Patrons' Fire Relief Ass'n, 54 N. Y. Supp. 1057, 85 App. Div. 58; Ripley v. Aetna Ins. Co., 80 N. Y. 136, 86 Am. Dec. 862; First National Bank v. Insurance Co. of North America, 50 N. Y. 45; Bobbitt v. Liverpool & London & Globe Ins. Co., 66 N. C. 70, 8 Am. Rep. 494; Phillips v. Knox County Mut. Ins. Co., 20 Ohio, 174; Protection Ins. Co. v. Harmer, 2 Ohio St. 452, 59 Am. Dec. 684; Byers v. Farmers' Ins. Co., 35 Ohio St. 606, 35 Am. Rep. 623; Commonwealth Mut. Fire Ins. Co. v. Huntzinger, 98 Pa. 41.*

The converse of the foregoing principle is necessarily true—that where the statement or stipulation is not contained in or made a part of the policy by a sufficient reference, it is not a warranty, but merely a representation.

It is sufficient to refer to Nicoll v. American Ins. Co., 18 Fed. Cas. 231; Wheaton v. North British & Mercantile Ins. Co., 76 Cal. 415, 18 Pac. 758, 9 Am. St. Rep. 216; Higginson v. Dall, 13 Mass. 96; Newman v. Springfield Fire & Marine Ins. Co., 17 Minn. 123 (Gil. 98); Jefferson Ins. Co. v. Cotheal, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567; Wall v. Howard Ins. Co., 14 Barb. (N. Y.) 383; Hughes v. Mercantile Mut. Ins. Co., 44 How. Prac. (N. Y.) 851; Delonguemare v. Tradesmen's Ins. Co., 2 N. Y. Super. Ct. 629; Lebanon Mutual Ins. Co. v. Losch, 42 Leg. Int. 416; Queen Ins. Co. v. May (Tex. Civ. App.) 35 S. W. 829.

* See Civ. Code Cal. § 2805; Sanders' 4505; Rev. Civ. Code S. D. 1903, § Civ. Code Mont. § 8472; Rev. St. Wis. 1853; Laws Minn. 1895, c. 175, § 52; 1898, §§ 1941-50; Pub. St. Mass. c. 119 § 138; Rev. Codes N. D. 1899, § 4505; Rev. Civ. Code S. D. 1903, § 1853; Laws Minn. 1895, c. 175, § 52; Gen. St. Conn. 1902, §§ 8496, 8499.

So a survey, not referred to in the application, as in *Sayles v. Northwestern Ins. Co.*, 21 Fed. Cas. 609, cannot, even by a reference to the application, be incorporated in the policy, so as to become a warranty. The reference must be to the survey directly.

In view of the foregoing principles and the undoubtedly well-settled rule that a warranty must be in writing, it would seem to be the rule, as stated in *Wytheville Ins. Co. v. Stultz*, 87 Va. 629, 13 S. E. 77, that, since nothing can be incorporated into a written contract unless it is also in writing, an oral application for insurance cannot by reference be made a part of the policy and a warranty.

A similar doctrine was applied in *Strauss v. Phenix Ins. Co.*, 9 Colo. App. 386, 48 Pac. 822; *Essex Sav. Bank v. Meriden Fire Ins. Co.*, 57 Conn. 335, 17 Atl. 930, 18 Atl. 324, 4 L. R. A. 759; *Ahlberg v. German Ins. Co.*, 94 Mich. 259, 53 N. W. 1102; *Newman v. Springfield Fire & Marine Ins. Co.*, 17 Minn. 123 (Gil. 98); *Benninghoff v. Agricultural Ins. Co.*, 98 N. Y. 495.

Similarly, in *Bardwell v. Conway Ins. Co.*, 122 Mass. 90, where there was a written application, and in addition thereto an oral statement as to value, which was not made part of the application, the fact that the application was referred to did not incorporate the oral statement, so as to make that a warranty. The contrary doctrine seems to have been approved in *Scottish Union & National Ins. Co. v. Petty*, 21 Fla. 399, and *Wierengo v. American Fire Ins. Co.*, 98 Mich. 621, 57 N. W. 833, though there were in those cases conditions in the policies which covered the particular facts as to which warranty was predicated. This phase of the question is discussed in a subsequent subdivision.

The authorities are not agreed as to whether a warranty can be predicated on an application not made at the time of or in connection with a policy. The effect of statements as dependent on the time when and the circumstances under which they are made is discussed in a subsequent brief. It is referred to here in a general way only because of its more or less close relation to the general principles under discussion.

That a warranty cannot be predicated of a statement not made at the time of or in connection with a policy is approved in *Rankin v. Amazon Ins. Co.*, 89 Cal. 208, 26 Pac. 872, 23 Am. St. Rep. 460; *Michigan Fire & Marine Ins. Co. v. Wich*, 8 Colo. App. 409, 46 Pac. 687; *Schroeder v. Trade Ins. Co.*, 109 Ill. 157; *Clinton v. Hope Ins. Co.*, 45 N. Y. 454; *Cleavenger v. Franklin Fire Ins. Co.*, 35 S. E. 998, 47 W. Va. 595; *Fire Ass'n v. Bynum* (Tex. Civ. App.) 44 S. W.

579. Reference may also be made to the dissenting opinion in *Le Roy v. Market Fire Ins. Co.*, 39 N. Y. 60.

The opposite view seems to have been taken in *McKibban v. Des Moines Ins. Co.*, 114 Iowa, 41, 86 N. W. 38; *Harmony Fire & Marine Ins. Co. v. Hazlehurst*, 30 Md. 380; *Convis v. Citizens' Mut Fire Ins. Co.*, 127 Mich. 616, 86 N. W. 994; *Vilas v. New York Central Ins. Co.*, 9 Hun (N. Y.) 121.

The basis of the affirmative principle, as stated in *Clinton v. Hope Ins. Co.*, 45 N. Y. 454, where the policy referred to the application and survey, is that as a written application is unquestionably intended, and the company issued the policy without requiring a written application, the contract took effect as if no reference thereto had been made.

Where the by-laws provide that the application shall be part of the contract and a warranty of the truth of the facts stated therein, such provision makes the application part of the contract and the statements therein warranties.

This may be deduced from *Chase v. Hamilton Mutual Ins. Co.*, 22 Barb. (N. Y.) 527; *Van Buren v. St. Joseph County & Village Fire Ins. Co.*, 28 Mich. 398; *Richmondville Union Seminary v. Hamilton Mut. Ins. Co.*, 14 Gray (Mass.) 459; *Tebbetts v. Hamilton Mutual Ins. Co.*, 1 Allen (Mass.) 306, 79 Am. Dec. 740.

(e) Sufficiency of reference to make statements part of the policy.

It is obvious that whether the statements in the application or survey become part of the policy, and consequently warranties, depends on the sufficiency of the reference to produce such a result. As said in *Goddard v. East Texas Fire Ins. Co.*, 67 Tex. 69, 1 S. W. 906, 60 Am. Rep. 1, if outside papers are to be imported into the policy, it must be done in so clear a manner as to leave no doubt as to the intention of the parties. A mere general reference to the statement or the application as a whole will not incorporate it into the policy, so as to make it a warranty.

This rule is supported by *Eddy Street Iron Foundry v. Hampden Stock & Mutual Fire Ins. Co.*, 8 Fed. Cas. 300; *Williams v. New England Mut. Fire Ins. Co.*, 31 Me. 219; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567; *Wall v. Howard Ins. Co.*, 14 Barb. (N. Y.) 383; *Burritt v. Saratoga County Mut. Fire Ins. Co.*, 5 Hill (N. Y.) 188, 40 Am. Dec. 345; *Vilas v. New York Central Ins. Co.*, 9 Hun (N. Y.) 121; *Delonguemare v. Tradesmen's Ins. Co.*, 2 N. Y. Super. Ct. 629; *Protection Ins. Co. v. Harmer*, 2 Ohio St. 452, 59 Am. Dec. 684.

It is not sufficient to indicate merely where the application or survey is on file. The reference must be specific.

Sayles v. Northwestern Ins. Co., 21 Fed. Cas. 609; *Commonwealth's Insurance Co. v. Monninger*, 18 Ind. 852.

The policy must refer to the application as forming a part of the contract (*First National Bank v. Insurance Co. of North America*, 50 N. Y. 45), and the reference must be to the statement as a warranty (*Columbia Ins. Co. v. Cooper*, 50 Pa. 331). In *Sheldon v. Hartford Fire Ins. Co.*, 22 Conn. 235, 58 Am. Dec. 420, the policy recited: "Reference is had to survey No. 83 on file in the office of the P. Insurance Company." The court held that the whole survey was thus incorporated into the policy, becoming a part of the contract and obligatory on the insured, but was inclined to regard it as a representation material to the risk, rather than a warranty. There is no reason, the court says, why a writing intended to be part of the contract cannot be incorporated into it by reference, as well as by extended recital. The insured contended that the reference was merely for purpose of identification, but the court said that, as the questions and statements in the survey were intended to draw forth a minute description of the premises, it became a part of the contract in those particulars. So, in *Le Roy v. Market Fire Ins. Co.*, 39 N. Y. 90, a reference to the survey in the following words: "As per survey No. 280, filed in the office of" another insurance company—was a sufficient reference to make such survey a part of the policy and its statements warranties. In *Barre Boot Co. v. Milford Mut. Ins. Co.*, 7 Allen (Mass.) 42, a recital in the policy that the application contained a just, full, and true exposition of all the facts and circumstances in regard to the condition, etc., of the property, seems to have been considered a sufficient reference under St. 1861, c. 152, which provided that neither the application nor by-laws, as such, should necessarily be considered a warranty or part of the contract.

In a general way it may be said that, where the policy refers to the application and survey as forming the basis of the contract or as a part of the policy and a warranty by the insured, it is a sufficient reference.

This is the substance of the decisions in *Morris v. Imperial Ins. Co. of London*, 32 S. E. 595, 106 Ga. 461; *Howard Fire & Marine Ins. Co. v. Cornick*, 24 Ill. 455; *Thomas v. Fame Ins. Co.*, 108 Ill. 91, affirming 10 Ill. App. 545; *Taylor v. Aetna Ins. Co.*, 120 Mass. 254; *Carson v. Jersey City Ins. Co.*, 43 N. J. Law, 300, 39 Am. Rep. 584; *Bobbitt v. Liverpool & London & Globe Ins. Co.*, 66 N. C. 70, 8 Am. Rep. 494.

In *Cox v. Ætna Ins. Co.*, 29 Ind. 586, the policy contained a stipulation that it was made and accepted in reference to the conditions annexed, which were to be used and resorted to in order to explain the rights and obligations of the parties in all cases not otherwise specially provided for. A condition recited that, when a policy is made and issued upon a survey and description, such survey and description shall be taken and deemed to be a part and portion of the policy and a warranty on the part of the insured. The court held, therefore, that the survey was by express agreement in the policy itself made a part thereof and a warranty on the part of the insured. On the other hand, where the words of reference were, as in *Lebanon Mutual Ins. Co. v. Losch*, 109 Pa. 100, that the policy was made and accepted in reference to the application, which was to be used to explain the rights of the parties in all cases not otherwise specially provided for, the court held the statements in the application were not warranties.

In the leading case of *Farmers' Ins. & Loan Co. v. Snyder*, 16 Wend. (N. Y.) 481, 30 Am. Dec. 118, affirming 13 Wend. 92, where the policy was on goods in a certain building "more particularly described in the application and survey * * * filed No. 938 in the office of the underwriters," the court held that the reference was not sufficient to make such application and survey part of the policy and a warranty. While recognizing the rule of marine insurance that matters of mere description appearing in the policy become warranties, the court regarded such rule as inapplicable to fire insurance. Following the doctrine of this case, it has been held that, where the reference is "for a more particular description" only, the application or survey is not made a part of the policy or a warranty.

This rule may be deduced from *Trench v. Chenango County Mut. Ins. Co.*, 7 Hill (N. Y.) 122; *Protection Ins. Co. v. Harmer*, 2 Ohio St. 452, 59 Am. Dec. 684; *Owens v. Holland Purchase Ins. Co.*, 56 N. Y. 565; *Commonwealth's Ins. Co. v. Monninger*, 18 Ind. 352.

It was, however, said, in *Sheldon v. Hartford Fire Ins. Co.*, 22 Conn. 235, 58 Am. Dec. 420, that, if the survey or description in such case is a material representation, it must be true. If the reference is to the application, for a more particular description "and as forming part of this policy" (*Burritt v. Saratoga County Mut. Fire Ins. Co.*, 5 Hill [N. Y.] 188, 40 Am. Dec. 345), the recital is sufficient to make the statements in the application and survey warranties.

This principle is laid down in *Carson v. Jersey City Ins. Co.*, 43 N. J. Law, 300, 39 Am. Rep. 584; *Phillips, Beckel & Co. v. Knox Co.*

Mut. Ins. Co., 20 Ohio, 174; Kennedy v. St. Lawrence County Mut. Ins. Co., 10 Barb. (N. Y.) 285; Smith v. Empire Ins. Co., 25 Barb. (N. Y.) 497; Williams v. New England Mut. Fire Ins. Co., 81 Me. 219.

In *Egan v. Mutual Ins. Co.*, 5 Denio (N. Y.) 326, the recital was: "Reference being had to the application for a more particular description and forming a part of this policy." The insured contended that this reference was not sufficient to make all of the stipulations of the application part of the contract, but merely the particular description of the property insured; that, in order to make the whole application part of the contract, it should have read, "and as forming a part of this policy." The court, however, held that the mere omission of the word "as," though the word is usually inserted in the clause, cannot be regarded as determining that it was not the intent to make the application a part of the policy. In *Cumberland Valley Mut. Protection Co. v. Mitchell*, 48 Pa. 374, where the recital was, "Reference being had to the application," etc., "which forms a part of the policy for a more particular description of the property," it was regarded as sufficient to make the application a part of the policy for description only, and not to constitute it a warranty.

In *Newman v. Springfield Fire & Marine Ins. Co.*, 17 Minn. 123 (Gil. 98), where there were several oral applications, a failure to designate which one was referred to was held to be fatal. In the often cited case of *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567, the application was filed with the report, but was not originally attached to it. The policy did not refer in terms to the application, but to the report. The court held, therefore, that the application was not made a part of the policy, so as to make the statements therein warranties. A leading case is *Delonguemare v. Tradesmen's Ins. Co.*, 2 N. Y. Super. Ct. 629, where the reference was to a certain report filed in the office of another company. It appeared that there were two plats on file with the report, the smaller one of which was handed in at the time of the application; the other being made by the company's surveyor. The court was of the opinion that the smaller plat was the application of plaintiff, and, not being referred to in the policy, did not constitute a warranty. The doctrine of this case formed the basis of the decision in *Stebbins v. Globe Ins. Co.*, 2 N. Y. Super. Ct. 675, where the policy referred to a report filed in the Washington office. There was an application, and it was contended that the application was

referred to in the policy as the report on file in the Washington office; but the court says that, in absence of evidence showing that the application was the report to which the policy referred, it could not be regarded as a warranty. In *Goddard v. East Texas Fire Ins. Co.*, 67 Tex. 69, 1 S. W. 906, 60 Am. Rep. 1, the application or survey was attached to the policy by means of mucilage, and it was contended, on the authority of certain English cases, where matter on a margin of the policy had been considered as a warranty, that the matter on the paper so attached was a warranty. The court held, however, that this did not fulfill the requirements as to making the application a part of the policy. On the other hand, where a statement is contained in the same paper as that describing the property, and the paper is so attached to the policy that the entire policy reads as a complete and connected whole, such statement will be regarded as a warranty (*Keller v. Liverpool & London & Globe Ins. Co.*, 27 Tex. Civ. App. 102, 65 S. W. 695).

(f) Statements made by third persons.

Independent of the doctrine of estoppel, which will be discussed in subsequent briefs, it has been held in numerous cases that a warranty or representation cannot be predicated on a statement in an application or survey made by the agent of the insurer.

Reference may be made to *Yoch v. Home Mut. Ins. Co.*, 111 Cal. 503, 44 Pac. 189, 34 L. R. A. 857; *Lycoming Fire Ins. Co. v. Jackson*, 83 Ill. 302, 25 Am. Rep. 386; *Thomas v. Fame Ins. Co.*, 108 Ill. 91; *Phenix Ins. Co. v. La Pointe*, 17 Ill. App. 248, affirmed in 118 Ill. 384, 8 N. E. 353; *Kausal v. Minn. Farmers' Mutual Fire Ass'n*, 81 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776; *Benninghoff v. Agricultural Ins. Co.*, 98 N. Y. 495; *Sprague v. Holland Purchase Ins. Co.*, 69 N. Y. 128; *Bennett v. Agricultural Ins. Co.*, 106 N. Y. 243, 12 N. E. 609; *Vilas v. N. Y. Central Ins. Co.*, 9 Hun (N. Y.) 121; *Blass v. Agricultural Ins. Co.*, 18 App. Div. 481, 46 N. Y. Supp. 392, affirmed in 162 N. Y. 639, 57 N. E. 1104, without opinion; *Saunders v. Agricultural Ins. Co. of Watertown, N. Y.*, 57 N. Y. Supp. 683, 39 App. Div. 631; *Koshland v. Hartford Fire Ins. Co.*, 31 Or. 402, 49 Pac. 866; *Howard Fire Ins. Co. v. Bruner*, 23 Pa. 50; *Phoenix Ins. Co. v. Coffman*, 10 Tex. Civ. App. 631, 32 S. W. 810; *Continental Fire Ins. Co. v. Whitaker (Tenn.)* 79 S. W. 119, 64 L. R. A. 451.

Where the policy recited that all applications must be made in writing, according to the printed terms prepared by the company and by the authorized agents of the company (*Owens v. Holland*

Purchase Ins. Co., 56 N. Y. 565), the court held that such a recital was entirely inconsistent with the idea that the application could be regarded as a warranty by the insured.

The basis of the rule stated above is the general principle that statements by a third person cannot be regarded as a warranty by the insured.

This principle is supported by *South Bend Toy Mfg. Co. v. Dakota Fire & Marine Ins. Co.*, 2 S. D. 17, 48 N. W. 810; *Phoenix Ins. Co. v. Moog*, 78 Ala. 284, 56 Am. Rep. 81; *Lycoming Fire Ins. Co. v. Jackson*, 83 Ill. 302, 25 Am. Rep. 386; *Harmony Fire & Marine Ins. Co. v. Hazlehurst*, 30 Md. 380; *Kausal v. Minnesota Farmers' Mut. Fire Ass'n*, 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776; *Thomas v. Lebanon Town Mut. Fire Ins. Co.*, 78 Mo. App. 268; *McGraw v. Germania Fire Ins. Co.*, 54 Mich. 145, 19 N. W. 927; *Landers v. Watertown Ins. Co.*, 19 Hun (N. Y.) 174.

The rule cannot be said to have been repudiated in *Clark v. Manufacturers' Ins. Co.*, 5 Fed. Cas. 889. It appeared in that case that the representations were originally made by S., who took out the original policy on the property. The policy was thereafter renewed at various times in the name of other persons, and finally in the name of plaintiff. Each renewal referred to the original representations, and it was held, therefore, that plaintiffs were bound by the representations made by S.

The rule is otherwise where such third person is the agent of the insured.

Spare v. Home Mut. Ins. Co. (C. C.) 19 Fed. 14; *Lycoming Fire Ins. Co. v. Rubin*, 79 Ill. 402; *Freedman v. Providence Washington Ins. Co.*, 182 Pa. 64, 37 Atl. 909.

These principles have been repudiated in some cases on the ground that by the acceptance of the policy the insured ratified the acts of the agent or third person and made the application his own. Such is the rule asserted in *Richardson v. Maine Ins. Co.*, 46 Me. 394, 74 Am. Dec. 459, though the application in that case was annexed to the application, so as to bring home to the insured notice of the false answers.

The principle of ratification was approved in *Steward v. Phoenix Ins. Co.*, 5 Hun (N. Y.) 261, *Swan v. Watertown Fire Ins. Co.*, 96 Pa. 37, and the dissenting opinion in *McGraw v. German Fire Ins. Co.*, 54 Mich. 145, 19 N. W. 927. The doctrine was apparently disapproved in the majority opinion in the latter case and in *Lycoming Fire*

Ins. Co. v. Jackson, 83 Ill. 302, 25 Am. Rep. 386, though it must be noted that it was assumed in both instances that the insured had no knowledge of the false representations.

(g) Application of general rules of construction.

The general rules discussed in the preceding subdivisions embody the fundamental principles relating to warranties and representations. As has been intimated, however, they are subject to many qualifications. They are to a large extent the outgrowth of the strict construction necessarily adopted in reference to contracts of marine insurance, owing to the peculiar circumstances attending the making of such contracts; but the strict rules of marine insurance cannot be applied to fire insurance.*

Cox v. Aetna Ins. Co., 29 Ind. 586; *Jolly's Adm'rs v. Baltimore Equitable Soc.*, 1 Har. & G. (Md.) 295, 18 Am. Dec. 288; *Glendale Woolen Co. v. Protection Ins. Co.*, 21 Conn. 19, 54 Am. Dec. 309.

Even in the early case of *Farmers' Ins. & Loan Co. v. Snyder*, 16 Wend. (N. Y.) 481, 30 Am. Dec. 118, the court, calling attention to the fact that many things have been construed into express warranties in marine policies which, if found in other contracts, would be unintelligible or regarded as immaterial, expressed a doubt whether the principle of construing every matter contained in the body of the policy, though not material to the risk, into an express warranty, should be applied with the same strictness to fire policies. In *Fowler v. Aetna Fire Ins. Co.*, 6 Cow. (N. Y.) 673, 16 Am. Dec. 460, the court, however, could see no reason why any distinction should be drawn between marine and fire contracts in this regard.

While the general rule is that warranties are always inserted in the policy or made a part thereof by apt words of reference, while representations are not part of the policy, the rule is not universally true. Not every statement in the body of the policy is an express warranty.

Frisbie v. Fayette Ins. Co., 27 Pa. 325; *Boardman v. N. H. Mutual Fire Ins. Co.*, 20 N. H. 551.

Though designated as warranties, they may be only representations.

Indiana Farmers' Live Stock Ins. Co. v. Byrnett, 9 Ind. App. 443, 36 N. E. 779; *Redman v. Hartford Ins. Co.*, 47 Wis. 89, 1 N. W. 393, 32 Am. Rep. 751.

* See Kent, Comm., vol. 3, p. 373.

It is true, as said in *Bennett v. Agricultural Ins. Co.*, 51 Conn. 504, if a statement is expressly made a warranty, it cannot be construed otherwise; but neither can a warranty be created by construction.

This is asserted in numerous cases, but reference to the following is deemed sufficient: *Ætna Ins. Co. v. Simmons*, 49 Neb. 811, 69 N. W. 125; *Convis v. Citizens' Mut. Fire Ins. Co.*, 127 Mich. 616, 86 N. W. 994; *Clinton v. Hope Ins. Co.*, 45 N. Y. 454; *Planters' Ins. Co. v. Myers*, 55 Miss. 479, 30 Am. Rep. 521; *Germier v. Springfield Fire & Marine Ins. Co.*, 109 La. 341, 33 South. 361.

A different doctrine seems to be asserted in *Wood v. Hartford Fire Ins. Co.*, 13 Conn. 533, 35 Am. Dec. 92; but, in view of the general trend of the authorities, it must be looked upon as a general statement merely, to be limited to the particular facts in that case and qualified by other portions of the opinion.

We are, then, prepared to say, with *Lennox v. Greenwich Ins. Co.*, 9 Pa. Super. Ct. 171, that it is only when a fair construction shows the fact that the words may be construed as a warranty. The statements must, according to *Clinton v. Hope Ins. Co.*, 45 N. Y. 454, and *Garcelon v. Hampton Fire Ins. Co.*, 50 Me. 580, clearly and explicitly appear to be warranties within the intent of the parties. The principle is well expressed in *Liverpool & London & Globe Ins. Co. v. Stern* (Tex. Civ. App.) 29 S. W. 678, where the court said that statements will be regarded as warranties only when adopted by the insurer as such, and both parties have agreed that they shall have that effect. In *Hart v. Niagara Fire Ins. Co.*, 9 Wash. 620, 38 Pac. 213, 27 L. R. A. 86, the court asserted it to be a universal rule that statements contained in the application will not be construed to be warranties, if elsewhere in the contract it can be found that such was not the clear intent of the parties. As said in *Wheaton v. North British & Mercantile Ins. Co.*, 76 Cal. 415, 18 Pac. 758, 9 Am. St. Rep. 216, even if the statements are declared to be warranties, they will not be so regarded, if qualified by other stipulations, which afford a fair inference that the parties themselves did not so intend them.

The intent of the parties was regarded as important in *National Bank of D. O. Mills & Co. v. Union Ins. Co.*, 88 Cal. 497, 28 Pac. 509, 22 Am. St. Rep. 324; *Waterbury v. Dakota Fire & Marine Ins. Co.*, 6 Dak. 468, 43 N. W. 697; *Convis v. Citizens' Mut. Fire Ins. Co.*, 127 Mich. 616, 86 N. W. 994; *Boardman v. N. H. Mut. Fire Ins. Co.*, 20 N. H. 551; *Morotock Ins. Co. v. Fosterio Novelty Glass Co.*, 94 Va. 361, 28 S. E. 850; *Blumer v. Phoenix Ins. Co.*, 45 Wis. 622.

The general rules of construction of contracts are therefore to be applied in determining whether the statements of the insured are to be regarded as warranties or representations. In the early case of *Mackie v. Pleasants*, 2 Bin. (Pa.) 363, involving a marine policy, it was said that, where the language is ambiguous, the intent must be inferred from other parts of the policy and extrinsic circumstances. In *Ætna Ins. Co. v. Simmons*, 49 Neb. 811, 69 N. W. 125, which is notable for its complete and logical discussion of the doctrine of warranties, the court lays down the principle that, in construing a contract to determine whether the statements are warranties or representations, the situation of the parties, the subject-matter of the contract and the language employed must be considered, and the court will construe a statement to be a warranty only when it clearly appears that such was the intention of the parties, and that each party consciously intended and assented that such should be the interpretation of the statements. A similar principle is asserted in *Planters' Ins. Co. v. Myers*, 55 Miss. 479, 30 Am. Rep. 521. In determining the question whether the statements are warranties or representations, the application and the policy must be construed together.

This is pointed out in *Rogers v. Phenix Ins. Co.*, 121 Ind. 570, 23 N. E. 498; *Phenix Ins. Co. v. Golden*, 121 Ind. 524, 23 N. E. 503; *Richmondville Union Seminary v. Hamilton Mut. Ins. Co.*, 14 Gray (Mass.) 459.

(h) Inconsistent recitals.

In accordance with the general rules applicable in the construction of insurance policies[†] is the doctrine laid down in *Indiana Farmers' Live Stock Ins. Co. v. Byrnett*, 9 Ind. App. 443, 36 N. E. 779, where the court said that if the policy contains contradictory or inconsistent provisions, or is so framed as to leave room for construction, the court will lean against the construction which imposes on the insured the obligation of a warranty.

This doctrine is also asserted in *National Bank of D. O. Mills & Co. v. Union Ins. Co.*, 88 Cal. 497, 26 Pac. 509, 22 Am. St. Rep. 324; *Strauss v. Phenix Ins. Co.*, 9 Colo. App. 386, 48 Pac. 822; *Schmidt v. Peoria Marine & Fire Ins. Co.*, 41 Ill. 295, 298; *Merchants' & Mechanics' Ins. Co. v. Schroeder*, 18 Ill. App. 216; *Rogers v. Phenix Ins. Co.*, 121 Ind. 570, 23 N. E. 498; *Phenix Ins. Co. v. Golden*, 121 Ind. 524, 23 N. E. 503; *Ætna Ins. Co. v. Norman*, 12 Ind. App. 652, 40 N. E. 1116; *Garcelon v. Hampden Fire Ins. Co.*,

[†] See ante, vol. 1, p. 627.

50 Me. 580; *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416, 59 Am. Dec. 192; *Pabst Brewing Company v. Union Ins. Co.*, 63 Mo. App. 663; *Ætna Ins. Co. v. Simmons*, 49 Neb. 811, 69 N. W. 125; *Wilson v. Conway Fire Ins. Co.*, 4 R. I. 141; *Goddard v. East Tex. Fire Ins. Co.*, 67 Tex. 69; 1 S. W. 906, 60 Am. Rep. 1; *Hart v. Niagara Fire Ins. Co.*, 9 Wash. 620, 38 Pac. 213, 27 L. R. A. 86.

A similar liberal principle has been applied in the recent case of *Thebaud v. Great Western Ins. Co.*, 155 N. Y. 516, 50 N. E. 284, involving a contract of marine insurance. In *Wall v. Howard Ins. Co.*, 14 Barb. (N. Y.) 383, it was said that where the written portion of the policy indicates an intention different from the printed, and such as will do away with the warranty, the written portion will govern the printed warranty. So, too, it was said, in *Clark v. Higgins*, 132 Mass. 586, that general provisions importing a warranty may yield to special provisions which indicate a contrary intent. In *Wilson v. Conway Fire Ins. Co.*, 4 R. I. 141, the court, while approving the general rule that inconsistent and doubtful recitals should not be considered as warranties, seems to limit its application to those statements which are not expressly declared to be warranties.

(1) Same—Reference to statements as representations.

The foregoing principles as to the effect of inconsistent recitals were applied in the leading case of *Houghton v. Manufacturers' Mut. Fire Ins. Co.*, 8 Metc. (Mass.) 114, 41 Am. Dec. 489, where it was said that if the policy, in addition to making the statements a part thereof, refers to them as representations, they will be accorded the latter character, and not regarded as warranties. In *Indiana Farmers' Live Stock Ins. Co. v. Rundell*, 7 Ind. App. 426, 34 N. E. 588,⁸ the statements were declared to be warranties, but in both the application and the policy the statements were referred to as representations; the recital in the policy being that "this policy shall be void if any material fact or circumstance stated in writing has not been fairly represented." The court held that there was such an inconsistency as reduced the statements to the grade of representations.

This decision was followed in *Indiana Farmers' Live Stock Ins. Co. v. Byrket*, 9 Ind. App. 443, 36 N. E. 779. The principle is also approved and forms the basis of the decision in *Ætna Ins. Co. v.*

⁸ Reversing (Ind. App.) 32 N. E. 865, on rehearing.

Simmons, 49 Neb. 811, 69 N. W. 125, Merchants' & Mechanics' Ins. Co. v. Schroeder, 18 Ill. App. 216, and Delaware Ins. Co. v. Harris, 26 Tex. Civ. App. 537, 64 S. W. 867.

On the other hand, the opposite rule seems to have been adopted in Michigan. In *American Ins. Co. v. Gilbert*, 27 Mich. 429, the policy referred to the application as a part thereof, and a warranty by the insured, but recited, also, that a false representation should render the policy void. The court held that this did not have the effect of reducing the statements to representations, instead of warranties. This doctrine seems to have been approved in *Briggs v. Fireman's Fund Ins. Co.*, 65 Mich. 52, 31 N. W. 616. A similar principle governed *Virginia Fire & Marine Ins. Co. v. Morgan*, 90 Va. 290, 18 S. E. 191, apparently on the ground that a policy may contain both warranties and representations. Somewhat similar is *King v. Tioga County Patrons' Fire Relief Ass'n*, 54 N. Y. Supp. 1057, 35 App. Div. 58, where the application was made a part of the policy, and a warranty, but a by-law provided that "in case there shall be any misrepresentation or omission of circumstances required by the association, increasing the hazard, it shall render void any policy issued on such application." The court held that this provision of the by-laws must be deemed to refer to representations which do not constitute warranties.

(j) Qualified recitals.

Though it is undoubtedly true, as said in *Carson v. Jersey City Ins. Co.*, 43 N. J. Law, 300, 39 Am. Rep. 584, and *Wood v. Hartford Fire Ins. Co.*, 13 Conn. 533, 35 Am. Dec. 92, that a warranty excludes all argument in regard to its reasonableness or the probable intent of the parties, this must be restricted to instances where there is an undoubted warranty. If there is any doubt as to the existence of a warranty, or doubt as to its scope and extent, the rule is that a reasonable construction is to be applied to determine such facts.

This principle may be deduced from *Cady v. Imperial Ins. Co.*, 4 Fed. Cas. 984; *James v. Lycoming Ins. Co.*, 13 Fed. Cas. 309; *Elliott v. Hamilton Mutual Ins. Co.*, 13 Gray (Mass.) 139; *Watertown Fire Ins. Co. v. Simons*, 96 Pa. 520; *Southern Mut. Ins. Co. v. Kloeber*, 31 Grat. (Va.) 739.

It is, too, a settled principle that a warranty cannot be extended by construction beyond what is reasonably implied by the exact language of the policy.

Reference may be made to *Cady v. Imperial Ins. Co.*, 4 Fed. Cas. 984; *James v. Lycoming Ins. Co.*, 13 Fed. Cas. 309; *Sayles v. North-*

western Ins. Co., 21 Fed. Cas. 609; *Mulville v. Adams* (C. C.) 19 Fed. 887; *Waterbury v. Dakota Fire & Marine Ins. Co.*, 6 Dak. 468, 43 N. W. 697; *Howard Fire & Marine Ins. Co. v. Cornick*, 24 Ill. 455; *Convis v. Citizens' Mutual Fire Ins. Co.*, 127 Mich. 616, 86 N. W. 994; *Planters' Ins. Co. v. Myers*, 55 Miss. 479, 30 Am. Rep. 521; *Ætna Ins. Co. v. Simmons*, 49 Neb. 811, 69 N. W. 125; *O'Neill v. Buffalo Fire Ins. Co.*, 3 N. Y. 122; *Protection Ins. Co. v. Harmer*, 2 Ohio St. 452, 59 Am. Dec. 684; *Louck v. Orient Ins. Co.*, 176 Pa. 638, 35 Atl. 247, 33 L. R. A. 712.

From these principles we may deduce the rule that statements will not be regarded as strict warranties, if qualified by other stipulations which by fair inference show a contrary intent.

This rule is asserted in *Wheaton v. North British & Mercantile Ins. Co.* 76 Cal. 415, 18 Pac. 758, 9 Am. St. Rep. 216, *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416, 59 Am. Dec. 192, and *Lindsey v. Union Mut. Fire Ins. Co.*, 3 R. I. 157. An important case involving this doctrine is *Protection Ins. Co. v. Harner*, 2 Ohio St. 452, 59 Am. Dec. 684.

(k) Same—Character dependent on materiality.

Though the fundamental rule, as already stated, is that no question as to materiality can be raised where warranties are involved,^{*} this refers to the effect to be given to the warranty. There are cases which apparently hold that, in determining whether a particular statement is a warranty, the materiality is an important factor.

Frisbie v. Fayette Mut. Ins. Co., 27 Pa. 325; *Imperial Fire Ins. Co. v. Murray*, 73 Pa. 13; *Pierce v. Empire Ins. Co.*, 62 Barb. (N. Y.) 636; and *Norris v. Farmers' Mut. Fire Ins. Co.*, 65 Mo. App. 632.

However that may be, it seems to be decided by abundant authority that where the policy recites that the statements are warranties so far as material to the risk, or, after making the statements warranties, recites, further, that any false statement as to facts material to the risk shall avoid the policy, the statements of the insured shall not be regarded as warranties, unless they are material.

This principle is asserted in *Mulville v. Adams* (C. C.) 19 Fed. 887; *Waterbury v. Dakota Fire & Marine Ins. Co.*, 6 Dak. 468, 43 N. W. 697; *Eddy v. Hawkeye Ins. Co.*, 70 Iowa, 472, 30 N. W. 808, 59 Am. Rep. 444; *Germier v. Springfield Fire & Marine Ins. Co.*, 109 La. 341, 33 South. 361; *Lee v. Howard Fire Ins. Co.*, 11 Cush. (Mass.) 324; *Elliott v. Hamilton Mutual Ins. Co.*, 13 Gray (Mass.) 139; *Ætna Ins. Co. v. Grube*, 6 Minn. 82 (Gil. 32); *Planters' Ins.*

^{*} See ante, p. 1130.

Co. v. Myers, 55 Miss. 479, 80 Am. Rep. 521; *Watertown Fire Ins. Co. v. Simons*, 96 Pa. 520; *Phoenix Assur. Co. v. Munger Improved Cotton Mach. Mfg. Co.*, 92 Tex. 297, 49 S. W. 222, affirming (Tex. Civ. App.) 49 S. W. 271; *Delaware Ins. Co. v. Harris*, 26 Tex. Civ. App. 537, 64 S. W. 867; *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575, 44 Am. Rep. 177; *Prieger v. Exchange Mutual Ins. Co.*, 6 Wis. 89; *Redman v. Hartford Ins. Co.*, 47 Wis. 89, 1 N. W. 393, 32 Am. Rep. 751.¹⁰

The contrary doctrine was asserted in *Chrisman v. State Ins. Co.*, 16 Or. 283, 18 Pac. 466, where the court said that a statement in a policy which makes the application, containing various warranties, a part of it, is not qualified or limited, as to such express warranties, by the further statement that any false or untrue answers or statements material to the risk shall render the policy void.

(1) Same—Statements made on knowledge and belief.

Where the policy recites that the application shall be considered part of the contract and a warranty by the insured, and the application stipulates that the statements therein contained are a just, true, and full exposition of all facts and circumstances relating to the risk, so far as they are known to the applicant, the stipulation qualifies the recital in the policy, and the statements can be regarded as warranties only so far as the facts are known to the applicant.

This principle is asserted in *National Bank v. Insurance Co.*, 95 U. S. 673, 24 L. Ed. 563; *Mulville v. Adams (C. C.)* 19 Fed. 887; *Fisher v. Crescent Ins. Co. (C. C.)* 33 Fed. 549; *Noone v. Transatlantic Ins. Co.*, 88 Cal. 152, 26 Pac. 103; *Waterbury v. Dakota Fire & Marine Ins. Co.*, 6 Dak. 465, 43 N. W. 697; *Wilkins v. Germania Fire Ins. Co.*, 57 Iowa, 529, 10 N. W. 916; *Lee v. Howard Fire Ins. Co.*, 11 Cush. (Mass.) 324; *Ætna Ins. Co. v. Grube*, 6 Minn. 82 (Gil. 32); *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575, 44 Am. Rep. 177; *Redman v. Hartford Ins. Co.*, 47 Wis. 89, 1 N. W. 393, 32 Am. Rep. 751.

As a corollary to this principle, it has been held in some cases that the fact whether the statements relate to matters of which the applicant has definite knowledge or are mere matters of opinion is important in determining the character of the statement as a warranty or a representation. In *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575, 44 Am. Rep. 177, and *Virginia Fire & Marine Ins. Co. v.*

¹⁰ See, also, Rev. St. Mo. 1899, § 7974

Sanders, 86 Va. 969, 11 S. E. 794, the court expresses the opinion that, whenever the application is incorporated in the policy as a warranty, the warranty should be regarded as relating only to matters of which the insured has or should be presumed to have some distinct definite knowledge, and not to such matters as depend wholly upon opinion and judgment.

That a warranty cannot be based on a statement which is merely a matter of opinion is also asserted in *Smith v. Home Insurance Co.*, 47 Hun (N. Y.) 30, *Phenix Ins. Co. v. Wilson*, 132 Ind. 449, 25 N. E. 592, *Owens v. Holland Purchase Ins. Co.*, 1 Thomp. & C. (N. Y.) 285, and *Merchants' & Mechanics' Ins. Co. v. Schroeder*, 18 Ill. App. 216.

In *Bryant v. Ocean Ins. Co.*, 22 Pick. (Mass.) 200, it is said that, if information is given as a mere opinion, it is not even a representation. But in *Bennett v. Agricultural Ins. Co.*, 51 Conn. 504, the court, relying on the strict doctrine relating to warranties, held that a statement declared to be a warranty could not be relieved of that character because it was based on opinion merely, though it is to be observed that the exact facts could have been easily ascertained in this case.

(m) Nonresponsive or partial answers—Failure to answer.

It is also asserted in some cases that a statement, in answer to a question in an application, which is not responsive, cannot be regarded as a warranty.

This is supported by *Farmers' Mutual Fire & Lightning Ins. Co. v. Lecroy*, 91 Ill. App. 41; *Ætna Live Stock, Fire & Tornado Ins. Co. v. Olmstead*, 21 Mich. 246, 251, 4 Am. Rep. 483; *Jersey City Ins. Co. v. Carson*, 44 N. J. Law, 210; *Meyers v. Lebanon Mut. Ins. Co.*, 156 Pa. 420, 27 Atl. 89; *Wilson v. Hampden Fire Ins. Co.*, 4 R. I. 159.

This rule will not apply to an uncertain answer, if the application does not assert a lack of knowledge (*Johnston v. Northwestern Live Stock Ins. Co.*, 107 Wis. 337, 83 N. W. 641).

In a leading case (*Gates v. Madison County Mut. Ins. Co.*, 2 N. Y. 43) the court raised the question whether a warranty that a fact does not exist can be implied by the omission to state or mention it, when interrogated as to its existence, without any declaration or statement of its nonexistence. While conceding that the failure or omission to state the fact, if known to the party and material to the risk, might vitiate

the contract, the court does not concede that it has the effect of a warranty.

That a warranty cannot be predicated on a failure to answer is distinctly asserted in *Carson v. Jersey City Ins. Co.*, 43 N. J. Law. 300, 39 Am. Rep. 584, and *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345, 15 Am. Rep. 612, and the same principle is asserted in the dissenting opinion in *Thomas v. Fame Ins. Co.*, 108 Ill. 91.

(n) Failure to make representation as to facts required by conditions of policy.

Where the policy or application contains an assertion to be completed by the filling of a blank, the failure to fill such blank does not amount to an affirmance or denial of a fact on which either representation or warranty can be predicated.

Parker v. Otsego County Farmers' Co-operative Fire Ins. Co., 47 App. Div. 204, 62 N. Y. Supp. 199; *Bardwell v. Conway Ins. Co.*, 122 Mass. 90.

It has, too, been held in some cases that, where the policy contains a condition that it shall be void if certain facts do or do not exist, the failure of the applicant to make any statement regarding such fact does not amount to an affirmance or denial, so as to constitute a warranty or representation, in the absence of inquiry.

This seems to be the doctrine asserted in *Manchester Fire Assur. Co. v. Abrams*, 89 Fed. 933, 32 C. C. A. 426; *Western Assur. Co. v. Mason*, 5 Ill. App. 141; *German Ins. & Savings Institution v. Kline*, 44 Neb. 395, 62 N. W. 857; *Phenix Ins. Co. v. Fuller*, 53 Neb. 811, 74 N. W. 269, 40 L. R. A. 408, 68 Am. St. Rep. 637; *Slobodsky v. Phenix Ins. Co.*, 53 Neb. 816, 74 N. W. 270; *Milwaukee Mechanics' Fire Ins. Co. v. Fuller*, 53 Neb. 815, 74 N. W. 273; *Seal v. Farmers' & Merchants' Ins. Co.*, 59 Neb. 253, 80 N. W. 807; *Dakin v. Liverpool, London & Globe Ins. Co.*, 77 N. Y. 600; *Union Assurance Soc. v. Nalls*, 101 Va. 613, 44 S. E. 896, 99 Am. St. Rep. 923; *Arthur v. Palatine Ins. Co.*, 57 Pac. 62, 35 Or. 27, 76 Am. St. Rep. 450; *Dooly v. Hanover Fire Ins. Co.*, 16 Wash. 155, 47 Pac. 507, 58 Am. St. Rep. 26.

On the other hand, it has been held in other cases that the acceptance by the insured of a policy containing a stipulation declaring it void unless certain facts exist or do not exist amounts to a representation or warranty that the facts conform to the condition.

This doctrine is asserted in *Syndicate Ins. Co. of Minneapolis v. Bohn*, 27 L. R. A. 614, 65 Fed. 165, 12 C. C. A. 531; *Phoenix Ins. Co. v. Public Parks Amusement Co.*, 63 Ark. 187, 37 S. W. 959; *Scottish Mut. & National Ins. Co. v. Petty*, 21 Fla. 399; *Orient Ins. Co. v. Williamson*, 98 Ga. 464, 25 S. E. 560; *Crikelair v. Citizens' Ins.*

Co., 168 Ill. 309, 48 N. E. 167, 61 Am. St. Rep. 119; *Baldwin v. German Ins. Co.*, 105 Iowa, 379, 75 N. W. 326; *Same v. New Hampshire Fire Ins. Co.*, Id.; *Adema v. Lafayette Fire Ins. Co.*, 86 La. Ann. 660; *Wierengo v. American Fire Ins. Co.*, 98 Mich. 621, 57 N. W. 833; *Hubbard v. North British & Mercantile Ins. Co.*, 57 Mo. App. 1; *Mers v. Franklin Ins. Co.*, 68 Mo. 127; *Hickey v. Dwelling House Ins. Co.*, 20 Ohio Cir. Ct. R. 385, 11 O. C. D. 135; *Slope Mine Coal Co. v. Quaker City Mut. Fire Ins. Co. of Philadelphia*, 13 Pa. Super. Ct. 626; *Wilcox v. Continental Ins. Co.*, 85 Wis. 193, 55 N. W. 188; *Crescent Ins. Co. v. Camp*, 64 Tex. 521; *Franklin v. Atlantic Fire Ins. Co.*, 42 Mo. 456; *Manhattan Fire Ins. Co. v. Well*, 28 Grat. (Va.) 389, 26 Am. Rep. 364; *Wood v. American Fire Ins. Co. of Philadelphia*, 78 Hun, 109, 29 N. Y. Supp. 250; *Mount Leonard Milling Co. v. Liverpool & London & Globe Ins. Co.*, 25 Mo. App. 259; *Kells v. Northwestern Live Stock Ins. Co.*, 64 Minn. 890, 67 N. W. 215, 58 Am. St. Rep. 541; *Western Assur. Co. v. Altheimer*, 58 Ark. 565, 25 S. W. 1067.

The decisions in these cases are not based on the theory of concealment,¹¹ but apparently on the ground that the stipulations are conditions precedent.

(c) Conditions precedent.

Policies of insurance generally contain certain stipulations which are in all essentials conditions precedent, rather than warranties or representations. It is, indeed, customary to designate warranties as conditions precedent, as in *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567, and numerous other cases. This cannot, however, be regarded as a strictly proper description. Warranties are conditions precedent to the extent that they must be absolutely true, but in other respects they differ materially from true conditions.

A warranty of seaworthiness is sometimes regarded as a condition precedent, as in *Capen v. Washington Ins. Co.*, 12 Cush. (Mass.) 517; *Van Wickle v. Mechanics' & Traders' Ins. Co.*, 97 N. Y. 354; *Merchants' Ins. Co. v. Morrison*, 62 Ill. 242, 14 Am. Rep. 93; *Berwind v. Greenwich Ins. Co.*, 114 N. Y. 231, 21 N. E. 151.

The distinction between warranties and conditions precedent is well pointed out in *Redman v. Ætna Ins. Co.*, 49 Wis. 431, 4 N. W. 591, where the court says that a condition precedent calls for the performance of some act or the happening of some event after the terms of the contract have been agreed on and before the contract shall take effect. A warranty lacks the essential element of a condition precedent, in that it contains no stipulation that an event

¹¹ See post, p. 1203.

shall happen or act be done after the agreement is made and before it shall take effect as a contract. As an example of the difference between a warranty and a condition precedent, the court cites as an example of a warranty a statement as to the soundness of a horse, and as a condition precedent the stipulation that the horse, which is the subject of the contract, shall return safe from a certain journey before the contract takes effect. So, in *Dumas v. Northwestern National Ins. Co.*, 12 App. D. C. 245, 40 L. R. A. 358, where the policy provided that it should be void if the interest of the insured was other than sole and unconditional ownership, or if the subject of the insurance be personal property subject to chattel mortgage, the court says that no question could arise as to representation or misrepresentation, or failure to disclose information. The parties made two essential conditions of the contract—that the policy should not take effect if there was a mortgage on the property, or the title was not of unconditional ownership. Such stipulations must be regarded as valid, and not opposed to any consideration of public policy.

The validity of such conditions has also been directly asserted in *Phoenix Ins. Co. v. Public Parks Amusement Co.*, 63 Ark. 187, 37 S. W. 859, *Baldwin v. German Ins. Co.*, 105 Iowa, 379, 75 N. W. 326, and *Sulphur Mines Co. v. Phenix Ins. Co.*, 94 Va. 355, 26 S. E. 856.

The doctrine in the Redman Case, that a condition precedent is a limitation as to the attachment of the risk, is well illustrated by *Banco de Sonora v. Bankers' Mut. Casualty Co.* (Iowa) 95 N. W. 232, where the contract was a running policy insuring against loss by shipment of money through the mails. One of the conditions of the policy was that no risk should be considered as insured until a letter describing it was placed in the post office addressed to the company. This condition was regarded by the court as a condition precedent to the risk attaching at all, and to be performed before the policy took effect.

As examples of conditions precedent are the stipulations which provide that the policy shall be void if the interest of the insured is other than sole and unconditional ownership, or if the subject of insurance is a building on ground not owned by the insured in fee simple, or if the subject of insurance be personal property and be incumbered by a chattel mortgage, or if the property is incumbered by mortgage or otherwise, not notified to the company and indorsed on the policy, and others of like character.

Reference may be made to *Pennsylvania Fire Ins. Co. v. Hughes*, 108 Fed. 497, 47 C. C. A. 459; *Dumas v. Northwestern National Ins.*

Co., 12 App. D. C. 245, 40 L. R. A. 358; *Brown v. Commercial Fire Ins. Co.*, 86 Ala. 189, 5 South. 500; *Phoenix Ins. Co. v. Copeland*, 86 Ala. 551, 6 South. 148, 4 L. R. A. 848; *Phoenix Ins. Co. v. Public Parks Amusement Co.*, 68 Ark. 187, 37 S. W. 959; *Indiana Ins. Co. v. Pringle*, 52 N. E. 821, 21 Ind. App. 559; *Day v. Charter Oak F. & M. Ins. Co.*, 51 Me. 91; *Lee v. Howard Fire Ins. Co.*, 3 Gray (Mass.) 583; *Blanchard v. Atlantic Mutual Fire Ins. Co.*, 33 N. H. 9; *Ordway v. Chace*, 57 N. J. Eq. 478, 42 Atl. 149; *Matthie v. Globe Fire Ins. Co.*, 74 N. Y. Supp. 177, 68 App. Div. 239; *Sulphur Mines Co. v. Phenix Ins. Co. of Brooklyn*, 94 Va. 355, 28 S. E. 858; *Wilcox v. Continental Ins. Co.*, 85 Wis. 193, 55 N. W. 188; *Fuller v. New York Fire Ins. Co.*, 67 N. E. 879, 184 Mass. 12.

In Michigan these stipulations have received a somewhat peculiar construction. In *Hoose v. Prescott Ins. Co.*, 84 Mich. 309, 47 N. W. 587, 11 L. R. A. 340, it was held that, where there is no written application, such conditions cannot be regarded as relating to circumstances existing before the policy attached, but only to changes arising after the policy has been delivered and accepted.

This doctrine is reasserted in *Hall v. Niagara Fire Ins. Co.*, 93 Mich. 184, 53 N. W. 727, 18 L. R. A. 185, 32 Am. St. Rep. 497, and *Ahlberg v. German Ins. Co.*, 94 Mich. 259, 53 N. W. 1102.

Under Gen. Laws Minn. 1895, p. 417, c. 175, § 53, as amended by Gen. Laws 1897, p. 468, c. 254, providing a standard form of fire insurance policy and declaring that in all insurance against loss by fire the conditions shall be stated in full, and that neither the application of the insured nor the by-laws of the company shall be considered as a warranty or a part of the contract, except so far as they are incorporated in full into the policy, conditions of insurance found in an application, but not embraced in the terms and conditions of the policy itself, are inoperative and of no effect (*Kollitz v. Equitable Mut. Fire Ins. Co.* [Minn.] 99 N. W. 892).

2. EFFECT OF MISREPRESENTATION OR BREACH OF WARRANTY OR CONDITION PRECEDENT AS DEPENDENT ON MATERIALITY AND ON KNOWLEDGE AND INTENT OF APPLICANT.

- (a) Effect of breach of warranty.
- (b) Same—Materiality of facts warranted.
- (c) Breach of warranty as affected by knowledge and intent of applicant.
- (d) Misrepresentations and effect thereof.
- (e) Same—Materiality of facts represented.
- (f) Misrepresentation as affected by intent of applicant.
- (g) Statements based on knowledge and belief.
- (h) Statutory provisions limiting effect of breach of warranty or misrepresentation.
- (i) Breach of condition precedent.
- (j) Misrepresentation and breach of warranty or condition as avoiding policy *ipso facto*.
- (k) Misrepresentation and breach of warranty or condition as to part of the property insured.

(a) Effect of breach of warranty.

The essential characteristics of warranties, already discussed in the preceding brief, justify us in saying, with *Mackie v. Pleasants*, 2 Bin. (Pa.) 263, that a warranty is a condition which must be fulfilled in order that the policy shall attach. The compliance with the terms of the warranty must be strict and literal.

Reference may be made to *Nicoll v. American Ins. Co.*, 18 Fed. Cas. 231; *Roth v. City Ins. Co.*, 20 Fed. Cas. 1255; *Guy v. Citizens' Mut. Ins. Co.* (D. C.) 30 Fed. 695; *Fisher v. Crescent Ins. Co.* (O. C.) 33 Fed. 544; *Hazard v. New England Marine Ins. Co.*, 8 Pet. 557, 8 L. Ed. 1043; *Western Assur. Co. v. Althelmer*, 58 Ark. 565, 25 S. W. 1067; *Morris v. Imperial Ins. Co.*, 106 Ga. 461, 32 S. E. 595; *Phoenix Ins. Co. v. Benton*, 87 Ind. 132; *Bennett v. Agricultural Ins. Co.*, 51 Conn. 504; *Lennox v. Greenwich Ins. Co.*, 9 Pa. Super. Ct. 171; *Baker v. Central Ins. Co.*, 3 Ohio Dec. 478; *Phoenix Assur. Co. of London v. Munger Improved Cotton-Mach Mfg. Co.*, 92 Tex. 297, 49 S. W. 222, affirming (Tex. Civ. App.) 49 S. W. 271; *Glendale Woolen Co. v. Protective Ins. Co.*, 21 Conn. 19, 54 Am. Dec. 309, and *Jennings v. Chenango County Mut. Ins. Co.*, 2 Denio (N. Y.) 75; *Burge Bros. v. Greenwich Ins. Co.*, 106 Mo. App. 244, 80 S. W. 342.

Noncompliance with the warranty is an express breach of the contract.

Wheaton v. North British & Mercantile Ins. Co., 76 Cal. 415, 18 Pac. 758, 9 Am. St. Rep. 216; *Hartford Protective Ins. Co. v. Harmer*, 2

Ohio St. 452, 59 Am. Dec. 684; *De Wees v. Manhattan Ins. Co.*, 34 N. J. Law, 244.

The cause of noncompliance does not affect the result (*Carson v. Jersey City Ins. Co.*, 43 N. J. Law, 300, 39 Am. Rep. 584, affirmed in 44 N. J. Law, 210).

In view of the nature of warranties and the principles just stated, it is, of course, a fundamental rule that a breach of warranty avoids the policy.

Reference to the following cases is deemed sufficient: *Bullard v. Roger Williams Ins. Co.*, 4 Fed. Cas. 643; *Tidmarsh v. Washington Fire & Marine Ins. Co.*, 23 Fed. Cas. 1197; *Illinois Mut. Fire Ins. Co. v. Marselles Mfg. Co.*, 1 Gilman (Ill.) 236; *Indiana Farmers' Live Stock Ins. Co. v. Byrnett*, 9 Ind. App. 443, 86 N. E. 779; *Zinck v. Phoenix Ins. Co.*, 60 Iowa, 266, 14 N. W. 792; *Golcochea v. Louisiana State Ins. Co.*, 6 Mart. N. S. (La.) 51, 17 Am. Dec. 175; *Gould v. York County Mut. Fire Ins. Co.*, 47 Me. 403, 74 Am. Dec. 494; *Murphy v. People's Equitable Mut. Fire Ins. Co.*, 7 Allen (Mass.) 239; *Liverpool & L. & G. Ins. Co. v. Cochran*, 77 Miss. 348, 26 South. 932, 78 Am. St. Rep. 524; *School Dist. No. 4 v. State Ins. Co.*, 61 Mo. App. 597; *Bryce v. Lorillard Fire Ins. Co.*, 85 N. Y. Super. Ct. 894; *King v. Tioga County Patrons' Fire Relief Ass'n*, 54 N. Y. Supp. 1057, 85 App. Div. 53; *Blaeser v. Milwaukee Mechanics' Mut. Ins. Co.*, 37 Wis. 31, 19 Am. Rep. 747; *Johnston v. Northwestern Live Stock Ins. Co.*, 94 Wis. 117, 68 N. W. 868.¹

It may be that the warranty is qualified, as in *Myers v. Council Bluffs Ins. Co.*, 72 Iowa, 176, 33 N. W. 453, in which case a breach cannot be predicated as on an unqualified statement, though a different rule seems to have been laid down in *Bennett v. Agricultural Ins. Co.*, 51 Conn. 504, where the court said that a statement warranted to be true must be strictly complied with, though the fact stated was in reality a matter of opinion. But a breach of warranty cannot be predicated on answers that are not responsive to the questions asked.

Wilson v. Hampden Fire Ins. Co., 4 R. I. 159; *Meyers v. Lebanon Mut. Ins. Co.*, 156 Pa. 420, 27 Atl. 39.

(b) Same—Materiality of facts warranted.

As was pointed out in the discussion of the general characteristics of warranties, it is not essential that the facts warranted should be material. As said in *Germier v. Springfield Fire & Marine Ins. Co.*, 109 La. 341, 33 South. 361, where there is a breach of warranty,

¹ See, also, Civ. Code Cal. § 2610; Codes N. D. 1899, § 4510; Rev. Civ. Sanders' Civ. Code Mont. § 3477; Rev. Code S. D. 1903, § 1858.

the only concern of the court, in the absence of a statutory enactment to the contrary, is to determine whether the statement is true or false. In other words, where a statement warranted true is shown to be false, the effect of the breach of the warranty is in no way dependent on whether the statement relates to a material or an immaterial fact.

This principle has been asserted in numerous cases. It is deemed sufficient to refer to *Cady v. Imperial Ins. Co.*, 4 Fed. Cas. 984; *Clark v. Manufacturers' Ins. Co.*, 5 Fed. Cas. 889; *Eddy Street Iron Foundry v. Hampden Stock & Mut. Fire Ins. Co.*, 8 Fed. Cas. 800; *James v. Lycoming Ins. Co.*, 18 Fed. Cas. 309; *Roth v. City Ins. Co.*, 20 Fed. Cas. 1255; *Fame Ins. Co. v. Thomas*, 10 Ill. App. 545; *Germania Fire Ins. Co. v. Hick*, 23 Ill. App. 381; *Phoenix Ins. Co. v. Benton*, 87 Ind. 132; *Indiana Farmers' Live Stock Ins. Co. v. Bogeman*, 9 Ind. App. 399, 36 N. E. 927; *Adema v. Lafayette Fire Ins. Co.*, 36 La. Ann. 680; *Witherell v. Maine Ins. Co.*, 49 Me. 200; *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416, 59 Am. Dec. 192; *Tebbetts v. Hamilton Mut. Ins. Co.*, 1 Allen (Mass.) 305, 79 Am. Dec. 740; *Ætna Ins. Co. v. Resh*, 40 Mich. 241; *Cerys v. State Ins. Co.*, 71 Minn. 338, 73 N. W. 849; *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247; *Hubbard v. North British & Mercantile Ins. Co.*, 57 Mo. App. 1; *Ætna Ins. Co. v. Simmons*, 69 N. W. 125, 49 Neb. 811; *Bobbitt v. Liverpool & London & Globe Ins. Co.*, 66 N. C. 70, 8 Am. Rep. 494; *Jennings v. Chenango County Mut. Ins. Co.*, 2 Denio (N. Y.) 75; *Duncan v. Sun Fire Ins. Co.*, 6 Wend. (N. Y.) 488, 22 Am. Dec. 539; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567; *Burrutt v. Saratoga County Mut. Fire Ins. Co.*, 5 Hill (N. Y.) 183, 40 Am. Dec. 345; *Shoemaker v. Glens Falls Ins. Co.*, 60 Barb. (N. Y.) 84; *O'Niel v. Buffalo Fire Ins. Co.*, 3 N. Y. 122; *Mead v. Northwestern Ins. Co.*, 7 N. Y. 530; *Le Roy v. Market Fire Ins. Co.*, 39 N. Y. 90; *Rohrbach v. Germania Fire Ins. Co.*, 62 N. Y. 47, 20 Am. Rep. 451; *Graham v. Firemen's Ins. Co.*, 87 N. Y. 69, 41 Am. Rep. 343, affirming 9 Daly, 341; *Bryce v. Lorillard Fire Ins. Co.*, 46 How. Prac. 498, affirming 35 N. Y. Super. Ct. 394; *Birmingham v. Empire Ins. Co.*, 42 Barb. (N. Y.) 457; *Byers v. Farmers' Ins. Co.*, 35 Ohio St. 606, 35 Am. Rep. 623; *Lennox v. Greenwich Ins. Co.*, 9 Pa. Super. Ct. 171, 29 Pittsb. Leg. J. (N. S.) 279, 43 Wkly. Notes Cas. 898; *Boyd v. Vanderbilt Ins. Co.*, 90 Tenn. 212, 16 S. W. 470, 25 Am. St. Rep. 676; *Johnston v. Northwestern Live Stock Ins. Co.*, 83 N. W. 641, 107 Wis. 337.*

In some cases, however, where the warranty was qualified by stipulations as to the materiality of the statements, the effect of

* See, also, Civ. Code Cal. § 2610; Codes N. D. 1899, § 4510; Rev. Civ. Sanders' Civ. Code Mont. § 3477; Rev. Code S. D. 1903, § 1858.

a breach of warranty has been regarded as depending on materiality to the risk.

Such seems to have been the fact in *Planters' Ins. Co. v. Myers*, 55 Miss. 479, 30 Am. Rep. 521; *Waterbury v. Dakota Fire & Marine Ins. Co.*, 6 Dak. 468, 48 N. W. 697; *Ætna Ins. Co. v. Grube*, 6 Minn. 82 (Gil. 82); *Elliott v. Hamilton Mut. Ins. Co.*, 13 Gray (Mass.) 189; *Eddy v. Hawkeye Ins. Co.*, 70 Iowa, 472, 80 N. W. 808, 59 Am. Rep. 444; *Delaware Ins. Co. v. Harris*, 28 Tex. Civ. App. 537, 64 S. W. 867; *Phoenix Assur. Co. of London v. Munger Improved Cotton Mach. Mfg. Co.*, 92 Tex. 297, 49 S. W. 222.

In some of these cases the statements were, because of the qualifying words, regarded as representations, rather than warranties. In *Chrisman v. State Ins. Co.*, 16 Or. 283, 18 Pac. 466, it was said that the qualifying words did not change the rule. In *Cox v. Ætna Ins. Co.*, 29 Ind. 586, the court seems to have adopted a modification of the principle just stated. The policy provided that the statements were a full, just, and true exposition of all facts and circumstances, etc., "so far as the same are known to the applicant and material to the risk," and the court held that in such case there must be a substantial breach of the warranty to defeat the recovery.

(c) Breach of warranty as affected by knowledge and intent of applicant.

From the very nature of warranties, it is evident that a breach of warranty is fatal to the policy, though the falsity constituting the breach is unknown to the applicant and there is no intent to deceive the insurer.

In support of this principle, reference to the following cases is deemed sufficient: *Fireman's Fund Ins. Co. v. Barker*, 6 Colo. App. 535, 41 Pac. 513; *Morris v. Imperial Ins. Co. of London*, 82 S. E. 595, 106 Ga. 461; *Zinck v. Phoenix Ins. Co.*, 60 Iowa, 266, 14 N. W. 792; *Shelden v. Michigan Millers' Mut. Fire Ins. Co.*, 124 Mich. 308, 82 N. W. 1068; *Davis v. Ætna Fire Ins. Co.*, 67 N. H. 385, 39 Atl. 902; *Merwin v. Star Fire Ins. Co.*, 7 Hun, 659, affirmed without opinion in 72 N. Y. 608; *Bryce v. Lorillard Fire Ins. Co.*, 35 N. Y. Super. Ct. 394; *Rohrbach v. Germania Fire Ins. Co.*, 62 N. Y. 47, 20 Am. Rep. 451; *Commonwealth Mut. Fire Ins. Co. v. Huntzinger*, 98 Pa. 41.³

Where, however, the applicant expresses himself as uncertain as to the exact truth of his answers, as in *Woods v. Atlantic Mut. Ins. Co.*,

³ See, also, *Sanders' Civ. Code Mont.* § 3479; *Rev. Codes N. D.* 1899, § 4512; *Rev. Civ. Code S. D.* 1903, § 1860.

50 Mo. 112, no breach of warranty can be predicated on his answer. In *Wilkins v. Germania Fire Ins. Co.*, 57 Iowa, 529, 10 N. W. 916, where the warranty was that the application contained a just, full, and true exposition of all facts, etc., so far as the same were known to the applicant, the court, recognizing the rule that, where the truth of matters is warranted absolutely, the ignorance of the insured of the falsity of such statements is immaterial, nevertheless held that the statements of the applicant must be regarded as warranties only so far as they were known to him, and there was no breach, if, as so limited, the warranty was true.

(d) Misrepresentations and effect thereof.

If the statements of the applicant are not contained in the policy, or so referred to as to become warranties, but are representations merely, such statements, if false, are termed "misrepresentations." A misrepresentation has been defined in *Hearn v. Equitable Safety Ins. Co.*, 11 Fed. Cas. 965, as a false representation of a material fact by one of the parties to the other, tending directly to induce the other to enter into the contract or to do so on terms less favorable to himself, when otherwise he might not enter into the contract at all or might demand terms more favorable. Perhaps the best definition is given in *Clark v. Insurance Co.*, 40 N. H. 333, 77 Am. Dec. 721, where it is said that a misrepresentation, according to the law of insurance, is the statement of something as a fact which is untrue, and which the assured states knowing it to be untrue and with intent to deceive, or which he states positively as true not knowing it to be true, and which has a tendency to mislead; such fact being in every case material to the risk.

This is the definition given, also, in *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416, 59 Am. Dec. 192, *Bridgewater Iron Co. v. Enterprise Ins. Co.*, 134 Mass. 433, and *Mascott v. First Nat. Fire Ins. Co.*, 69 Vt. 116, 37 Atl. 255.

It has been held in *Trade Ins. Co. v. Barracliff*, 45 N. J. Law, 543, 46 Am. Rep. 792, that a misrepresentation cannot be based on a mere statement in the policy concerning which no direct allegation was made by the applicant.

A similar rule may be deduced from *Hoose v. Prescott Ins. Co.*, 84 Mich. 309, 47 N. W. 587, 11 L. R. A. 340; *Seal v. Farmers' & Merchants' Ins. Co.*, 59 Neb. 253, 80 N. W. 807; *Phoenix Ins. Co. v. Fuller*, 53 Neb. 811, 74 N. W. 269, 40 L. R. A. 408, 68 Am. St. Rep. 637; *Slobodisky v. Phenix Ins. Co.*, 53 Neb. 816, 74 N. W. 270;

Arthur v. Palatine Ins. Co., 85 Or. 27, 57 Pac. 62, 76 Am. St. Rep. 450; Dooly v. Hanover Fire Ins. Co., 16 Wash. 155, 47 Pac. 507, 58 Am. St. Rep. 26.

Statements which are not responsive to the questions asked, as in *Farmers' Mut. Fire & Lightning Ins. Co. v. Lecroy*, 91 Ill. App. 41, or which are indefinite and ambiguous, as in *Lebanon Mut. Ins. Co. v. Kepler*, 106 Pa. 28, cannot be used as a basis on which to predicate misrepresentation. Nor can misrepresentations be predicated on voluntary statements regarding matters concerning which no questions were asked, and which do not relate to the risk.

Howard Fire & Marine Ins. Co. v. Cornick, 24 Ill. 455; *Wytheville Ins. Co. v. Stultz*, 87 Va. 629, 18 S. E. 77.

It would seem, however, that if the policy provides that false representations shall avoid the contract, any false statement will have that effect.

Graham v. Firemen's Ins. Co., 9 Daly (N. Y.) 341; *American Ins. Co. v. Gilbert*, 27 Mich. 429.

But it was said in *Minnock v. Eureka Fire & Marine Ins. Co.*, 90 Mich. 236, 51 N. W. 367, that such provisions refer only to statements attending the inception of the policy, and not to facts occurring thereafter. While it is true that, as to matters already covered by a warranty, no representation need be made, yet, if there is a misrepresentation in answer to inquiries, it will avoid the policy, though the matter misrepresented may be covered by a warranty (*Bulkley v. Protective Ins. Co.*, 4 Fed. Cas. 614).

Even if the representations are not made by the insured, but by his agent, if he accepts the policy, he ratifies the acts of the agent, so as to make the misrepresentations his misrepresentations.

Such seems to be the rule governing *Carpenter v. American Ins. Co.*, 5 Fed. Cas. 105; *Lycoming Fire Ins. Co. v. Rubin*, 79 Ill. 402; *Richardson v. Maine Ins. Co.*, 46 Me. 394, 74 Am. Dec. 459; *Armour v. Transatlantic Fire Ins. Co.*, 90 N. Y. 450; *Freedman v. Providence Washington Ins. Co.*, 37 Atl. 909, 182 Pa. 64.⁴

In *Kimball v. Ætna Ins. Co.*, 9 Allen (Mass.) 540, 85 Am. Dec. 786, the court stated the general principle that, if an existing fact material to the risk is misrepresented by the applicant for insurance, the minds of the parties do not meet, and the contract founded on such represen-

⁴ See, also, Civ. Code Ga. 1895, § 2101.

tation never takes effect, the risk does not attach, and the policy never becomes a contract between the parties. This is, perhaps, too broad a statement, involving, as it does, a question to be discussed subsequently, namely, whether a misrepresentation makes the policy void ipso facto or voidable only.

The difference between the effect of a misrepresentation and the effect of a breach of warranty is that, while a breach of warranty is an express breach of the contract, a misrepresentation operates merely on the ground of fraud.

This principle has been stated in the leading cases of *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567, *Hartford Protective Ins. Co. v. Harmer*, 2 Ohio St. 452, 59 Am. Dec. 684, and *Wheaton v. North British & Mercantile Ins. Co.*, 76 Cal. 415, 18 Pac. 758, 9 Am. St. Rep. 216.

In the discussion of the general characteristics of and distinctions between warranties and representations, reference was made to the fact that representations, unlike warranties, need not be literally true. It is, indeed, a rule well settled by abundant authority that, if the statements are representations and are substantially true, it is sufficient.

Reference may be made to *Hazard v. New England Marine Ins. Co.*, 8 Pet. 557, 8 L. Ed. 1043; *Id.*, 11 Fed. Cas. 934; *Sheldon v. Hartford Fire Ins. Co.*, 22 Conn. 235, 58 Am. Dec. 420; *Kingston Mutual County Fire & Lightning Ins. Co. v. Olmstead*, 68 Ill. App. 111; *Glade v. Germania Fire Ins. Co.*, 56 Iowa, 400, 9 N. W. 320; *Curry v. Commonwealth Ins. Co.*, 10 Pick. (Mass.) 535, 20 Am. Dec. 547; *Houghton v. Manufacturers' Mut. Fire Ins. Co.*, 8 Metc. (Mass.) 114, 41 Am. Dec. 489; *Jacobs v. Eagle Mut. Fire Ins. Co.*, 7 Allen (Mass.) 132; *Newman v. Springfield Fire & Marine Ins. Co.*, 17 Minn. 123 (Gil. 98).

In other words, in order to constitute a misrepresentation, the statement must vary from the truth to a material extent.

Such is the rule in *Clark v. Manufacturers' Ins. Co.*, 5 Fed. Cas. 889; *Nicoll v. American Ins. Co.*, 18 Fed. Cas. 231; *Mobile Fire Department Ins. Co. v. Miller*, 58 Ga. 420; *Indiana Farmers' Live Stock Ins. Co. v. Bogeman*, 9 Ind. App. 399, 36 N. E. 927; *Jacobs v. Eagle Mut. Fire Ins. Co.*, 7 Allen (Mass.) 132; *Ætna Ins. Co. v. Simmons*, 49 Neb. 811, 69 N. W. 125; *Jefferson v. Cotheal*, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567; *Lennox v. Greenwich Ins. Co.*, 9 Pa. Super. Ct. 171; *Johnston v. Northwestern Live Stock Ins. Co.*, 94 Wis. 117, 68 N. W. 868; *Id.*, 107 Wis. 337, 83 N. W. 641.

(c) Same—Materiality of facts represented.

From what has been already said regarding the characteristics and general effect of representations, it is apparent that a misrepresentation as to a fact or condition material to the risk will avoid the policy.

Reference may be made to *Columbia Ins. Co. v. Lawrence*, 10 Pet. 507, 9 L. Ed. 512; *Carpenter v. American Ins. Co.*, 5 Fed. Cas. 105; *Nicoll v. American Ins. Co.*, 18 Fed. Cas. 231; *Higgle v. American Lloyds* (D. C.) 14 Fed. 148; *Rankin v. Amazon Ins. Co.*, 89 Cal. 203, 26 Pac. 872, 23 Am. St. Rep. 460; *Wich v. Equitable Fire & Marine Ins. Co.*, 2 Colo. App. 484, 31 Pac. 389; *State Ins. Co. v. Du Bois*, 7 Colo. App. 214, 44 Pac. 756; *Helvetia Swiss Fire Ins. Co. v. Edward P. Allis Co.*, 11 Colo. App. 264, 53 Pac. 242; *Kingston Mut. County Fire & Lightning Ins. Co. v. Olmstead*, 68 Ill. App. 111; *Orient Ins. Co. v. Peiser*, 91 Ill. App. 278; *Lycoming Fire Ins. Co. v. Rubin*, 79 Ill. 402; *Germania Fire Ins. Co. v. McKee*, 94 Ill. 494; *Glade v. Germania Fire Ins. Co.*, 56 Iowa, 400, 9 N. W. 320; *Curell v. Insurance Co.*, 3 La. 353; *Stetson v. Massachusetts Mut. Fire Ins. Co.*, 4 Mass. 330, 3 Am. Dec. 217; *Alsop v. Coit*, 12 Mass. 40; *Bryant v. Ocean Ins. Co.*, 22 Pick. (Mass.) 200; *Houghton v. Manufacturers' Mut. Fire Ins. Co.*, 8 Metc. (Mass.) 114, 41 Am. Dec. 489; *Davenport v. New England Mut. Fire Ins. Co.*, 6 Cush. (Mass.) 340; *Clark v. New England Fire Ins. Co.*, Id. 342, 53 Am. Dec. 44; *Lowell v. Middlesex Mut. Fire Ins. Co.*, 8 Cush. (Mass.) 127; *Friesmuth v. Agawan Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 587; *Lewis v. Eagle Ins. Co.*, 10 Gray (Mass.) 508; *Digby v. American Central Ins. Co.*, 3 Mo. App. 603; *Burge Bros. v. Greenwich Ins. Co.*, 106 Mo. App. 244, 80 S. W. 342; *Seal v. Farmers' & Merchants' Ins. Co.*, 59 Neb. 253, 80 N. W. 807; *Callaghan v. Atlantic Ins. Co.*, 1 Edw. Ch. (N. Y.) 64; *Howell v. Cincinnati Ins. Co.*, 7 Ohio, 276, pt. 1; *Boyd v. Vanderbilt Ins. Co.*, 90 Tenn. 212, 16 S. W. 470, 25 Am. St. Rep. 676; *Queen Ins. Co. v. May* (Tex. Civ. App.) 35 S. W. 829; *Continental Ins. Co. v. Kasey*, 25 Grat. (Va.) 268, 18 Am. Rep. 681; *Wytheville Ins. Co. v. Stultz*, 87 Va. 636, 13 S. E. 77; *Ryan v. Springfield Fire & Marine Ins. Co.*, 46 Wis. 671, 1 N. W. 426; *Seal v. Farmers' & Merchants' Ins. Co.*, 59 Neb. 253, 80 N. W. 807; *Patten v. Merchants' & Farmers' Mut. Fire Ins. Co.*, 38 N. H. 338; *Armour v. Trans-Atlantic Fire Ins. Co.*, 90 N. Y. 450; *Northrup v. Porter*, 44 N. Y. Supp. 814, 17 App. Div. 80; *Evans v. Columbia Fire Ins. Co.*, 40 Misc. Rep. 316, 81 N. Y. Supp. 933; *Freedman v. Fire Ass'n of Philadelphia*, 168 Pa. 249, 32 Atl. 39; *Wilson v. Conway Fire Ins. Co.*, 4 R. I. 141.⁵

⁵ See, also, Gen. St. Conn. 1902, § 119, § 139; Rev. Laws Mass. c. 118, § 3499; Civ. Code Ga. 1895, § 2097; 60; Laws Minn. 1895, c. 175, § 53; Laws Me. 1895, c. 18, p. 14; Rev. St. Sanders' Civ. Code Mont. § 3429. Ma. 1903, c. 49, § 4; Pub. St. Mass. c.

The effect of misrepresentations was discussed at some length in *Evans v. Columbia Fire Ins. Co.*, 40 Misc. Rep. 316, 81 N. Y. Supp. 933, where the court, after calling attention to the fact that, in most of the cases upholding the general rule that misrepresentation as to a material fact will avoid the policy, where the application provides that any misrepresentation as to material facts shall render the policy void, bases its decision on the broad ground that in every insurance contract, in the absence of express provisions, there is an implied condition of the truth of all material representations.

We are, then, justified in assuming, a priori, that it is also an established rule that, where there is no moral fraud, a representation, though false, does not avoid the policy unless such representation be material.

The rule is asserted in numerous cases. Reference to the following is deemed sufficient: *Livingston v. Maryland Ins. Co.*, 6 Cranch, 274, 3 L. Ed. 222; *Alsop v. Commercial Ins. Co.*, 1 Fed. Cas. 564; *Hearn v. Equitable Safety Ins. Co.*, 11 Fed. Cas. 965; *Kohne v. Insurance Co. of North America*, 14 Fed. Cas. 835; *Roth v. City Ins. Co.*, 20 Fed. Cas. 1255; *Ruggles v. General Interest Ins. Co.*, 20 Fed. Cas. 1321; *Manufacturers' & Merchants' Ins. Co. v. Zeitlinger*, 48 N. E. 179, 168 Ill. 286, 61 Am. St. Rep. 105, affirming 68 Ill. App. 268; *Germania Fire Ins. Co. v. Deckard*, 8 Ind. App. 361, 28 N. E. 868; *Indiana Farmers' Live-Stock Ins. Co. v. Bogeman*, 9 Ind. App. 399, 36 N. E. 927; *Kentucky Mut. Ins. Co. v. Harrison*, 7 Ky. Law Rep. 43; *Allen v. Lafayette Ins. Co.*, 34 La. Ann. 763; *Adema v. Lafayette Fire Ins. Co.*, 36 La. Ann. 660; *Witherell v. Maine Ins. Co.*, 49 Me. 200; *Garcelon v. Hampden Fire Ins. Co.*, 50 Me. 580; *Mutual Fire Ins. Co. v. Deale*, 18 Md. 26, 79 Am. Dec. 673; *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416, 59 Am. Dec. 192; *Ætna Ins. Co. v. Grube*, 6 Minn. 82 (Gil. 32); *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247; *Hubbard v. North British & Mercantile Ins. Co.*, 57 Mo. App. 1; *Phenix Ins. Co. v. Gebhart*, 32 Neb. 144, 49 N. W. 333; *Ætna Ins. Co. v. Simmons*, 49 Neb. 811, 69 N. W. 125; *Boardman v. New Hampshire Mut. Fire Ins. Co.*, 20 N. H. 551; *Leathers v. Farmers' Mut. Fire Ins. Co.*, 24 N. H. 259; *Deweese v. Manhattan Ins. Co.*, 34 N. J. Law, 244; *Jennings v. Chenango County Mut. Ins. Co.*, 2 Denio (N. Y.) 75; *Delonguemare v. Tradesman's Ins. Co.*, 2 N. Y. Super. Ct. 629; *Owens v. Holland Purchase Ins. Co.*, 56 N. Y. 565; *Boyd v. Vanderbilt Ins. Co.*, 90 Tenn. 212, 16 S. W. 470, 25 Am. St. Rep. 676; *Delaware Ins. Co. v. Harris*, 26 Tex. Civ. App. 537, 64 S. W. 867; *Mosley v. Vermont Mut. Fire Ins. Co.*, 55 Vt. 142; *Mascott v. First Nat. Fire Ins. Co.*, 69 Vt. 116, 37 Atl. 255; *Mechler v. Phoenix Ins. Co.*, 38 Wis. 665; *Redman v. Hartford Ins. Co.*, 47 Wis. 89, 1 N. W. 393, 32 Am. Rep. 751; *Johnston v. Northwestern Live Stock Ins. Co.*, 94 Wis. 117, 68 N. W. 868.

The foregoing principle must, however, be qualified to the effect that where, by stipulation in the policy, it is provided that any misrepresentations shall render the policy void, the statements, if not intrinsically material, are made so by express agreement of the parties, and consequently, if false, avoid the policy. Such is the principle which governed *Johnson v. Dakota Fire & Marine Ins. Co.*, 1 N. D. 167, 45 N. W. 799. In *Friesmuth v. Agawam Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 587, the insured attempted to avoid responsibility for false statements on the ground that a representation was material only to the extent that it related to the risk; but, in view of the further provision that misrepresentations as to material facts would avoid any claim for loss, the court held that the effect could not be limited as contended. In *American Ins. Co. v. Gilbert*, 27 Mich. 429, the policy provided that a false representation, or any omission to make known any fact material to the risk, or any misrepresentation whatever, should render the policy void. The court, while admitting that, to avoid the policy because of an omission to state a fact, such fact must be material, held that the provision in reference to false representations or misrepresentations was not thus limited, and that the effect of misrepresentation was not made dependent on their materiality to the risk, but that a false representation rendered the policy void, whether material or not. In *Graham v. Firemen's Ins. Co.*, 9 Daly (N. Y.) 341, the policy provided that any false representation, or omission to make known every fact material to the risk, or any misrepresentation whatever, "or if the insured shall have," etc., followed by a series of conditions, commencing "or if," then and in every such case the policy should be void. The insured contended that the words "any false representation" had no connection with the phrase avoiding the policy. The court, however, held that they were connected with the phrase avoiding the policy, so as to make the policy void if there was any misrepresentation.

In the absence of provisions such as those just discussed, the question what facts shall be deemed material becomes important. In *Thayer v. Providence Ins. Co.*, 70 Me. 531, it was said that whatever increases the hazard of loss is material. In the leading case of *Columbia Ins. Co. v. Lawrence*, 10 Pet. 507, 9 L. Ed. 512, the decisive test was considered to be whether the true statement of the facts would have influenced the insurer to insure only at an increased premium or to decline the risk altogether. The authorities are agreed that whatever would affect the rate of premium or influence the insurer in accepting or rejecting the risk is material.

This principle is supported by *Alsop v. Commercial Ins. Co.*, 1 Fed. Cas. 564; *Clason v. Smith*, 5 Fed. Cas. 990; *Hearn v. Equitable*

Safety Ins. Co., 11 Fed. Cas. 965, affirmed in 20 Wall. 494, 22 L. Ed. 398; Nicoll v. American Ins. Co., 18 Fed. Cas. 231; Roth v. City Ins. Co., 20 Fed. Cas. 1255; Rankin v. Amazon Ins. Co., 89 Cal. 203, 26 Pac. 872, 23 Am. St. Rep. 460; Germania Fire Ins. Co. v. Deckard, 3 Ind. App. 361, 28 N. E. 868; Indiana Farmers' Live Stock Ins. Co. v. Bogeman, 9 Ind. App. 399, 36 N. E. 927; Adema v. Lafayette Fire Ins. Co., 36 La. Ann. 660; Draper v. Charter Oak Fire Ins. Co., 2 Allen (Mass.) 569; Moore v. Atlantic Mut. Ins. Co., 56 Mo. 348; Jefferson Ins. Co. v. Cotheal, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567; Armour v. Trans-Atlantic Fire Ins. Co., 90 N. Y. 450; Freedman v. Fire Ass'n, 168 Pa. 249, 32 Atl. 39; Continental Ins. Co. v. Kasey, 25 Grat. 268, 18 Am. Rep. 681.*

In accordance with the foregoing principle is the doctrine of *Armour v. Trans-Atlantic Fire Ins. Co.*, 90 N. Y. 450, where it was said that an immaterial misrepresentation, unless made in response to a specific inquiry, will not avoid the policy. The principle is more broadly stated in *Draper v. Charter Oak Fire Ins. Co.*, 2 Allen (Mass.) 569, where the court said that any misrepresentation of a fact specifically inquired about, though not material, will have the same effect in exonerating the insurer as if the fact had been material, since by making the inquiry he implies that he considers it so.

This principle seems to be asserted, also, in *Davenport v. New England Mut. Fire Ins. Co.*, 6 Cush. (Mass.) 340; *Jenkins v. Quincy Mut. Fire Ins. Co.*, 7 Gray (Mass.) 370; *Hardy v. Union Mut. Fire Ins. Co.*, 4 Allen (Mass.) 217; *Towne v. Fitchburg Mut. Fire Ins. Co.*, 7 Allen (Mass.) 51; *North American Fire Ins. Co. v. Throop*, 22 Mich. 146, 7 Am. Rep. 638; *De Wees v. Manhattan Ins. Co.*, 34 N. J. Law, 244; *Hutchins v. Cleveland Mut. Ins. Co.*, 11 Ohio St. 477; *Wilson v. Conway Fire Ins. Co.*, 4 R. I. 141; *Mullin v. Vermont Mut. Fire Ins. Co.*, 54 Vt. 223.

It is to be noted, however, that in *Hardy v. Union Mut. Fire Ins. Co.*, 4 Allen (Mass.) 217, the application stipulated for a true statement as to all facts inquired for. As a similar provision occurred in the contract in *Tebbetts v. Hamilton Mut. Ins. Co.*, 1 Allen (Mass.) 305, 79 Am. Dec. 740, the court considered the present case as falling within the rule of the *Tebbetts* Case, ignoring the fact that in the latter case these statements were expressly regarded as warranties. In *Waterbury v. Dakota Fire & Marine Ins. Co.*, 6 Dak. 468, 43 N. W. 697, the court calls attention to a class of cases which it says are often incorrectly cited as holding that, if the representations are in the form of an-

* See, also, Civ. Code Cal. § 2581; Codes N. D. 1899, § 4484; Rev. Civ. Sanders' Civ. Code Mont. § 3440; Rev. Code S. D. 1903, § 1835.

swers to specific questions the parties must be regarded as having settled for themselves that they shall be deemed material, and that a question and answer must be regarded as tantamount to an agreement that the matter inquired about is material. The court says that an examination of these authorities, referring especially to *Wilson v. Conway Fire Insurance Co.*, 4 R. I. 141, discloses that they depend generally on the fact that by the form of the application and the policy the insured stipulates for the absolute truth of all answers to questions in the application, and agrees that the policy shall be void if any of the answers are false.

(f) Misrepresentation as affected by intent of applicant.

The principle that a misrepresentation made with fraudulent intent to deceive will avoid the policy is elementary.

Reference may be made to *Tarpey v. Security Trust Co.*, 80 Ill. App. 378; *Hartford Fire Ins. Co. v. Magee*, 47 Ill. App. 387; *Howes v. Union Ins. Co.*, 16 La. Ann. 235; *Allen v. Lafayette Ins. Co.*, 34 La. Ann. 763; *Columbia Ins. Co. v. Cooper*, 50 Pa. 331; *Blaeser v. Milwaukee Mechanics' Mut. Ins. Co.*, 37 Wis. 81, 19 Am. Rep. 747.

But, where there is no actual intent to deceive or actual fraud, a different question is presented. Mr. Arnould, in his treatise on *Marine Insurance*,[†] has, indeed, advocated the theory of the English courts that actual fraud is not necessary to determine the effect of misrepresentation, but that the constructive fraud attached to a false answer is sufficient. This principle has not met with much favor in America, and has been directly criticised in *Evans v. Columbia Fire Ins. Co.*, 81 N. Y. Supp. 933, 40 Misc. Rep. 316. The intent of the applicant is regarded as of vital importance in *Fisher v. Crescent Ins. Co. (C. C.)* 33 Fed. 544; and in *Houghton v. Manufacturers' Mut. Fire Ins. Co.*, 8 Metc. (Mass.) 114, 41 Am. Dec. 489, a leading case, it was laid down as a general rule that statements made without intent to deceive will not, though false, avoid the policy.

This principle is asserted in *Gardner v. Columbian Ins. Co.*, 9 Fed. Cas. 1165; *Wheaton v. North British Mercantile Ins. Co.*, 76 Cal. 415, 18 Pac. 758, 9 Am. St. Rep. 216; *Citizens' Fire & Marine Ins. Co. v. Short*, 62 Ind. 316; *Behrens v. Germania Fire Ins. Co.*, 64 Iowa, 19, 19 N. W. 838; *Kentucky Mut. Ins. Co. v. Harrison*, 7 Ky. Law Rep. 43; *Agricultural Ins. Co. v. Yates*, 10 Ky. Law Rep. 984; *Dwelling House Ins. Co. v. Freeman*, 10 Ky. Law Rep. 496; *German Ins. Co. v. Read (Ky.)* 13 S. W. 1080; *Teutonia Ins. Co. v. Howell (Ky.)* 54 S. W. 852; *Allen v. Lafayette Ins. Co.*, 34 La.

[†] *Arn. Ins.* vol. 1, p. 495.

Ann. 763; *Williams v. Phoenix Fire Ins. Co.*, 61 Me. 67; *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416, 59 Am. Dec. 192; *Wood v. Firemen's Fire Ins. Co.*, 126 Mass. 816; *Newman v. Springfield Fire & Marine Ins. Co.*, 17 Minn. 123 (Gil. 98); *Omaha Ins. Co. v. Orlighton*, 50 Neb. 314, 69 N. W. 786; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567; *Farmers' Mut. Fire & Lightning Ins. Co. v. Ward*, 24 Ohio Cir. Ct. R. 156; *Eakin v. Home Ins. Co.*, 1 White & W. Civ. Cas. Ct. App. § 368; *Underwriters' Fire Ass'n v. Palmer* (Tex. Civ. App.) 74 S. W. 608.

A contrary view seems to have been taken in *Owen v. Farmers' Joint Stock Ins. Co.*, 57 Barb. (N. Y.) 518, and *Weigle v. Cascade Fire & Marine Ins. Co.*, 12 Wash. 449, 41 Pac. 53, but possibly on the ground that the representations were material. In view of the principle and cases discussed in the following paragraph, it is probable that in the decisions cited above the rule that the misrepresentation must be fraudulent is limited to those cases where the representation was of some immaterial fact.

Reference may be made to *Kenton Ins. Co. v. Wigginton*, 89 Ky. 330, 12 S. W. 668, 7 L. R. A. 81; *De Wees v. Manhattan Ins. Co.*, 34 N. J. Law, 244; *Armour v. Trans-Atlantic Fire Ins. Co.*, 90 N. Y. 450.

It would seem, too, from *Ætna Ins. Co. v. Simmons*, 49 Neb. 811, 69 N. W. 125, that the insurer must have relied on the representation and must have been induced thereby to issue the policy.

It is a well-settled rule, supported by abundant authority, that, where the insurer is induced to enter into the contract by a representation as to a material fact, the policy will be avoided, whether the misrepresentation was made willfully, with intent to deceive, or through an innocent mistake.

The rule is stated in *Carpenter v. American Ins. Co.*, 5 Fed. Cas. 105; *Hubbard v. Coolidge*, 12 Fed. Cas. 779; *Higgle v. American Lloyds* (D. C.) 14 Fed. 143; *Wich v. Equitable Fire & Marine Ins. Co.*, 2 Colo. App. 484, 31 Pac. 389; *State Ins. Co. of Des Moines v. Du Bois*, 7 Colo. App. 214, 44 Pac. 756; *Curell v. Insurance Co.*, 3 La. 353; *Dennison v. Thomaston Mut. Ins. Co.*, 20 Me. 125, 37 Am. Dec. 42; *Gould v. York County Mut. Fire Ins. Co.*, 47 Me. 403, 74 Am. Dec. 494; *Stetson v. Massachusetts Mut. Fire Ins. Co.*, 4 Mass. 330, 3 Am. Dec. 217; *Alsop v. Colt*, 12 Mass. 40; *Bryant v. Ocean Ins. Co.*, 22 Pick. (Mass.) 200; *Clark v. New England Fire Ins. Co.*, 6 Cush. (Mass.) 342, 53 Am. Dec. 44; *Lowell v. Middlesex Mut. Fire Ins. Co.*, 8 Cush. (Mass.) 127; *Wilbur v. Bowditch Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 446; *Lewis v. Eagle Ins. Co.*, 10 Gray (Mass.) 508; *Digby v. American Cent. Ins. Co.*, 3 Mo. App. 603; *Seal v. Farmers' & Merchants' Ins. Co.*, 59 Neb.

253, 80 N. W. 807; *Callaghan v. Atlantic Ins. Co. of New York*, 1 Edw. Ch. (N. Y.) 64; *Armour v. Trans-Atlantic Fire Ins. Co.*, 90 N. Y. 450; *Bobbitt v. Liverpool & London & Globe Ins. Co.*, 66 N. C. 70, 8 Am. Rep. 494; *Howell v. Cincinnati Ins. Co.*, 7 Ohio, 276, pt. 1; *Melvin v. Insurance Co. of North America*, 2 Lux. Leg. Reg. (Pa.) 219; *Freedman v. Providence Washington Ins. Co.*, 182 Pa. 64, 37 Atl. 909; *Boyd v. Vanderbilt Ins. Co.*, 90 Tenn. 212, 16 S. W. 470, 25 Am. St. Rep. 676; *Ingrams v. Mutual Assur. Soc.*, 1 Rob. (Va.) 661; *Continental Ins. Co. v. Kasey*, 25 Grat. (Va.) 268, 18 Am. Rep. 681.

The fact that the false statement was made through the negligence of the applicant does not excuse him.

Davenport v. New England Mut. Fire Ins. Co., 6 Cush. (Mass.) 340; *Armour v. Trans-Atlantic Fire Ins. Co.*, 90 N. Y. 450; *Howell v. Cincinnati Ins. Co.*, 7 Ohio, 276, pt. 1.

An exception to the rule is stated in *Schuster v. Dutchess County Mut. Ins. Co.*, 102 N. Y. 260, 6 N. E. 406, where the contract was severable, and the court held that the rule did not apply to avoid the whole contract. So, too, it is said in *Phoenix Ins. Co. v. Swann* (Tex. Civ. App.) 41 S. W. 519, that if the insured unintentionally made a false statement, which if intentionally made would have avoided the policy, the fact that he failed to use due diligence to ascertain the truth does not render the policy void. The rule has also been qualified in a number of cases, where the representation was as to the value of the property insured; the courts holding that an overvaluation made in good faith will not avoid the policy.

This principle is asserted in *Hodgson v. Marine Ins. Co.*, 5 Oranch, 100, 3 L. Ed. 48; *Franklin Fire Ins. Co. v. Vaughan*, 92 U. S. 516, 23 L. Ed. 740; *Alsop v. Commercial Ins. Co.*, 1 Fed. Cas. 564; *Field v. Insurance Co. of North America*, 9 Fed. Cas. 16; *Continental Ins. Co. of New York v. Ware*, 3 Ky. Law Rep. 621; *Teutonic Ins. Co. v. Howell*, 21 Ky. Law Rep. 1245, 54 S. W. 852; *Owens v. Holland Purchase Ins. Co.*, 56 N. Y. 565; *Baker v. State Ins. Co.*, 31 Or. 41, 48 Pac. 699, 65 Am. St. Rep. 807; *Miller v. Germania Fire Ins. Co. (Pa.)* 34 Leg. Int. 339; *Morotock Ins. Co. v. Fostoria Novelty Glass Co.*, 94 Va. 361, 26 S. E. 850.

It is to be noted, however, that the question of valuation is usually regarded as a matter of opinion, rather than exact statement.

(g) Statements based on knowledge and belief.

It may, perhaps, be fairly regarded as a corollary to the principle that a material misrepresentation, whether made willfully or through inno-

cent mistake, avoids the policy, that the ignorance of the applicant of the falsity of his statements cannot excuse him. This corollary has, however, been repudiated in several important and well-considered cases. In *Fisher v. Crescent Ins. Co.* (C. C.) 33 Fed. 544, the court expressed the opinion that if the applicant makes a statement according to his best knowledge and belief, after availing himself of all means of information conveniently and reasonably within his power, such statement, though inaccurate or untrue, will not avoid the policy, if it is fairly made and honestly believed to be true. In the important and leading case of *Dennison v. Thomaston Mut. Ins. Co.*, 20 Me. 125, 37 Am. Dec. 42, the court said that the insured could not be held responsible for representations which proved to be untrue, if, as a man of ordinary intelligence and prudence, he was not bound to know it was untrue when made. He could not be held culpable for not knowing that which he was not reasonably bound to know. So, in *Hall v. People's Mut. Fire Ins. Co.*, 6 Gray (Mass.) 185, and *Miller v. Alliance Ins. Co.* (C. C.) 7 Fed. 649, the knowledge of the applicant was regarded as a determining factor. Where the representations of the applicant are stipulated to be true only "so far as known" to him, he becomes responsible for their truth only to the extent of his knowledge.

Houghton v. Manufacturers' Mut. Fire Ins. Co., 8 Metc. (Mass.) 114, 41 Am. Dec. 489; *Mulville v. Adams* (C. C.) 19 Fed. 887; *National Bank v. Insurance Co.*, 95 U. S. 673, 24 L. Ed. 563.

Attention was called in the discussion of statements made in good faith to those cases in which the statements were perhaps matters of opinion. It may be stated as a principle supported by many well-considered cases that misrepresentation avoiding the policy cannot be predicated on statements based wholly on belief or opinion.

In addition to the cases cited in subdivision (f), reference may be made to *National Bank v. Insurance Co.*, 95 U. S. 673, 24 L. Ed. 563; *Clason v. Smith*, 5 Fed. Cas. 990; *Phenix Ins. Co. v. Stocks*, 40 Ill. App. 64, affirmed in 149 Ill. 319, 86 N. E. 408; *Same v. Pickel*, 119 Ind. 155, 21 N. E. 546, 12 Am. St. Rep. 393; *Home Ins. Co. v. Koob*, 68 S. W. 453, 24 Ky. Law Rep. 223, 58 L. R. A. 58; *Dennison v. Thomaston Mut. Ins. Co.*, 20 Me. 125, 37 Am. Dec. 42; *Bridgewater Iron Co. v. Enterprise Ins. Co.*, 134 Mass. 433; *Owens v. Holland Purchase Ins. Co.*, 1 Thomp. & C. (N. Y.) 285; *Standard Oil Co. v. Amazon Ins. Co.*, 14 Hun (N. Y.) 619; *Dupree v. Virginia Home Ins. Co.*, 92 N. C. 417; *Id.*, 93 N. C. 237; *Baker v. State Ins. Co.*, 31 Or. 41, 48 Pac. 699, 65 Am. St. Rep. 807; *Imperial Fire Ins. Co. v. Murray*, 73 Pa. 13.

Similarly, where the statement is merely of an expectation, misrepresentation cannot be predicated thereon.

Fosdick v. Norwich Marine Ins. Co., 3 Day (Conn.) 108; *Allegre's Adm'rs v. Maryland Ins. Co.*, 2 Gill & J. (Md.) 136, 20 Am. Dec. 424; *Olason v. Smith*, 5 Fed. Cas. 990.⁸

A representation based on information honestly obtained, if false, will not avoid the policy, as the insured becomes responsible, not for the truth of the facts, but only for the truth of the information.

Rice v. New England Ins. Co., 4 Pick. (Mass.) 439; *Blays v. Union Ins. Co.*, 3 Fed. Cas. 329; *Angusta Ins. & Banking Co. v. Abbott*, 12 Md. 348; *Tidmarsh v. Washington Fire & Marine Ins. Co.*, 23 Fed. Cas. 1197.⁹

(h) Statutory provisions limiting effect of breach of warranty or misrepresentation.

For the purpose of relieving the insured from the burdens imposed by the strict rules of construction governing contracts of marine insurance, and applied with more or less severity to contracts of fire insurance, a number of states have by law qualified such rules and limited the effect of breaches of warranties or misrepresentations to avoid the policy. California, Georgia, Iowa, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Hampshire, New Orleans, North Dakota, South Dakota, Tennessee, and Virginia have adopted statutes providing in substance that false statements must be material to or increase the risk, or contribute to the loss, to avoid the policy.¹⁰ The operation and effect of these statutes will be discussed in a subsequent brief.

(i) Breach of condition precedent.

In view of the essential characteristics of conditions precedent, it is elementary that a breach of such a condition avoids the policy absolutely.

Reference may be made to *Dumas v. Northwestern National Ins. Co.*, 12 App. D. C. 245, 40 L. R. A. 858; *Phoenix Ins. Co. v. Copeland*,

⁸ See Civ. Code Cal. §§ 2670, 2677.

⁹ See, also, Code Ga. 1895, § 2090.

¹⁰ California, Civ. Code, §§ 2611, 2677; Georgia, Code 1895, §§ 2098, 2099; Iowa, Code 1897, § 1743; Kentucky, St. 1903, § 639; Maine, Rev. St. 1883, c. 49, § 20; Massachusetts, Pub. St. c. 119, § 181; Rev. Laws, c. 118, § 21; Michigan, Comp. Laws 1897, §§ 5171, 5180-5182; Minnesota, Laws

1895, c. 175, § 20; Missouri, Rev. St. 1899, §§ 7973, 7974; Montana, Civ. Code (Sanders) § 3478; New Hampshire, Pub. St. 1901, c. 170, § 2; North Carolina, Pub. Laws 1893, c. 299, § 9; North Dakota, Rev. Codes 1899, §§ 4485, 4511; South Dakota, Rev. Civ. Code 1903, § 1859; Tennessee, Shannon's Code 1896, § 3306; Virginia, Acts Va. 1899-1900, c. 515; Code 1904, § 3344a.

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86 Ala. 551, 6 South. 143, 4 L. R. A. 848; Same v. Public Parks Amusement Co., 63 Ark. 187, 37 S. W. 959; *Alberts v. Insurance Co. of North America*, 117 Ga. 854, 45 S. E. 282; *Indiana Ins. Co. v. Pringle*, 21 Ind. App. 559, 52 N. E. 821; *Henning v. Western Assur. Co.*, 77 Iowa, 319, 42 N. W. 308; *MacKinnon v. Mutual Fire Ins. Co.*, 89 Iowa, 170, 56 N. W. 423; *Baldwin v. New Hampshire Fire Ins. Co.*, 105 Iowa, 379, 75 N. W. 326; *Citizens' Fire Ins. Security Co. v. Doll*, 35 Md. 89, 6 Am. Rep. 360; *Beck v. Hibernia Ins. Co.*, 44 Md. 95; *Collins v. St. Paul Fire & Marine Ins. Co.*, 44 Minn. 440, 46 N. W. 906; *Hubbard v. North British & Mercantile Ins. Co.*, 57 Mo. App. 1; *Overton v. American Cent. Ins. Co.*, 79 Mo. App. 1; *Blanchard v. Atlantic Mut. Fire Ins. Co.*, 33 N. H. 9.

Even where the fact constituting a breach ceases to exist the day following the execution of the policy, the insured is not relieved from the consequences of the breach, according to *Insurance Co. of North America v. Wicker*, 93 Tex. 390, 55 S. W. 740, affirming (*Tex. Civ. App.*) 54 S. W. 300.

The materiality of the fact which is the subject of the condition cannot affect the result.

Banco de Sonora v. Bankers' Mut. Casualty Co. (Iowa) 95 N. W. 232; *Lee v. Howard Fire Ins. Co.*, 3 Gray (Mass.) 583. But *Baldwin v. Citizens' Ins. Co.*, 60 Hun, 389, 15 N. Y. Supp. 587, seems to be in direct conflict with such principle.

The intent of the insured is an unimportant element.

Richmond v. Niagara Falls Ins. Co., 15 Hun (N. Y.) 248; *Geiss v. Franklin Ins. Co.*, 123 Ind. 172, 24 N. E. 99, 18 Am. St. Rep. 324.

Nor is knowledge on the part of the insured essential.

Phoenix Ins. Co. v. Copeland, 86 Ala. 551, 6 South. 143, 4 L. R. A. 848; *Aetna Ins. Co. v. Holcomb*, 89 Tex. 404, 34 S. W. 915. On the other hand, in *Rowley v. Empire Ins. Co.*, 42 N. Y. 557, and *Halder v. St. Paul Fire & Marine Ins. Co.*, 67 Minn. 514, 70 N. W. 805, the knowledge of the insured seems to have been regarded as an important factor.

It has been asserted in numerous well-considered cases that misrepresentation or breach of warranty cannot be predicated on the failure to state or deny facts the existence of which is asserted or denied by a condition precedent.

Such seems to be the rule governing *Manchester Fire Assur. Co. v. Abrams*, 89 Fed. 933, 32 C. C. A. 426; *Western Assur. Co. v. Mason*, 5 Ill. App. 141; *Hoose v. Prescott Ins. Co.*, 84 Mich. 309, 47 N. W. 587, 11 L. R. A. 340; *German Ins. & Savings Institution v.*

Kline, 44 Neb. 395, 62 N. W. 857; *Phenix Ins. Co. v. Fuller*, 53 Neb. 811, 74 N. W. 269, 40 L. R. A. 408, 68 Am. St. Rep. 637; *Slobodsky v. Phenix Ins. Co.*, 53 Neb. 816, 74 N. W. 270; *Milwaukee Mechanics' Fire Ins. Co. v. Fuller*, 53 Neb. 815, 74 N. W. 273; *Seal v. Farmers' & Merchants' Ins. Co.*, 59 Neb. 253, 80 N. W. 807; *Dakin v. Liverpool & London & Globe Ins. Co.*, 77 N. Y. 600; *Arthur v. Palatine Ins. Co.*, 35 Or. 27, 57 Pac. 62, 76 Am. St. Rep. 450; *Dooly v. Hanover Fire Ins. Co.*, 16 Wash. 155, 47 Pac. 507, 58 Am. St. Rep. 28.

On the theory that the insured, by accepting the policy containing the condition, in effect asserts or denies the facts in accordance with the condition, other courts have adopted a doctrine contrary to that of the cases last cited.

Reference may be made to *Syndicate Ins. Co. v. Bohn*, 65 Fed. 165, 12 C. C. A. 531, 27 L. R. A. 614; *Dumas v. Northwestern National Ins. Co.*, 12 App. D. C. 245, 40 L. R. A. 358; *Phoenix Ins. Co. v. Public Parks Amusement Co.*, 63 Ark. 187, 37 S. W. 959; *Scottish Union & Nat. Ins. Co. v. Petty*, 21 Fla. 399; *Orient Ins. Co. v. Williamson*, 25 S. E. 560, 98 Ga. 464; *Crikelair v. Citizens' Ins. Co.*, 48 N. E. 167, 168 Ill. 309, 61 Am. St. Rep. 119, affirming 68 Ill. App. 637; *Baldwin v. German Ins. Co.*, 75 N. W. 326, 105 Iowa, 379; *Adema v. Lafayette Ins. Co.*, 38 La. Ann. 660; *Wierengo v. American Fire Ins. Co.*, 98 Mich. 621, 57 N. W. 833; *Hubbard v. North British & Mercantile Ins. Co.*, 57 Mo. App. 1; *Mers v. Franklin Ins. Co.*, 68 Mo. 127; *Hickey v. Dwelling House Ins. Co.*, 20 Ohio Cir. Ct. R. 385, 11 O. O. D. 135; *Slope Mine Coal Co. v. Quaker City Mut. Fire Ins. Co.*, 13 Pa. Super. Ct. 626; *Guinn v. Phenix Ins. Co.* (Tex. Civ. App.) 31 S. W. 566; *Wilcox v. Continental Ins. Co.*, 85 Wis. 193, 55 N. W. 188.

(J) Misrepresentation and breach of warranty or condition as avoiding policy ipso facto.

The question has often been raised whether a misrepresentation or breach of warranty or condition renders the policy void ipso facto or voidable only. In an early and important case (*Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495, 10 L. Ed. 1044, affirming 5 Fed. Cas. 105) the Supreme Court of the United States affirmed the principle, laid down in the circuit court, that, because a policy is procured by a misrepresentation of material facts, it is not to be treated as utterly void ab initio, but is voidable only at the election of the insurer, and until so avoided it must be regarded as a subsisting policy.

This doctrine has been reasserted in *Turner v. Meridan Fire Ins. Co.* (C. C.) 16 Fed. 454; *Georgia Home Ins. Co. v. Allen*, 24 South. 899, 119 Ala. 436; *Wheaton v. North British Mercantile Ins. Co.*, 76 Cal. 415, 18 Pac. 758, 9 Am. St. Rep. 216; *St. Paul Fire &*

Marine Ins. Co. v. Neldecken, 6 Dak. 494, 43 N. W. 696; *Tarpey v. Security Trust Co.*, 80 Ill. App. 378; *Hubbard v. Hartford Fire Ins. Co.*, 83 Iowa, 325, 11 Am. Rep. 125; *Sweeting v. Mutual Fire Ins. Co.*, 83 Md. 63, 34 Atl. 826, 32 L. R. A. 570; *Bersche v. Globe Mutual Ins. Co.*, 31 Mo. 546; *Saville v. Aetna Ins. Co.*, 8 Mont. 419, 20 Pac. 646, 3 L. R. A. 542; *Hughes v. Insurance Co. of North America*, 40 Neb. 626, 59 N. W. 112; *German Ins. Co. v. Shader (Neb.)* 93 N. W. 972, 60 L. R. A. 918; *Huntley v. Perry*, 38 Barb. (N. Y.) 569; *Queen Ins. Co. v. Leonard*, 9 Ohio Cir. Ct. R. 46, 6 O. C. D. 49, 2 Ohio Dec. 122; *Cumberland Valley Mut. Protection Co. v. Mitchell*, 48 Pa. 374.

On the other hand, the decision in the *Carpenter Case* has been criticised in *Gale v. Insurance Co.*, 41 N. H. 176, *Allison v. Phoenix Ins. Co.*, 1 Fed. Cas. 530, and *Clark v. New England Fire Ins. Co.*, 6 Cush. (Mass.) 342, 53 Am. Dec. 44.

That a breach of implied warranty of seaworthiness avoids the policy ab initio has been asserted in *Porter v. Bussey*, 1 Mass. 436; *Taylor v. Lowell*, 3 Mass. 331, 3 Am. Dec. 141, and *Berwind v. Greenwich Ins. Co.*, 114 N. Y. 231, 21 N. E. 151.

A similar rule has been laid down as to other warranties and representations in *Georgia Home Ins. Co. v. Rosenfield*, 95 Fed. 358, 37 O. C. A. 96; *Kimball v. Aetna Ins. Co.*, 9 Allen (Mass.) 540, 85 Am. Dec. 786; *Merwin v. Star Fire Ins. Co.*, 72 N. Y. 603; *Gee v. Cheshire County Mut. Fire Ins. Co.*, 55 N. H. 65, 20 Am. Rep. 171.

The Supreme Court of Wisconsin has held (*O'Brien v. Home Ins. Co.*, 79 Wis. 399, 48 N. W. 714) that a policy is void at its inception by reason of false representations. But in *England v. Westchester Fire Ins. Co.*, 81 Wis. 583, 51 N. W. 954, 29 Am. St. Rep. 917, it apparently took the opposite view. In Pennsylvania it was held, in *Stacey v. Franklin Fire Ins. Co.*, 2 Watts & S. 506, that the policy was avoided ab initio. A different view was taken in *Cumberland Valley Mut. Protection Co. v. Mitchell*, 48 Pa. 374; but in *Marshall v. Insurance Co. of North America*, 10 Pa. Co. Ct. R. 87, the doctrine of the *Stacey Case* was reaffirmed. In *David v. Hartford Ins. Co.*, 13 Iowa, 69, and *American Ins. Co. v. Replogle*, 114 Ind. 1, 15 N. E. 810, the distinction seems to have been drawn that, where the avoidance is dependent on proof of extrinsic facts, the policy is not absolutely void, but only voidable.

Of course, where there are special provisions rendering the policy invalid unless certain facts exist, as in *Leathers v. Farmers' Mut. Fire Ins. Co.*, 24 N. H. 259, and *Froehly v. North St. Louis Mut. Fire Ins. Co.*, 32 Mo. App. 302, the policies must be regarded as void ab initio if such condition is not fulfilled. It has, too, been generally held

that a breach of condition precedent renders the policy void at its inception, so that it never attaches.

Reference may be made to *Henning v. Western Assur. Co.*, 77 Iowa, 319, 42 N. W. 308; *Citizens' Fire Ins. Security & Land Co. v. Doll*, 35 Md. 89, 6 Am. Rep. 300; *Blanchard v. Atlantic Mut. Fire Ins. Co.*, 33 N. H. 9; *Genesee Falls Permanent Savings & Loan Ass'n v. United States Fire Ins. Co.*, 16 App. Div. 587, 44 N. Y. Supp. 979; *Berwind v. Greenwich Ins. Co.*, 114 N. Y. 231, 21 N. E. 151; *Insurance Co. of North America v. Wicker*, 55 S. W. 740, 98 Tex. 390; *Gettelman v. Commercial Union Assur. Co.*, 97 Wis. 237, 72 N. W. 627. But apparently a different view was taken in *Hubbard v. Hartford Fire Ins. Co.*, 33 Iowa, 325, 11 Am. Rep. 125; *Georgia Home Ins. Co. v. Allen*, 119 Ala. 436, 24 South. 399; *Queen Ins. Co. v. Leonard*, 9 Ohio Cir. Ct. R. 46, 6 O. C. D. 49, 2 Ohio Dec. 122; *Saville v. Ætna Ins. Co.*, 8 Mont. 419, 20 Pac. 846, 3 L. R. A. 542.

(b) Misrepresentation and breach of warranty or condition as to part of the property insured.

One of the most important questions connected with the effect of false statements, concealment, or breach of conditions arises when the false statement, concealment, or breach relates to one or more of several articles or pieces of property insured under one policy. In such a case the question at once arises whether the whole policy is avoided, or only such part thereof as covers the particular item of property in relation to which the false statement was made or the facts were not disclosed. The law governing such cases is still in a very unsettled state, and, as the rules applicable in the case of affirmative representations and warranties are also applicable when forfeiture is claimed for breach of a promissory representation or warranty, a discussion of the question in this place would probably be misleading. The whole subject will be considered in a subsequent brief, in connection with forfeiture of policies for breach of promissory representations and warranties and conditions subsequent.¹¹

¹¹ See post, p. 1804.

**3. PLEADING AND PRACTICE WITH REFERENCE TO MISREPRESENTATION OR BREACH OF WARRANTY OR CONDITION
IN GENERAL.**

- (a) Pleading truth of representations and warranties and performance of condition.
- (b) Pleading misrepresentation or breach of warranty or condition.
- (c) Same—Form and sufficiency of plea.
- (d) Same—Amendment.
- (e) Subsequent pleadings.
- (f) Issues and proof.
- (g) Evidence—Presumptions and burden of proof.
- (h) Same—Admissibility.
- (i) Same—Weight and sufficiency.
- (j) Trial and judgment in general.
- (k) Questions for jury.
- (l) Instructions.
- (m) Review.

(a) Pleading truth of representations and warranties and performance of condition.

In *Bobbitt v. Liverpool & London & Globe Ins. Co.*, 66 N. C. 70, 8 Am. Rep. 494, it was said that the plaintiff must aver a fulfillment of all the conditions of the policy, and this has been regarded as equivalent to the holding that he must allege the truth of his representations and warranties. So, in *Craig v. United States Ins. Co.*, 6 Fed. Cas. 733, it was said that every warranty is a condition precedent, performance of which must be averred. While the rule undoubtedly is (*Phenix Ins. Co. v. Stocks*, 149 Ill. 319, 36 N. E. 408) that the plaintiff must aver performance of conditions precedent, this cannot be regarded as referring to the representations and warranties on which the policy is based. The distinction between conditions precedent and warranties is pointed out in *Redman v. Ætna Ins. Co.*, 49 Wis. 431, 4 N. W. 591. In this case the court says that, while the plaintiff must allege and prove performance of conditions precedent, he is not required to allege the truth of warranties made by him of existing conditions and negative the breach of such warranties, as they are not conditions precedent within the meaning of that term as used in law. It may be stated as an established principle that the truth of matters represented or warranted need not be alleged in a complaint on the policy.

This is supported by *King v. Phoenix Ins. Co.*, 101 Mo. App. 163, 76 S. W. 55; *Phenix Ins. Co. v. Stocks*, 149 Ill. 319, 36 N. E. 408; *Union Ins. Co. v. McGookey*, 33 Ohio St. 555; *Phenix Ins. Co. v. Pickel*,

119 Ind. 155, 21 N. E. 546, 12 Am. St. Rep. 393; *Guy v. Citizens' Mut. Ins. Co.* (D. C.) 30 Fed. 695; *Herron v. Peoria Marine & Fire Ins. Co.*, 28 Ill. 235, 81 Am. Dec. 272; *Queen Ins. Co. v. Leonard*, 9 Ohio Cir. Ct. R. 46, 6 O. C. D. 49; *Coolidge v. Continental Ins. Co.*, 67 Vt. 14, 30 Atl. 798.

Under the provisions of Code Ala. 1896, § 3352, as pointed out in *Phoenix Ins. Co. v. Moog*, 78 Ala. 284, 56 Am. Rep. 31, it is not necessary that the plaintiff should allege the truth of his representations and warranties, or negative the defense of misrepresentation or breach of warranty; and, since a complaint following the statute is sufficient in a suit at common law, it is sufficient in admiralty, where but little regard is paid to the technical rules of pleading (*Guy v. Citizens' Mut. Ins. Co.* [D. C.] 30 Fed. 695). A similar rule was laid down in *Cowan v. Phenix Ins. Co.*, 78 Cal. 181, 20 Pac. 408, in view of the provisions of the California Code of Civil Procedure (section 457); but it must appear what the conditions are (*Gilmore v. Lycoming Fire Ins. Co.*, 55 Cal. 123). In Virginia there is also a statute (Code 1887, § 3251 [Va. Code 1904, p. 1711]) which relieves the plaintiff from the necessity of alleging the truth of his warranties and representations, and makes it sufficient to aver in general terms the performance of all conditions. Under the provisions of the New York Code of Civil Procedure (section 533) it is sufficient if the insured alleges generally the performance of conditions precedent.

McLain v. British & Foreign Marine Ins. Co., 14 Misc. Rep. 650, 35 N. Y. Supp. 827; *Sullivan v. Spring Garden Ins. Co.*, 34 App. Div. 128, 54 N. Y. Supp. 629.

A general averment is also regarded as sufficient in Indiana (*American Ins. Co. v. Leonard*, 80 Ind. 272), and in Ohio (*Union Ins. Co. v. McGookey*, 33 Ohio St. 555).

In *Ætna Ins. Co. v. Kittles*, 81 Ind. 96, where the allegation was that plaintiff had duly "fulfilled" all the conditions, the court held that the word "fulfilled" was synonymous with "performed," so as to be a sufficient compliance with the statutory provision requiring the averment generally of the performance of conditions precedent. Where the complaint did not allege performance of conditions precedent, as in *Price v. Patrons' & Farmers' Home Protection Co.*, 77 Mo. App. 236, but the answer not only alleged the omitted conditions, but denied performance of the same, such allegation was held to be an express aider of the defective complaint.

The principle that a defense of breach of warranty need not be anticipated in the complaint is asserted in *Gardiner v. Continental*

Ins. Co., 25 Ky. Law Rep. 426, 75 S. W. 283, and *Redman v. Aetna Ins. Co.*, 49 Wis. 431, 4 N. W. 591; and it was held in *Indian River State Bank v. Hartford Fire Ins. Co.* (Fla.) 35 South. 228, that plaintiff need not negative the breach of conditions.

(b) Pleading misrepresentation or breach of warranty or condition.

As said in *Burrows v. McCalley*, 17 Wash. 269, 49 Pac. 508, a condition in a policy affecting its validity can be taken advantage of only by the company. It cannot be invoked by one of two claimants to the proceeds of the policy. In *Blaeser v. Milwaukee Mechanics' Mut. Ins. Co.*, 37 Wis. 31, 19 Am. Rep. 747, it was contended that the insurer could not avail itself of misrepresentations, without first tendering to the insured the amount of premiums paid; but the court said that in this particular case the representations were warranties, and there is no authority for holding that the premiums must be tendered back before the insurer could avail itself of the defense of breach of warranty. Moreover, the same rule would apply if there were fraudulent misrepresentations as to material facts. Even where the policy is void ab initio, an offer to return the premium is not a condition precedent to pleading the breach of warranty. (*Georgia Home Ins. Co. v. Rosenfield*, 95 Fed. 358, 37 C. C. A. 96.)

The South Carolina Civil Code of 1902 (sections 1817, 1818) provides that after the expiration of 60 days the insurer shall be estopped to deny the truth of statements in the application, unless they were founded on fraud.

- Since a misrepresentation and breach of warranty are available as defenses in an action at law on the policy, they do not furnish ground for a bill in equity to cancel the policy, according to *Home Ins. Co. v. Stanchfield*, 12 Fed. Cas. 449.

In this connection reference may also be made to *Cable v. United States Life Ins. Co.*, 191 U. S. 288, 24 Sup. Ct. 74, 48 L. Ed. 188, reversing 111 Fed. 19, 49 C. C. A. 216; *Insurance Co. v. Bailey*, 13 Wall. 616, 20 L. Ed. 501; *Insurance Co. v. Smith* (C. C.) 73 Fed. 318.

Misrepresentation or breach of warranty or condition, to be relied on as a defense to the action on the policy, must be specially pleaded.

This principle is supported by *Marine Ins. Co. v. Hodgson*, 6 Cranch, 206, 3 L. Ed. 200; *Guy v. Citizens' Mut. Ins. Co.* (D. C.) 30 Fed. 695; *Capital City Ins. Co. v. Caldwell*, 95 Ala. 77, 10 South. 355; *Herron v. Peoria Marine & Fire Ins. Co.*, 28 Ill. 235, 81 Am. Dec. 272; *Phenix Ins. Co. v. Stocks*, 149 Ill. 319, 36 N. E. 408; *Danvers*

Mut. Fire Ins. Co. v. Schertz, 95 Ill. App. 656; Phenix Ins. Co. v. Pickel, 119 Ind. 155, 21 N. E. 546, 12 Am. St. Rep. 398; Pino v. Merchants' Mut. Ins. Co., 19 La. Ann. 214, 92 Am. Dec. 529; Theodore v. New Orleans Mut. Ins. Ass'n, 28 La. Ann. 917; Home Ins. Co. v. Curtis, 32 Mich. 402; Minnock v. Eureka Fire & Marine Ins. Co., 90 Mich. 236, 51 N. W. 367; King v. Phoenix Ins. Co., 101 Mo. App. 163, 76 S. W. 55; Mayor, etc., v. Brooklyn Fire Ins. Co., 3 Abb. Dec. (N. Y.) 251; Hynds v. Schenectady County Mut. Ins. Co., 16 Barb. (N. Y.) 119; Whitney v. Black River Ins. Co., 9 Hun (N. Y.) 37; Smith v. Home Ins. Co., 47 Hun (N. Y.) 30; Brandegee v. National Ins. Co., 20 Johns. (N. Y.) 328; Weed v. Schenectady Ins. Co., 7 Lans. (N. Y.) 452; Redfield v. Holland Purchase Ins. Co., 56 N. Y. 354, 15 Am. Rep. 424; Cone v. Niagara Fire Ins. Co., 60 N. Y. 619; Woodruff v. Imperial Fire Ins. Co., 83 N. Y. 133; Union Ins. Co. v. McGookey, 33 Ohio St. 555; Phoenix Mut. Fire Ins. Co. v. Bowersox, 6 Ohio Cir. Ct. R. 1, 3 O. C. D. 321; Queen Ins. Co. v. Leonard, 9 Ohio Cir. Ct. R. 46, 6 O. C. D. 49, 2 Ohio Dec. 122; German Ins. Co. v. Hunter (Tex. Civ. App.) 82 S. W. 344; American Cent. Ins. Co. v. Murphy (Tex. Civ. App.) 61 S. W. 956.¹

The opposite rule was announced in *Western Assur. Co. v. Mason*, 5 Ill. App. 141.

(c) Same—Form and sufficiency of plea.

Where the misrepresentation is by an agent (*Phoenix Ins. Co. v. Moog*, 78 Ala. 284, 56 Am. Rep. 31), a plea which fails to allege plaintiff's complicity therein is not sufficient.

A plea of false representation should also allege that the representation was material and in what respect it was material.

Hodgson v. Marine Ins. Co., 5 Cranch, 100, 3 L. Ed. 48; *Phoenix Assur. Co. v. Munger Improved Cotton Machinery Mfg. Co.*, 92 Tex. 297, 49 S. W. 222.

Similarly it was said, in *O'Leary v. German-American Ins. Co.*, 100 Iowa, 390, 69 N. W. 686, that, where misrepresentation is charged, the plea should allege fraud and knowledge on the part of the insured.

While a special plea setting out facts alleged to be in avoidance is insufficient if the condition violated is not averred (*Elliott v. Agricultural Ins. Co.* [N. J. Sup.] 3 Atl. 171), the converse is also true according to the weight of authority. As said

¹ See Code W. Va. 1899, c. 125, §§ 63, 64, where it is provided that, if the defense to the action is a failure to comply with or violation of any clause, con-

dition, or warranty, the defendant must file specifications of the particular clause or warranty in respect of which the failure or violation is claimed.

in *Girard Fire Ins. Co. v. Boulden* (Ala.) 11 South. 773, a plea averring generally that there was a misrepresentation is not sufficient. It should set forth the representation alleged to be false, state wherein it was untrue, and though it is not necessary to allege all the minute circumstances which perhaps the testimony will disclose, yet the substantial facts must be averred.

The rule that the facts constituting the breach or misrepresentation must be set out in the plea is also asserted in *Helvetia Swiss Fire Ins. Co. v. Allis*, 11 Colo. App. 264, 53 Pac. 242, *Kentucky & Louisville Mut. Ins. Co. v. Southard*, 8 B. Mon. (Ky.) 637, and *De Wees v. Manhattan Ins. Co.*, 34 N. J. Law, 244.

On the other hand, it was said, in *Jackson v. St. Paul Fire & Marine Ins. Co.*, 33 Hun (N. Y.) 60, that a general allegation is sufficient, in the absence of a demand for a more particular statement. In *Cappellar v. Queen Ins. Co.*, 21 W. Va. 576, it was held that under Acts 1877, c. 66, providing that defendant shall file a statement of particulars of his defense, such statement, if filed voluntarily, cannot be adjudged insufficient by the court until the trial of the case; but if the statement is ordered by the court, and is too vague, the court may pass upon it and grant time for amendment, but in no case can it refuse to permit a statement to be filed.²

(d) Same—Amendment.

Though the refusal of the trial court to receive an additional plea or amend one already filed cannot be assigned for error, being a matter of discretion (*Marine Ins. Co. v. Hodgson*, 6 Cranch, 206, 3 L. Ed. 200), it has been held that amendments setting up special defenses will not be allowed, where the facts could be proved under the original plea or under amendments already made (*Swain v. Boylston Ins. Co.* [C. C.] 37 Fed. 766). Where the answers were made warranties, and the defense is that there was a breach of such warranty (*Southern Ins. Co. v. Hastings*, 41 S. W. 1093, 64 Ark. 253), the insurer should be allowed to amend its answer, on its appearing from plaintiff's own testimony that other warranties were also broken.

(e) Subsequent pleadings.

In *Johnston v. Northwestern Live Stock Ins. Co.*, 94 Wis. 117, 68 N. W. 868, it was said that plaintiff need not plead an estoppel of the insurer to claim that a statement in the application was a warranty,

² See, also, *Rheims v. Standard Fire Ins. Co.*, 39 W. Va. 670, 20 S. E. 670, involving a breach of a promissory warranty.

since the defense of breach of warranty does not amount to a counter-claim, and therefore does not admit of a reply. Where misrepresentation was pleaded as a defense, and the plaintiff replied that the insurer, at the time of issuing the policy, knew all the facts alleged to constitute the misrepresentation, and further denied each and every allegation of the answer (*Sun Fire Office v. Ayerst*, 37 Neb. 184, 55 N. W. 635), and the defendant contended that this constituted a confession in respect of the defense, the court held that, in view of the denial, the reply could not be regarded as an admission of the misrepresentation pleaded. In a subsequent case (*Dwelling House Ins. Co. v. Brewster*, 43 Neb. 528, 61 N. W. 746) the court apparently regarded a similar reply as amounting to an admission. But in *Hartford Fire Ins. Co. v. Landfare*, 63 Neb. 559, 88 N. W. 780, the Supreme Court seems to have returned to the doctrine of the *Ayerst* Case. In *Farmers' & Merchants' Ins. Co. v. Peterson*, 47 Neb. 747, 66 N. W. 847, where misrepresentation was pleaded, the plaintiff in his reply denied every allegation of new matter in the answer except such as was expressly admitted, admitted that he signed an application for insurance, but said, further, that he could not read English, and that the application was not read to him, but was signed in reliance upon the statements of the agent that it was a matter of form. The insurer contended that this was an admission of the misrepresentation. The court held, however, that plaintiff's admission that he signed an application was not an admission that it was the application relied on by defendant, and the mere admission that a condition, such as the defendant had set up in its answer, existed in the policy, did not admit a breach of such condition. In *State Mut. Fire Ins. Co. v. Arthur*, 30 Pa. 315, where the defendant pleaded a breach of condition, the plaintiff replied that the facts were well known to the insurers and truly stated to them at the time of making the policy, and that the condition mentioned was not violated or broken. Defendants rejoined, reasserting the breach of the condition. The court said that, as any different rejoinder would have been a departure, demurrer would not lie thereto.

(f) Issues and proof.

The general rule that defenses based on misrepresentation or breach of warranty or condition must be specially pleaded has already been stated. As a corollary to the rule, it follows, as a matter of course, that, where the general issue only is pleaded, evidence of misrepresentation or breach of warranties or conditions is not admissible.

This is asserted in *Marine Ins. Co. v. Hodgson*, 6 Cranch, 206, 3 L. Ed. 200; *Pino v. Merchants' Mut. Ins. Co.*, 19 La. Ann. 214, 92

Am. Dec. 529; *Minnock v. Eureka Fire & Marine Ins. Co.*, 90 Mich. 238, 51 N. W. 367; *Phoenix Mut. Fire Ins. Co. v. Bowersox*, 6 Ohio Cir. Ct. R. 1, 3 O. C. D. 321.

Similarly it was said, in *British America Assur. Co. v. Cooper*, 6 Colo. App. 25, 40 Pac. 147, that a denial by the insurer that it ever insured plaintiff, amounting as it does to merely a denial of the execution of the policy, is not in itself sufficient to admit proof of facts which would give the insurer the right to avoid the policy after it was executed. In *Home Ins. Co. v. Curtis*, 32 Mich. 402, it was held that the rule just stated was not changed because a breach of warranty was incidentally shown in the testimony introduced by the plaintiff.

Such, too, was the principle announced in *Mulry v. Mohawk Valley Ins. Co.*, 5 Gray (Mass.) 541, 66 Am. Dec. 380, and *Haskins v. Hamilton Mut. Ins. Co.*, 5 Gray (Mass.) 432. The contrary doctrine was, however, asserted in *Illinois Mut. Fire Ins. Co. v. Marseilles Mfg. Co.*, 6 Ill. 236, and *Western Assur. Co. v. Mason*, 5 Ill. App. 141.

In *Lewis v. Eagle Ins. Co.*, 76 Mass. (10 Gray) 508, where the allegation of the answer was that the misrepresentation was false and fraudulent, it was held that as the representation was material, and avoided the policy if false, whether fraudulent or not, an instruction placing on defendant the burden of proving fraud, as well as falsity, was not justified. Where the insurer pleads a breach of the implied condition that material representations of fact are true (*Evans v. Columbia Fire Ins. Co.*, 40 Misc. Rep. 316, 81 N. Y. Supp. 933), the insurer may show misrepresentations under such plea. An answer by way of general denial and setting up a breach of warranty does not, according to *Indiana Farmers' Live Stock Ins. Co. v. Rundell*, 7 Ind. App. 426, 34 N. E. 588, tender an issue as to the falsity and materiality of representations. Similarly, where the insurer pleads misrepresentation as in *Ætna Ins. Co. v. Grube*, 6 Minn. 82 (Gil. 32), and *German Ins. Co. v. Hunter* (Tex. Civ. App.) 32 S. W. 344, he cannot try the issues on the theory that the statements are warranties. Where an insurance company denies that it contracted for the issuance of the policy, as in *Phoenix Ins. Co. v. Slobodisky*, 53 Neb. 782, 74 N. W. 258, it cannot offer in evidence a blank policy of the usual form, for the purpose of showing the existence of certain conditions and warranties, as a foundation for evidence of breaches thereof which by the terms of the policy would operate to render it void. Having denied the existence of the contract, it cannot at the same time appeal to such contract for protec-

tion. So the insured, having alleged that the policy was issued on an application made and signed by himself, as in *Menk v. Commercial Ins. Co.*, 70 Cal. 585, 11 Pac. 654, cannot, on the trial, introduce evidence to the effect that he did not know what representations the application contained because it was made by his agent, such evidence being contrary to the allegations of the complaint.

(g) Evidence—Presumptions and burden of proof.

In *South Bend Toy Mfg. Co. v. Dakota Fire & Marine Ins. Co.*, 2 S. D. 17, 48 N. W. 310, it was said that in view of Comp. Laws 1887, § 4157, providing that every express warranty must be contained in the policy itself, or in another instrument signed by the insured and referred to in the policy, the insurer and its agent must be presumed to know that no application containing a warranty was binding on plaintiff, unless signed by him or his authorized agent. According to *Richmond v. Niagara Fire Ins. Co.*, 79 N. Y. 230, the presumption is that the applicant's representations are true, and though, as said in *Wich v. Equitable Fire & Marine Ins. Co.*, 2 Colo. App. 484, 31 Pac. 389, the general rule is that want of good faith will not be presumed, it seems to have been intimated in *Lewis v. Eagle Ins. Co.*, 10 Gray (Mass.) 508, that fraud will be presumed where there is a misrepresentation. This, however, is contrary to the general rule.

In strict accord with the general rule that misrepresentation or breach of warranty must be specially pleaded is the well-settled principle that the burden is not on the plaintiff to prove the truth of his representations or warranties, but on the insurer to show a misrepresentation or breach of warranty. As said in *Morris v. Imperial Ins. Co.*, 106 Ga. 461, 32 S. E. 595, though plaintiff has the burden of making out a prima facie case as to every material allegation on which he relies for recovery, it by no means follows that in addition to this burden it is incumbent upon him to go further and deny the several defenses introduced to his action.

It is an inflexible rule of practice that, as to all matters purely of defense, the burden of proof is cast upon the defendant.

This principle is asserted in *Bullard v. Roger Williams Ins. Co.*, 4 Fed. Cas. 643; *Whittle v. Farmville Ins. Co.*, 29 Fed. Cas. 1126; *Guy v. Citizens' Ins. Co. (D. C.)* 30 Fed. 695; *Wich v. Equitable Fire & Marine Ins. Co.*, 2 Colo. App. 484, 31 Pac. 389; *State Ins. Co. v. Dubois*, 7 Colo. App. 214, 44 Pac. 756; *Herron v. Peoria Marine Fire Ins. Co.*, 28 Ill. 235, 81 Am. Dec. 272; *Indiana Farmers' Live*

Stock Ins. Co. v. Byrnett, 9 Ind. App. 443, 36 N. E. 779; Parno v. Iowa Merchants' Mut. Ins. Co., 114 Iowa, 132, 86 N. W. 210; Home Ins. Co. v. Koob, 24 Ky. Law Rep. 223, 68 S. W. 453, 58 L. R. A. 58; Blake v. Exchange Mut. Ins. Co., 12 Gray (Mass.) 265; Hartford Fire Ins. Co. v. Landfare, 63 Neb. 559, 88 N. W. 779; Smith v. Home Ins. Co., 47 Hun (N. Y.) 30; Richmond v. Niagara Fire Ins. Co., 79 N. Y. 230, reversing 15 Hun, 248; Cole v. Germania Fire Ins. Co., 99 N. Y. 36, 1 N. E. 38; Queen Ins. Co. v. Leonard, 9 Ohio Cir. Ct. R. 46, 6 O. C. D. 49; Sullivan v. Hartford Fire Ins. Co. (Tex. Civ. App.) 34 S. W. 999; Fire Ass'n v. Jones (Tex. Civ. App.) 40 S. W. 44; Morotock Ins. Co. v. Fostoria Novelty Co., 94 Va. 361, 26 S. E. 850.

On the other hand, it was said, in *Moses v. Sun Mut. Ins. Co.*, 11 N. Y. Leg. Obs. 78, that the general rule is that the burden of showing a fulfillment of a condition precedent rests on him whose right to maintain the action depends on its performance. So it was said, in *Bobbitt v. Liverpool & London & Globe Ins. Co.*, 66 N. C. 70, 8 Am. Rep. 494, that the burden is on plaintiff to show the truth of warranties or material representations. The doctrine of this case, however, seems to have been questioned in *Du Pree v. Virginia Home Ins. Co.*, 92 N. C. 417.*

Where the issue is as to the materiality of the misrepresentation or the fraudulent intent of the insured in making the statement on which the plea of misrepresentation is based, the burden of proof is also on the insurer.

Reference may be made to *Wich v. Equitable Fire & Marine Ins. Co.*, 2 Colo. App. 484, 30 Pac. 389; *State Ins. Co. v. DuBois*, 7 Colo. App. 214, 44 Pac. 956; *Home Ins. Co. v. Koob*, 24 Ky. Law Rep. 223, 68 S. W. 453, 58 L. R. A. 58; *Phillips v. Merrimack Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 350; *De Longuemare v. Tradesman's Ins. Co.*, 2 N. Y. Super. Ct. 588; *McCarty v. Imperial Ins. Co.*, 126 N. C. 820, 36 S. E. 284; *Lennox v. Greenwich Ins. Co.*, 9 Pa. Super. Ct. 171; *Eakin v. Home Ins. Co.*, 1 White & W. Civ. Cas. Ct. App. § 368; *Fire Ass'n v. Jones* (Tex. Civ. App.) 40 S. W. 44.

(h) Same—Admissibility.

In accordance with the general rules relating to the admission of parol testimony, it has been held that parol evidence is not admissible to vary the representations in a written application.

Wall v. East River Ins. Co., 10 N. Y. Super. Ct. 264; *Mayor v. Brooklyn Fire Ins. Co.*, 3 Abb. Dec. (N. Y.) 251; *Rae v. Washington Mut. Ins. Co.*, 1 Code Rep. (N. Y.) 185; *Birmingham v. Empire Ins. Co.*, 42 Barb. (N. Y.) 457.

* See, also, *Britt v. Mutual Benefit Life Ins. Co.*, 105 N. C. 175, 10 S. E. 896.

So, too, parol evidence was not admissible to show a warranty was intended as a representation merely.

Lewis v. Thatcher, 15 Mass. 431; *Higgins v. Livermore*, 14 Mass. 106.

The general rule has, however, been qualified to the extent that it may be shown by parol that the insured never made the statements attributed to him.

Southern Mut. Ins. Co. v. Yates, 28 Grat. (Va.) 585; *Millers' Nat. Ins. Co. v. Jackson County Milling Co.*, 60 Ill. App. 224; *Grabbs v. Farmers' Mut. Fire Ins. Ass'n*, 125 N. C. 389, 34 S. E. 503.

The converse is also true, that parol evidence may be resorted to, to show what were the representations made by the insured.

This seems to have been asserted in *Higginson v. Dall*, 18 Mass. 97, and *Clark v. Manufacturers' Ins. Co.*, 8 How. 235, 12 L. Ed. 1061.

It has also been said in *Bell v. Western Marine & Fire Ins. Co.*, 5 Rob. (La.) 423, 39 Am. Dec. 542, that parol evidence is admissible to show the truth or falsity of representations. Where the answer is ambiguous, it may be explained by parol, according to *Fowler v. Aetna Fire Ins. Co.*, 7 Wend. (N. Y.) 270; and in *Mutual Mill Ins. Co. v. Gordon*, 121 Ill. 366, 12 N. E. 747, affirming 20 Ill. App. 559, it was said that, where a question is ambiguous, the insured may, by parol, show how he understood it. Declarations in the report of a person appointed by an insurer to survey the premises on which insurance is asked, but to which the attention of the insured was never called, are not admissible against him, according to *Saunders v. Agricultural Ins. Co.*, 39 App. Div. 631, 57 N. Y. Supp. 683. Where fraudulent misrepresentation is alleged, as in *Fowler v. Aetna Fire Ins. Co.*, 6 Cow. (N. Y.) 673, 16 Am. Dec. 460, evidence of insured's good character is not admissible.

(1) Same—Weight and sufficiency.

In *Orient Ins. Co. v. Weaver*, 22 Ill. App. 122, it was said that, where there is a charge of fraudulent misrepresentation, it is incumbent on the insurer to prove such fraud merely by preponderance of evidence, and not beyond a reasonable doubt.

Proofs of loss are not conclusive on the question of misrepresentation.

McMaster v. Insurance Co. of North America, 64 Barb. (N. Y.) 536, and *Parmelee v. Hoffman Fire Ins. Co.*, 54 N. Y. 198.

The sufficiency of the evidence generally was considered in *Pope v.*

Glens Falls Ins. Co., 136 Ala. 670, 34 South. 29; Delonguemare v. Tradesman's Ins. Co., 2 N. Y. Super. Ct. 588; Underwriters' Fire Ass'n v. Palmer (Tex. Civ. App.) 74 S. W. 603.

(4) Trial and judgment in general.

In *Underhill v. Agawam Mut. Fire Ins. Co.*, 6 Cush. (Mass.) 440, where the representation was affirmative, and evidence was introduced showing a change after the issuance of the policy, which was replied to by plaintiff, and on cross-examination of one of plaintiff's witnesses testimony was elicited tending to show that the representation was true at the time of the issuance of the policy, defendant could not thereafter introduce evidence to contradict such testimony. At that stage of the case evidence could properly be offered only to contradict or impeach plaintiff's witnesses. The mere fact that defendant sets up affirmative defenses by alleging misrepresentation or breach of warranty does not, according to *Lexington Fire, Life & Marine Ins. Co. v. Paver*, 16 Ohio, 324, entitle him to open and close. In *Joy v. Liverpool & London & Globe Ins. Co.* (Tex. Civ. App.) 74 S. W. 822, where the insurer pleaded that the insured procured the burning of the property and also a misrepresentation, and the jury found for defendant generally, this was regarded as in effect a finding that the insured had burned his property, and consequently a failure to sustain exceptions directed against the defense of misrepresentation was not prejudicial to the insured. Error cannot be predicated on the failure of the jury to find as to facts not set up in defense and as to which no request was made, according to *Brooks v. Erie Ins. Co.*, 78 N. Y. Supp. 748, 76 App. Div. 275. Where there is a finding of misrepresentation, but a general finding for the plaintiff (*Citizens' Fire & Marine Ins. Co. v. Short*, 62 Ind. 316), it must be construed as a finding that the misrepresentation was not fraudulent. A general verdict inconsistent with the special findings cannot stand (*Ryan v. Springfield Fire & Marine Ins. Co.*, 46 Wis. 671, 1 N. W. 426). Where the issue of breach of warranty or misrepresentation is raised by the pleadings, but there is no general verdict (*Bartow v. Northern Assur. Co.*, 10 S. D. 132, 72 N. W. 86), a special verdict not finding on the issues raised will not support a judgment. The same doctrine was asserted in *Wilson v. Commercial Union Ins. Co.*, 15 S. D. 322, 89 N. W. 649. Where, in an action between the original insurer and the reinsurer, the former had been found legally liable upon its contract, and the amount due ascertained (*Jackson v. St. Paul Fire & Marine Ins. Co.*, 99 N. Y. 124, 1 N. E. 539), it was not

open to the reinsurer to inquire into the merits of the contentions settled by the action against the original insurer.

(k) Questions for jury.

Whether an application is the application of the insured or not is for the jury.

State Ins. Co. v. Jordan, 24 Neb. 358, 38 N. W. 839; *Sun Fire Office v. Wich*, 6 Colo. App. 103, 39 Pac. 587.

Whether the policy was, as a matter of fact, issued on the written application, is also a question for the jury (*Cronin v. Fire Ass'n*, 123 Mich. 277, 82 N. W. 45). Where a policy was based on a letter describing the property and referred to an application, the question whether the memorandum contained in the letter was the application referred to in the policy was a question for the jury (*Witherell v. Maine Ins. Co.*, 49 Me. 200). If there was no written application (*Curry v. Sun Fire Office*, 155 Pa. 467, 26 Atl. 658), the question as to what representations were made is for the jury. Following the general rule that the construction of a contract is for the court, it was said, in *Boyd v. Vanderbilt Ins. Co.*, 90 Tenn. 212, 16 S. W. 470, 25 Am. St. Rep. 676, that whether a statement is a warranty or a representation is for the court. So, in *Lapeer County Farmers' Mut. Fire Ins. Ass'n v. Doyle*, 30 Mich. 159, where the question whether there was a misrepresentation turned on the further question whether a certain word filling a blank was "six" or "oix," this latter question was for the court.

The general question whether there is a misrepresentation or breach of warranty avoiding the policy is for the jury.

This is supported by *Eddy Street Iron Foundry v. Hampden Stock & Mutual Fire Ins. Co.*, 8 Fed. Cas. 300; *Wich v. Equitable Fire & Marine Ins. Co.*, 2 Colo. App. 484, 31 Pac. 389; *Ætna Ins. Co. v. Strickle*, 3 Ky. Law Rep. 535; *Ætna Ins. Co. v. Grube*, 6 Minn. 82 (Gil. 32); *Davis v. Ætna Mut. Fire Ins. Co.*, 67 N. H. 335, 39 Atl. 902; *Mead v. Northwestern Ins. Co.*, 7 N. Y. 530; *Brooks v. Erie Ins. Co.*, 78 N. Y. Supp. 748, 76 App. Div. 275; *Cumberland Valley Mut. Protection Co. v. Mitchell*, 48 Pa. 374; *Sabotta v. St. Paul Fire & Marine Ins. Co.*, 54 Wis. 687, 12 N. W. 18.

Though more or less qualified in those states where statutes have been adopted relating to the effect to be given to immaterial statements, it is nevertheless the general rule that the materiality of the misrepresentation is a question for the jury.

Such is the rule laid down in *Bulkley v. Protection Ins. Co.*, 4 Fed. Cas. 614; *Eddy Street Iron Foundry v. Hampden Stock & Mut.*

Fire Ins. Co., 8 Fed. Cas. 300; *Wich v. Equitable Fire & Marine Ins. Co.*, 2 Colo. App. 484, 31 Pac. 389; *State Ins. Co. v. Du Bois*, 7 Colo. App. 214, 44 Pac. 756; *Manufacturers' & Merchants' Ins. Co. v. Zeitlinger*, 168 Ill. 286, 48 N. E. 179, 61 Am. St. Rep. 105, affirming 68 Ill. App. 268; *Garcelon v. Hampden Fire Ins. Co.*, 50 Me. 580; *Mutual Fire Ins. Co. v. Deale*, 18 Md. 28, 79 Am. Dec. 678; *Curry v. Commonwealth Ins. Co.*, 10 Pick. (Mass.) 535, 20 Am. Dec. 547; *Dolan v. Missouri Town Mut. Fire Ins. Co.*, 88 Mo. App. 666; *Boardman v. New Hampshire Mut. Fire Ins. Co.*, 20 N. H. 551; *Davis v. Aetna Mut. Fire Ins. Co.*, 67 N. H. 335, 39 Atl. 902; *Clark v. Union Mut. Fire Ins. Co.*, 40 N. H. 333, 77 Am. Dec. 721; *Sussex County Mut. Ins. Co. v. Woodruff*, 26 N. J. Law, 541; *Mackay v. Rhinelander*, 1 Johns. Cas. (N. Y.) 408; *Farmers' Ins. & Loan Co. v. Snyder*, 16 Wend. (N. Y.) 481, 30 Am. Dec. 118; *Leitch v. Atlantic Mut. Ins. Co.*, 66 N. Y. 100; *Armour v. Trans-Atlantic Fire Ins. Co.*, 90 N. Y. 450; *Brooks v. Erie Ins. Co.*, 78 N. Y. Supp. 748, 76 App. Div. 275; *Cumberland Valley Mut. Protection Co. v. Mitchell*, 48 Pa. 374; *Mascott v. First Nat. Fire Ins. Co.*, 69 Vt. 116, 37 Atl. 255; *Continental Ins. Co. v. Kasey*, 25 Grat. (Va.) 268, 18 Am. Rep. 681.

Where the statement is a warranty, there is, as said in *Graham v. Firemen's Ins. Co.*, 87 N. Y. 69, 41 Am. Rep. 348, affirming 9 Daly, 341, no question for the jury as to materiality. So, if the representation is made material by the conditions of the contract, there can be no question for the jury.

Owen v. Farmers' Joint Stock Ins. Co., 57 Barb. (N. Y.) 518; *Aetna Ins. Co. v. Resh*, 40 Mich. 241; *North American Fire Ins. Co. v. Throop*, 22 Mich. 146, 7 Am. Rep. 688.

This may be the principle governing *Ryan v. Springfield Fire & Marine Ins. Co.*, 46 Wis. 671, 1 N. W. 426, where it is intimated that materiality is a question for the court.

The knowledge of the insured of the falsity of his statements and his fraudulent intent are questions for the jury.

Reference may be made to *Garcelon v. Hampden Fire Ins. Co.*, 50 Me. 580; *Houghton v. Manufacturers' Mut. Fire Ins. Co.*, 8 Metc. (Mass.) 114, 41 Am. Dec. 489; *Farmers' Ins. & Loan Co. v. Snyder*, 16 Wend. (N. Y.) 481, 30 Am. Dec. 118; *Vilas v. New York Central Ins. Co.*, 9 Hun (N. Y.) 121; *Smith v. Home Ins. Co.*, 47 Hun (N. Y.) 80; *Schuster v. Dutchess County Mut. Ins. Co.*, 102 N. Y. 260, 6 N. E. 406; *Cumberland Valley Mut. Protection Co. v. Mitchell*, 48 Pa. 374.

(1) Instructions.

In *Le Roy v. Market Fire Ins. Co.*, 45 N. Y. 80, where the policy referred to a survey, it was contended that the papers referred to

were never designed or intended as a survey, the court instructed the jury that they were to determine whether the conditions were annexed to the policy, and whether it was so understood by the parties or not; that, if not so understood, though the minds of the parties met in issuing the policy, they did not meet in annexing conditions which would destroy it. This was held to be erroneous, as it left the jury to infer that, though the paper referred to was the survey, yet unless it was so understood by both parties it cannot have effect. Where the plea alleged misrepresentation with knowledge (*Lexington Fire Life & Marine Ins. Co. v. Paver*, 18 Ohio, 324), an instruction which is not predicated on knowledge is properly refused, as not within the issues raised by the pleadings. In *Queen Ins. Co. v. Leonard*, 9 Ohio Cir. Ct. R. 46, 6 O. C. D. 49, 2 Ohio Dec. 122, it was said that the court should not be compelled to charge upon a separate and special defense which nowhere appears in the pleadings. Where the policy was issued without a written application and on the personal inspection of the property by the agent (*Strauss v. Phenix Ins. Co.*, 9 Colo. App. 386, 48 Pac. 822), an instruction that any misstatements or overvaluation of the property by the insured would avoid the policy is not applicable to the facts, and is misleading.

In *Citizens' Fire & Marine Ins. Co. v. Short*, 62 Ind. 316, the defendant objected that the trial judge, in giving his instructions, read extracts from an opinion printed in a legal journal, and also from a text-book on Insurance, after written instructions had been requested. The court, however, said that, as the record did not show that such extracts were not transcribed into the instructions, the defendant's objection was not sustained. So, in the same case, where it was objected that the extracts were misleading, the court held that as in fact, if misleading at all, it was in defendant's favor, no objection on the part of defendant could be based thereon. Where the liability of the company depended solely on the question whether or not the word "no" had been written in a blank in the policy before it was issued (*Georgia Home Ins. Co. v. Campbell*, 102 Ga. 106, 29 S. E. 148), it was held that it was not necessary that the trial judge should specifically call the attention of the jury to all the specifications of the policy under and in consequence of which this controlling question arose, if he instructed them that, if the word was written before issuance, there could be no recovery. In *Georgia Home Ins. Co. v. Brady* (Tex. Civ. App.) 41 S. W. 513, where it was not disputed that plaintiff had made a written appli-

cation, but there was a question whether the policy was issued solely on such application, it was not error to charge that if plaintiff made the application, and any of the representations were false, and defendant was thereby induced to issue the policy, the jury should find for defendant. The jury could not have been misled by the fact that it was left to them to determine whether the representations were in the application which was before them.

(m) Review.

In accord with the rule that such defenses must be pleaded specially is the principle that a defense of misrepresentation or breach of warranty or condition cannot be raised for the first time on appeal.

Reference to the following cases is deemed sufficient: *Redfield v. Holland Purchase Ins. Co.*, 56 N. Y. 354, 15 Am. Rep. 424; *Cone v. Niagara Fire Ins. Co.*, 60 N. Y. 619; *Crete Farmers' Mut. Township Ins. Co. v. Miller*, 70 Ill. App. 599; *Adams v. Greenwich Ins. Co.*, 70 N. Y. 166; *Denny v. Conway Stock & Mut. Fire Ins. Co.*, 13 Gray (Mass.) 492.

Neither can facts showing estoppel of defendant to plead a defense be raised first on appeal (*Sulphur Mines Co. v. Phenix Ins. Co.*, 94 Va. 355, 26 S. E. 856). In view of a finding by the trial court that insured had fully kept and performed all conditions of the policy, it cannot be assumed that the insured did not make true representations as to facts inquired about (*Richmond v. Niagara Fire Ins. Co.*, 79 N. Y. 230).

The general rule that, where there is evidence to support verdict or finding, it will be regarded as conclusive on appeal, is applied in *Western Assur. Co. v. Althelmer*, 58 Ark. 565, 25 S. W. 1067; *Wich v. Equitable Fire & Marine Ins. Co.*, 2 Colo. App. 484, 31 Pac. 389; *Citizens' Fire & Marine Ins. Co. v. Short*, 62 Ind. 316; *Witherell v. Maine Ins. Co.*, 49 Me. 200.

**4. STATUTORY PROVISIONS RELATING TO AVOIDANCE OF
POLICY FOR MISREPRESENTATION OR BREACH
OF WARRANTY.**

- (a) Statutory provisions qualifying strict rules.
- (b) Operation of statutes as dependent on materiality and intent.
- (c) Validity of stipulations intended to evade the operation of the statutes.
- (d) Pleading and practice.

(a) Statutory provisions qualifying strict rules.

For the purpose of relieving the insured from the severe penalties imposed by the strict construction of contracts of insurance under common-law rules, statutes have been adopted in several states limiting the effect of misrepresentations and breaches of warranty. These statutes provide, in substance, that a false answer shall not render the policy void, unless it relates to facts material to the risk or is made in bad faith.¹ The purpose of these statutes, as

¹ California: Civ. Code, § 2611, provides that a policy may declare that a violation of specific provisions thereof shall avoid it; otherwise, the breach of an immaterial provision does not avoid the policy.

Georgia: Civ. Code 1895, § 2097, provides that every application for insurance must be made in good faith, and that any variation, by which the nature or extent or character of the risk is affected, will avoid the policy. Section 2098 provides that representations, if material, must be true. If, however, a person has no knowledge, but states on the representation of others in good faith, the falsity of the statement does not avoid the policy.

Iowa: Code 1897, § 1743, provides that any condition or stipulation in the application or policy, making it void before a loss, shall not prevent recovery, if it is shown by plaintiff that a violation thereof did not contribute to the loss, except in case of stipulations in regard to other insurance, vacancy, title or ownership, incumbrances, forfeiture for nonpayment of premiums, assign-

ment or transfer of policy before loss, removal of property, change in occupancy and use, if removal, change, or use increases hazard, or in the case of fraud in procurement of the policy.

Kentucky: Ky. St. 1903, § 639, provides that the statements or descriptions in any application for a policy of insurance shall be deemed and held representations, and not warranties; neither shall any misrepresentation, unless material or fraudulent, prevent a recovery on the policy.

Maine: Rev. St. 1883, c. 49, § 20, provides that all statements of description or value in an application or policy of insurance are representations, and not warranties; that descriptions or statements of value or title do not prevent recovery, unless the difference between the property as described and as it really existed contributed to the loss or materially increased the risk; and that no misrepresentation of title or interest of the insured in whole or in part of the property, real or personal, shall prevent a recovery to the extent of the insured's insurable interest, unless mate-

said in *Waterbury v. Dakota Fire & Marine Ins. Co.*, 6 Dak. 468, 43 N. W. 697, is to relax the rules by which a strict performance of immaterial conditions is required. The intent of the legislature, as said in *Dolan v. Missouri Town Mut. Fire Ins. Co.*, 88 Mo. App. 666, is to cut off defenses based on immaterial matters so often made the subject of warranty in fire policies. The constitutionality of the statutes has been questioned in connection with fire policies in *Continental Fire Ins. Co. v. Whitaker & Dillard* (Tenn.) 79 S. W. 119, 64 L. R. A. 451, where it was held that the Tennessee statute is not

rial or fraudulent. (Not incorporated in Rev. St. Me. 1908.)

Massachusetts: Pub. St. c. 119, § 181, provides that no misrepresentation shall avoid a policy, unless made with actual intent to deceive, or unless it increased the risk. The provision in Supp. Pub. St. c. 522, § 21 (St. 1889-95, p. 1207), is identical, but chapter 271, § 1 (page 1323), amends the above provisions by requiring the words "or warranty" to be inserted after a representation. The provision as thus amended appears in Rev. Laws, c. 118, § 21, wherein it is required that a misrepresentation or warranty be material in order to avoid a policy.

Michigan: Comp. Laws 1897, § 5171, provides for a standard form of fire insurance policy, requiring, among other things, the omission of conditions the violation of which by the insured would, without being prejudicial to the insurer, render the policy void or voidable at the option of the insurer.

Minnesota: Laws 1895, p. 400, c. 175, § 20, provides that no misrepresentation shall be deemed material to avoid a policy, unless made with an actual intent to deceive and defraud, or unless the matter misrepresented increases the risk or loss.

Missouri: Rev. St. 1890, §§ 7973, 7974 (Laws 1897, p. 180), provides that a warranty contained in the policy or in an application for fire, tornado, or cyclone insurance, made part of the policy, shall, if not material, be deemed a representation only.

Montana: Civ. Code (Sanders') §

3478, provides that a policy may declare that a violation of specified provisions shall avoid it; otherwise, the breach of an immaterial provision does not avoid the policy.

New Hampshire: Pub. St. 1901, c. 170, § 2 (Gen. St. c. 157, § 2), provides that descriptions of property and statements concerning its value and the title of the insured thereto, in an application for insurance or in an insurance policy, shall not be treated as warranties, and that a policy shall not be avoided by reason of any mistake or misrepresentation, unless it appears to have been intentionally and fraudulently made, or unless the misrepresentation contributed to the loss.

North Carolina: Acts 1893, c. 290, § 9, provides that all statements or descriptions in the policy or in the application shall be deemed and held representations, and not warranties, and that no misrepresentation shall avoid a policy, unless material or fraudulent.

North Dakota: Rev. Codes 1890, § 4435, provides that no oral or written misrepresentations shall be deemed material to defeat or avoid the policy, unless such misrepresentation is made with actual intent to deceive, or unless the material misrepresentation increased the risk. Section 4511 (Comp. Laws Dak. § 4163) provides that a policy may declare that a violation of a specified provision thereof shall avoid it; otherwise, the breach of an immaterial provision does not avoid the policy.

Ohio: Rev. St. § 3643 (Bates' Ann. St. 1904, § 3643), provides that the in-

class legislation, though applying only to nonassessment companies.²

The Massachusetts statute is regarded as applying to contracts of marine insurance (*Durkee v. India Mut. Ins. Co.*, 159 Mass. 514, 34 N. E. 1133). The Maine statute was held (*Bellatty v. Thomaston Ins. Co.*, 61 Me. 414) to apply to mutual companies, if not inconsistent with their charter provisions. It has been held (*Campbell v. Merchants' & Farmers' Mutual Fire Ins. Co.*, 37 N. H. 35, 72 Am. Dec. 324), that the New Hampshire statute does not apply to corporations established by the laws of other states. In *King Brick Mfg. Co. v. Orient Ins. Co.*, 164 Mass. 291, 41 N. E. 277, the provision of the Maine statute that statements of description are representations was construed to refer to statements as to existing facts only, and not to promises as to the future. The statute is effective as to policies taken out while the law is in force, though subsequently, and prior to the action on the policy, it is repealed (*McCarty v. Scottish Union & National Ins. Co.*, 126 N. C. 820, 36 S. E. 284). Such statutes must be considered a part of the contract.

Emery v. Piscataqua Fire & Marine Ins. Co., 52 Me. 322; *United Firemen's Ins. Co. v. Kukral*, 7 Ohio Cir. Ct. R. 356, 4 O. C. D. 633.

The Ohio statute refers only to the physical condition of the building, and not to other representations affecting the risk, such as representations as to title, incumbrances, etc.

Dwelling House Ins. Co. v. Webster, 7 Ohio Cir. Ct. R. 511, 4 O. C. D. 704, affirmed in 53 Ohio St. 558, 42 N. E. 546, 30 L. R. A. 719, 53

surer shall examine the premises to be insured, and, in the absence of intentional fraud or unauthorized changes increasing the risk, the loss shall be paid.

South Dakota: Rev. Civ. Code 1903, § 1859 (Comp. Laws Dak. § 4163), provides that a policy may declare that a violation of a specific provision shall avoid it; otherwise, the breach of an immaterial provision does not avoid the policy.

Tennessee: Shannon's Code 1896, § 3306, provides that no written or oral misrepresentation or warranty made in the negotiations of a contract or policy of insurance, or in the application, shall be deemed material, or defeat or void

the policy, unless made with actual intent to deceive, or unless the matter represented increased the risk of loss.

Virginia: Acts 1899-1900, c. 515, approved February 26, 1900 [Va. Code 1904, p. 1766, § 8344a], provides that a false answer to interrogatories in an application for insurance shall not render the policy void, unless it be clearly proved that such answer was willfully false or fraudulently made, or that it was material.

² For a more extended discussion of the constitutionality of the statutes in connection with life insurance cases, see post, vol. 3, p. 1985.

Am. St. Rep. 658; disapproving *United Firemen's Ins. Co. v. Kukul*, 7 Ohio Cir. Ct. R. 358, 4 O. C. D. 633, and *Phoenix Mut. Fire Ins. Co. v. Bowersox*, 6 Ohio Cir. Ct. R. 1, 3 O. C. D. 321.

The law of the place of contract will govern as to the effect of misrepresentations and false warranties.

King Brick Mfg. Co. v. Orient Ins. Co., 164 Mass. 291, 41 N. E. 277;
Perry v. Dwelling House Ins. Co., 67 N. H. 291, 33 Atl. 731, 68 Am. St. Rep. 668.

(b) Operation of statutes as dependent on materiality and intent.

As said in *Mobile Fire Dept. Ins. Co. v. Miller*, 58 Ga. 420, and *Rosser v. Georgia Home Ins. Co.*, 101 Ga. 716, 29 S. E. 286, involving the Georgia statute, it is not any and every variation from the representations contained in the application that will constitute a breach of warranty and avoid the policy. The variation must be such as to change the nature or extent or character of the risk. In other words, a false statement, whether fraudulent or otherwise, must be material to the risk.

Under these statutes the test for materiality of a warranty is substantially the same as for representations (*Waterbury v. Dakota Fire & Marine Ins. Co.*, 6 Dak. 468, 43 N. W. 697). Where the statute provides, as in Maine and Massachusetts, that the misrepresentation must relate to matters increasing the risk, this must be construed as referring to matters increasing the hazard of loss, and not matters inducing the insurer to take the risk.

This is the rule asserted in *Thayer v. Providence Ins. Co.*, 70 Me. 531, and *Davis v. Aetna Mut. Fire Ins. Co.*, 68 N. H. 815, 44 Atl. 521.

If the representation increases the risk, within the meaning of the Massachusetts statute, it will defeat the policy, whether made with intent to deceive or not, according to *Ring v. Phoenix Assur. Co.*, 145 Mass. 426, 14 N. E. 525. Under the Ohio statute, it would seem, from *Queen Ins. Co. v. Leslie*, 47 Ohio St. 409, 24 N. E. 1072, 9 L. R. A. 45, that, if the representation is not material, it cannot be fraudulent.

The operation of the statutes, in view of the materiality of the facts and the intent of the insured, has been considered in *Mobile Fire Dept. Ins. Co. v. Coleman*, 58 Ga. 251; *Mobile Fire Dept. Ins. Co. v. Miller*, Id. 420; *Phoenix Ins. Co. v. Fulton*, 80 Ga. 224, 4 S. E. 866; *Banco de Sonora v. Bankers' Mut. Casualty Co.* (Iowa) 100 N. W. 532; *Kenton Ins. Co. v. Wigginton*, 89 Ky. 330, 12 S. W.

668, 7 L. R. A. 81; Lancashire Ins. Co. v. Monroe, 101 Ky. 12, 39 S. W. 434; Home Ins. Co. v. Koob, 113 Ky. 360, 68 S. W. 453, 58 L. R. A. 58; Manchester Assur. Co. v. E. V. Dowell & Co., 25 Ky. Law Rep. 2240, 80 S. W. 207; Fox v. Phenix Fire Ins. Co., 52 Me. 333; Bellatty v. Thomaston Ins. Co., 61 Me. 414; Buck v. Phoenix Ins. Co., 76 Me. 586; Sweat v. Piscataquis Mut. Ins. Co., 79 Me. 109, 8 Atl. 457; Gilman v. Dwelling House Ins. Co., 81 Me. 488, 17 Atl. 544; Doyle v. American Fire Ins. Co., 63 N. E. 394, 181 Mass. 139; Dolan v. Missouri Town Mut. Fire Ins. Co., 88 Mo. App. 666; Tuck v. Hartford Fire Ins. Co., 56 N. H. 326; Leach v. Republic Fire Ins. Co., 58 N. H. 245; Perry v. Dwelling-House Ins. Co., 67 N. H. 291, 33 Atl. 731, 68 Am. St. Rep. 668; Davis v. Aetna Mut. Fire Ins. Co., 67 N. H. 335, 39 Atl. 902; Light v. Greenwich Ins. Co., 58 S. W. 851, 105 Tenn. 480; Continental Fire Ins. Co. v. Whitaker & Dillard (Tenn.) 79 S. W. 119, 64 L. R. A. 451.

(c) Validity of stipulations intended to evade the operation of the statutes.

In some instances the insurer has attempted to evade the provisions of these statutes by stipulations as to materiality of statements and conditions contained in the policy or application. In accordance with the general rule that contracts contravening statutory provisions are void,³ it has been held in many cases that such stipulations cannot release the insurer from the operation of the statute. Such stipulations are characterized, in *Mobile Fire Dept. Ins. Co. v. Coleman*, 58 Ga. 251, as attempts to repeal a law by contract, and as such idle and nugatory. That such attempts cannot be sanctioned is asserted, also, in *Williams v. Bankers' & Merchants' Town Mut. Fire Ins. Co.*, 73 Mo. App. 607. According to *Queen Ins. Co. v. Leslie*, 47 Ohio St. 409, 24 N. E. 1072, 9 L. R. A. 45, the statute cannot be regarded as conferring on the insured a mere personal privilege, which can be waived by agreement. The contract cannot override the law.

In Missouri⁴ and Maine⁵ the statute further provides that stipulations inconsistent therewith are void. The effect of the Maine statute is considered in *King Brick Mfg. Co. v. Orient Ins. Co.*, 164 Mass. 291, 41 N. E. 277, and *Emery v. Piscataqua Fire & Marine Ins. Co.*, 52 Me. 322. In the latter case the court says that the statute is imperative and must control, as contracts of private persons cannot alter the rule established on grounds of public policy. The

³ See Cent. Dig. vol. 11, "Contracts," cols. 451-493, §§ 468-511.

⁴ Rev. St. 1899, § 7975.

⁵ Rev. St. 1893, c. 49, § 21.

statute does not annul the policy, but simply the provisions in conflict therewith.

A different view of such stipulations has been taken in *Farmers' & Drovers' Ins. Co. v. Curry*, 13 Bush (Ky.) 312, 26 Am. Rep. 194, where the court said that the statute must control in all cases in which the policy is silent as to the effect of the statements, but, when the parties undertake in the policy itself to declare the meaning and effect to be given to its stipulations, they have a right to do so, and there is nothing in the act to indicate an intention on the part of the legislature to control the action of the parties in this respect. No principle of public policy is involved, and when a person chooses by his contract to stipulate that parts of it shall have an effect different from that which the law would give it, but for the contrary declaration in the contract itself, it ought to be interpreted by the courts as the parties have contracted it shall be interpreted.*

Similar views were expressed by Justices Davis and Walton, dissenting, in *Emery v. Piscataqua Fire & Marine Ins. Co.*, 52 Me. 322, to which reference was made above. In the opinion of Justice Davis the effect of the statute was to prevent the avoidance of policies for matters stipulated therein, where no direct provision was made for their effect in the policy; but, if the contract itself stipulated what their effect should be, the statute did not operate. The contract is entire, and to strike out certain provisions of it and leave others in operation is to create for the parties a contract which they never made. The stipulations are not distinct and independent, so as to be capable of being separated.

In North Dakota and in South Dakota the statute excepts contracts in which the parties have stipulated that a violation of specified provisions shall void them.

The operation of these provisions is considered in *Waterbury v. Dakota Fire & Marine Ins. Co.*, 6 Dak. 408, 43 N. W. 697; *Johnson v. Dakota Fire & Marine Ins. Co.*, 1 N. D. 167, 45 N. W. 799; *Peet v. Dakota Fire & Marine Ins. Co.*, 7 S. D. 410, 64 N. W. 208.

(d) Pleading and practice.

In view of the Missouri statute, it was held, in *Dolan v. Missouri Town Mut. Fire Ins. Co.*, 88 Mo. App. 666, that, where the defense is the materiality of the warranties in the application, the answer should allege that the warranties were material, but it is not neces-

* See Sedgwick on Statutory and Constitutional Law (1857) p. 109.

sary to allege that they were made fraudulently. Even under the statute, the materiality of the misrepresentations is for the jury, except in such clear cases that the materiality can be declared by the court, according to *White v. Merchants' Ins. Co.*, 93 Mo. App. 282.

Reference may also be made to *Phenix Ins. Co. v. Fulton*, 4 S. E. 866, 80 Ga. 224; *Sweat v. Piscataquis Mut. Ins. Co.*, 79 Me. 109, 8 Atl. 457; *Atherton v. British America Assur. Co.*, 89 Atl. 1006, 91 Me. 289; *Dolan v. Missouri Town Mut. Fire Ins. Co.*, 88 Mo. App. 666.

In *Bellatty v. Thomaston Ins. Co.*, 61 Me. 414, it was said that the question of the materiality should be submitted to the jury, although prior to the statute misrepresentations of the particular character involved were material and avoided the policy. In *United Firemen's Ins. Co. v. Kukral*, 7 Ohio Cir. Ct. R. 356, 4 O. C. D. 633, where the defense was that certain facts had not been truthfully stated, it was said that an instruction which required the jury to find for the defendant, without a predication of fraud, was properly refused.

5. EFFECT OF MISREPRESENTATION OR BREACH OF WARRANTY AS DEPENDENT ON TIME AND CIRCUMSTANCES.

- (a) Statements true when made, but false when policy takes effect.
- (b) Circumstances on which effect of false statements may be dependent.
- (c) Statements made after issuance of policy.
- (d) Applications to other companies.
- (e) Renewals based on original applications.

(a) Statements true when made, but false when policy takes effect.

It has been contended in many important cases that the false representations and warranties pleaded by the insurer to avoid the policy cannot have that effect because of the particular time, manner, and circumstances under which the statements alleged to be false were made. The authorities are by no means agreed as to the extent to which time and circumstances should be taken into consideration, and the effect that is to be given to such elements. One of the most important phases of this question arises when some time has elapsed between the making of the application and the is-

suance or delivery of the policy. This question does not involve the matter of promissory or continuing representations or warranties. Consequently, as said in *Howard Fire Ins. Co. v. Bruner*, 23 Pa. 50, an inquiry relating to the property insured refers only to the time of the making of the contract, and the falsity of a negative answer cannot be predicated on a change taking place after the issuance of the policy. The general principle that representations need be true only as of the time when they were made has been asserted in some cases.

Lycoming Ins. Co. v. Mitchell, 48 Pa. 367; *Tarpey v. Security Trust Co.*, 80 Ill. App. 378; *Brown v. German-American Ins. Co.*, 10 N. Y. St. Rep. 412.

It has also been said that, if the representation is true when made, it is sufficient, and a change in the fact or condition represented, between the time when the representation is made and the issuance of the policy, will not render the policy void as for a misrepresentation.

Day v. Hawkeye Ins. Co., 72 Iowa, 597, 34 N. W. 435; *Pioneer Sav. & Loan Co. v. Providence Washington Ins. Co.*, 17 Wash. 175, 49 Pac. 231, 38 L. R. A. 397; *Blumer v. Phoenix Ins. Co.*, 45 Wis. 622 (dissenting opinion).

The question was discussed at length in *Schroeder v. Trade Ins. Co.*, 109 Ill. 157. The policy, which was dated December 3, 1878, contained a provision that a certain application made by plaintiff to another company should be a part of the policy and a warranty on the part of the insured. This application bore date February 2, 1878. Between the making of the application and the issuing of the present policy a change had taken place in the facts as represented in the application. The court held that misrepresentation or breach of warranty could not be predicated on the statements in the application. It cannot be presumed that the insured intended that his statements as to the condition of the property in February should apply absolutely in December.

The contrary view seems to have been taken in *Frederick County Mut. Fire Ins. Co. v. De Ford*, 38 Md. 404, where the court stated, without discussion, that a proposal for insurance constitutes a warranty that the facts are as therein represented on the day the policy is accepted, though this is not until several days after the application is made. In a leading case, *Blumer v. Phoenix Ins. Co.*, 45

Wis. 622, the application was made December 3d, but through the fault of the insured the policy was not delivered until December 28th. Certain conditions stated as existing in the application became nonexistent on December 25th. The court held that the representation in the application was continuous until the delivery of the policy. Consequently, if it was not true on that date, the policy was avoided. Justice Taylor dissented, regarding it as a gross outrage upon justice that statements made in an application bearing date December 3d, in regard to matters then inquired of as existing or not existing, should be held as false because they did not exist on a day three weeks later, when the policy was delivered, especially in view of the fact that the policy was issued the day after the application, and, when delivered, insured the property from the date of the application.

In a recent case (*Kerr v. Union Marine Ins. Co.*, 130 Fed. 415, 64 C. C. A. 617, reversing [D. C.] 124 Fed. 835) the application, which was for insurance on a cargo, was dated November 4th, and presented to the company on that day, and left for an inquiry respecting the rates. The application contained a statement that the vessel had not sailed. On December 12th, the applicants having received a letter, dated December 3d, stating that the ship would clear on that date, applied to have the insurance made binding. The representative of the company changed the date of the application to December 12th, and signed the binding slip. The ship sailed December 4th, but was wrecked and the cargo lost on the 7th; such fact, however, not being known to the insured. It was held that the statement in the application, made on November 4th, that the ship had not sailed, was a continuing representation that she had not sailed on December 12th, and, being false when the policy was issued, rendered the contract void.

In *State Mutual Fire Ins. Co. v. Arthur*, 30 Pa. 315, it seems to be asserted that, though a statement is untrue when the application is made, if it becomes true when the policy is actually issued and attaches, misrepresentation cannot be based thereon. Similarly, in *Anson v. Winnesheik Ins. Co.*, 23 Iowa, 84, it was said that, if the company receives information as to the true state of the fact wrongly stated in the application before it forwards the policy, such information becomes an amendment or correction of the application in that particular, making it true in fact, so that a misrepresentation cannot be based thereon.

(b) Circumstances on which effect of false statements may be dependent.

Where the application was made by an indifferent person, without any authority, knowledge, or consent of the insured, misrepresentation or breach of warranty cannot be predicated thereon to the prejudice of the insured (*Thomas v. Lebanon Town Mutual Fire Ins. Co.*, 78 Mo. App. 268). The principle governing *McGraw v. Germania Fire Ins. Co.*, 54 Mich. 145, 19 N. W. 927, must be regarded as similar, though the person making the application was an insurance agent to whom the insured had applied for a policy; the ground of the decision being that, in applying to the defendant company, such agent acted neither as the agent for the defendant nor under any authority given by the insured.

In *Phoenix Ins. Co. v. Padgitt* (Tex. Civ. App.) 42 S. W. 800, the application contained certain statements as to the condition of the building insured. The policy originally issued on this application was canceled, and, after an inspection of the property, the present policy was issued at an increased premium. The court held that the statements could not be regarded as warranties, though referred to in the policy as a part of the contract and warranties by the insured. On the other hand, in *McKibban v. Des Moines Ins. Co.*, 114 Iowa, 41, 86 N. W. 38, where two policies were issued on written applications, one on a barn and personalty therein and the other on a house and personalty therein, it was held that a subsequent policy issued on the house and barn alone, the same being stricken out of the original policies, will be deemed to have been issued on the application for the original policies, so that a false statement therein will afford a basis for avoidance. In *Northrup v. Piza*, 43 App. Div. 284, 60 N. Y. Supp. 363, affirmed without opinion in 167 N. Y. 578, 60 N. E. 1117, the policy was originally taken out before the completion of the buildings, and, among other matters of description, recited that the division walls extended to the roof between each of the buildings. After the completion of the buildings the insurers made an indorsement on the policy to the effect that "on and after this date this policy to cover as below, and not as heretofore," followed by a description of the buildings, in which no mention was made of the division walls. It was contended that the indorsement had the effect of doing away with the warranty as to the division walls; but the court held otherwise, on the ground that, as the provisions of the two instruments were in conflict, it will be presumed that the indorsement was merely for the purpose

of making its provisions applicable to the completed buildings, and to cover additions thereto mentioned in the indorsement. Justice Spring dissented, holding that the omission of the warranty as to the division walls in the indorsement indicated an intention on the part of the insurer to relieve the insured therefrom.

(e) Statements made after issuance of policy.

In *Le Roy v. Park Ins. Co.*, 39 N. Y. 56, it appeared that about six months after the date of the policy the insured was requested by the company's agent to make a survey of the property. This survey was dated back to a date twelve days subsequent to the date of the policy. It was shown that the agent had expressly declared that this survey was intended merely as his private memorandum, that it was never read by the insured, and that it had been altered as to its date. The court held, therefore, that it could not be regarded as a warranty or representation binding on the insured. A leading case involving this phase of the question is *Liverpool & London & Globe Ins. Co. v. Stern* (Tex. Civ. App.) 29 S. W. 678. It appeared that at the time the policy was issued no written application was made. Subsequently the agent granted the insured permission to remove the property to another building; but the company, on being notified, refused to ratify the act of the agent unless insured made out an application. The agent secured an application from the insured, but it appeared the latter did not know that the policy would be canceled unless the application was made, nor did he know for what purpose it was required. The court held that statements in such application could not be regarded as warranties, a breach of which would avoid the policy, but that the most that could be said was that the application contained representations by which the company was induced to forego any right it might have had to cancel the policy. So, too, it was said, in *Fire Ass'n v. Bynum* (Tex. Civ. App.) 44 S. W. 579, that an application, made and signed, after the policy is issued and delivered, at the request of the company, does not relate back and become a part of the original contract, though it might have so become if it had been shown that the application was given in consideration of an agreement by the company to forego canceling the policy. In *Williams v. New England Mut. Fire Ins. Co.*, 31 Me. 219, the policy was on an unfinished building. Some time after the policy was issued, for the purpose of securing consent to take out additional insurance in another company, a representation was made that the building was

finished. It was held that such statement did not avoid the policy, though the building was not in fact entirely finished.

The principles laid down in the foregoing cases have also met with approval in *Michigan Fire & Marine Ins. Co. v. Wich*, 8 Colo. App. 409, 46 Pac. 687, though the court conceded that a subsequent application might be available, if the insured agrees to make such a subsequent application, as such an agreement is to be taken as a part of the policy. This was, indeed, the principle on which *Rankin v. Amazon Ins. Co.*, 89 Cal. 203, 26 Pac. 872, 23 Am. St. Rep. 460 (for prior report see 25 Pac. 260), was decided. In this case the insured promised, at the time of making application for insurance, to furnish a survey, and reference was made in the policy to the survey furnished by and a warranty on the part of the insured. The court held that, though the survey was not furnished until after the insurance was effected, it had the force of a representation made as an inducement for the issuance of the policy, if, indeed, it could not be regarded as a warranty.

(d) Applications to other companies.

Mr. Arnould, in his treatise on Marine Insurance,¹ states the rule to be that, where there are several underwriters of the same policy, a representation to the one whose name stands first on the policy extends to all the others, so that, if false, each may avail himself of it. Chancellor Kent² calls attention to the fact that this rule has been regarded unfavorably in some cases, and that it must be limited strictly to representations to the first underwriter. It cannot apply to representations to intermediate underwriters. So, too, it was said, in *Elting v. Scott*, 2 Johns. (N. Y.) 157, that representations to one insurer cannot be evidence of like representations to another insurer on a different policy. In *Le Roy v. Market Fire Ins. Co.*, 39 N. Y. 90, a survey which had been made for insurance in another company was made the basis of the contract, and was referred to as on file in the office of such other company. In the majority opinion the fact that the survey was made at a time prior to the application for the present policy and to another company does not seem to have been taken into consideration, but Justice Miller in a dissenting opinion regards it as exceedingly questionable whether the survey was so adopted as to make it a warranty on the part of the insured. In the important case of *Clinton v. Hope Ins.*

¹ Arnould, *Marine Ins.* vol. 1, p. 531.

² Kent, *Comm.* vol. 3, p. 284.

Co., 45 N. Y. 454, where the policy referred to the application on file in the office of the company, and it appeared that the only application was one made two years before by the insured to another company, it was held that such an application cannot be regarded as the basis of the contract. In *Vilas v. N. Y. Central Ins. Co.*, 72 N. Y. 590, 28 Am. Rep. 186, affirming 9 Hun, 121, this doctrine was reasserted. In this case the policy referred to it as "application on file, No. 1,234." As a matter of fact no such application was ever sent to the defendant company, nor was it on file in its office. The application was on file with defendant's agent, but it was made for a policy in another company, which had expired, and in place of which the present policy was issued. The court held that it could not be regarded as a part of the present policy, so that breach of warranty could be predicated thereon. The question was discussed at some length in *Cleavenger v. Franklin Fire Ins. Co.*, 47 W. Va. 595, 35 S. E. 998. In this case it appeared that the application had been made to the Jefferson Insurance Company. In the absence of the insured, and without his consent or knowledge, the application was changed so as to make it an application to the defendant company, and the policy issued. The policy varied in several respects from the application, and the court held that, though the insured accepted the policy, he was not bound by the representations and answers contained in the application, so that the falsity thereof would avoid the policy.

The principle also governed *Tarpey v. Security Trust Co.*, 80 Ill. App. 378; *Schroeder v. Trade Ins. Co.*, 109 Ill. 157; *Phoenix Ins. Co. v. Padgett* (Tex. Civ. App.) 42 S. W. 800; *Virginia Fire & Marine Ins. Co. v. Kloeber*, 31 Grat. (Va.) 749.

In *Harmony Fire & Marine Ins. Co. v. Hazlehurst*, 30 Md. 380, a broker made application to a company for insurance on a vessel, covering B.'s interest. While this application was pending, the broker also applied to defendant company for insurance on plaintiff's interest. The court held that plaintiff was not bound by representations made by the broker to the first company, in such a manner that the falsity thereof would avoid his policy.

On the other hand, in *Steward v. Phoenix Ins. Co.*, 5 Hun (N. Y.) 261, where the policy referred to a survey filed in the office of the People's Insurance Company, the court held that the survey was part of the contract, so that a breach of warranty would avoid the policy, distinguishing the case from *Clinton v. Hope Ins. Co.*, 45

N. Y. 454, on the ground that the recital in that case, declaring the survey to be part of the policy, described such survey as on file in the office of the company, when in fact there was no such survey on file in that office. A similar doctrine seems to have governed *Sheldon v. Hartford Fire Ins. Co.*, 22 Conn. 235, 58 Am. Dec. 420. In *Mulville v. Adams* (C. C.) 19 Fed. 887, the policies were based on a survey and application made several years before in obtaining a policy on the same property in the Imperial Insurance Company. The court held that the insured was bound by the representations contained in such application.

(e) Renewals based on original applications.

In a leading case, *Clark v. Manufacturers' Ins. Co.*, 5 Fed. Cas. 889, it appeared that representations were made by one S. in taking out the original policy on the property. Subsequently the policy was renewed, at various times, extending over a period of several years, in the name of other persons, and finally in the name of plaintiff. Each renewal policy referred to the original representations. It was, therefore, held that plaintiff's policy was based on such representations, and that plaintiff was bound thereby. This doctrine was subsequently affirmed in *Clark v. Manufacturers' Ins. Co.*, 8 How. 235, 12 L. Ed. 1061.

The principle was also asserted and governed the decision in the important case of *Syndicate Ins. Co. v. Bohn*, 65 Fed. 165, 12 C. C. A. 531, 27 L. R. A. 614, and in *Wolff v. Oswego & Onondago Ins. Co.*, 6 N. Y. St. Rep. 548.

The doctrine has also been applied to uphold the policy against a claim of avoidance.

Reference may be made to *Witherell v. Maine Ins. Co.*, 49 Me. 200, and *Fayette County Mut. Fire Ins. Co. v. Neel*, 6 Wkly. Notes Cas. (Pa.) 233.

In *Garrison v. Farmers' Mut. Fire Ins. Co.*, 56 N. J. Law, 235, 28 Atl. 8, where the policy had been renewed from year to year, it was held that, though the original policy might have been avoided at the time it was issued because of a misdescription of the use to which the property was put, yet if, at the date of the renewal, the use was as stated in the original description, the prior misdescription could not be relied on to avoid the renewal.

In *Merchants' Ins. Co. v. Dwyer*, 1 Posey, Unrep. Cas. (Tex.) 441, where the renewal policy did not refer to the original application,

it was held that the insurer could not claim that the original application was to be treated as a part of the policy by implication.

It is usually provided in policies that renewals will be made only if there has been no change in the risk, but it has been held that the departure from the statements in the original application must substantially increase the risk to avoid the renewal.

Such seems to be the principle asserted in *Parker v. Arctic Fire Ins. Co.*, 59 N. Y. 1; *Eddy Street Iron Foundry v. Farmers' Mut. Fire Ins. Co.*, 5 R. I. 426; *Barre Boot Co. v. Milford Mutual Fire Ins. Co.*, 7 Allen (Mass.) 42; and the opinion of Justice Davis in *Brueck v. Phoenix Ins. Co.*, 21 Hun (N. Y.) 542.

In accordance with the principle that renewal policies rest on the original application, it has been held, in *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410, 8 Abb. N. C. 315, that, if the changed conditions were not in existence at the time of the renewal, there would be no avoidance, though they may have existed previously. Similarly, in *Brown v. German-American Ins. Co.*, 10 N. Y. St. Rep. 412, where the change ceased to exist December 23d, and the renewal policy, though dated December 9th, was not delivered to the insured until December 25th, the court said that, had the loss occurred between December 9th and December 25th, the defendants could have claimed that the renewal receipt did not take effect because of nondelivery, and therefore the insurance attached at the time the renewal receipt was delivered, and was valid, notwithstanding the fact that there had been a change of conditions previous thereto, and which had ceased to exist.

6. CONCEALMENT AND ITS EFFECT ON THE POLICY.

- (a) Concealment defined.
- (b) Duty to make disclosure.
- (c) Same—Knowledge of facts.
- (d) Same—Materiality of facts.
- (e) Duty to disclose as dependent on character of facts.
- (f) Same—Expectations, fears, and rumors.
- (g) Same—Matters arising after application is made.
- (h) Same—Facts known to insurer.
- (i) Necessity of making inquiry and effect of failure to inquire.
- (j) Same—Special provisions of policy.
- (k) Same—Facts putting insurer on inquiry.
- (l) General and specific inquiries.
- (m) Failure to answer—Partial answers.

- (n) Effect of concealment as dependent on materiality of facts concealed.
- (o) Effect of concealment as dependent on knowledge and intent of applicant.
- (p) Pleading.
- (q) Evidence.
- (r) Questions for jury and instructions.

(a) Concealment defined.

Besides the duty which rests upon the applicant for insurance to make truthful representations of the facts on which the risk is based, it is also obligatory on him to communicate all facts which may in any degree influence the insurer in accepting the risk or in fixing the premiums. A failure to communicate such facts is termed "concealment." Concealment has been defined (*Clark v. Insurance Co.*, 40 N. H. 333, 77 Am. Dec. 721) as the designed and intentional withholding of any fact material to the risk, which the insured in honesty and good faith ought to communicate.

Such is the definition given, too, in *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416, 59 Am. Dec. 192, and *Mascott v. National Fire Ins. Co.*, 69 Vt. 116, 37 Atl. 255.

In *McNamara v. Dakota Fire & Marine Ins. Co.*, 1 S. D. 342, 47 N. W. 288, concealment is, in view of the provisions of the statute, defined as the neglect to communicate that which the party knows and ought to communicate.¹ In the following subdivisions the essential elements on which these definitions rest, and the qualifications that limit the somewhat broad statement, will be discussed.

(b) Duty to make disclosure.

The doctrine of concealment rests on the fundamental principle that it is the duty of the applicant for insurance to disclose all facts known to him which relate to the risk or which might influence the insurer in making the contract. This strict rule is a necessary result of the peculiar conditions surrounding the insurance of marine risks, where the subject of the insurance was, as said in *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452, 59 Am. Dec. 684, generally beyond the reach and not open to the inspection of the underwriter. In such cases the insurer is obliged to rely almost wholly on the insured for information regarding the risk, and, as said in *McLanahan v. Universal Ins. Co.*, 1 Pet. 170, 7 L. Ed. 98,

¹ See Rev. Civ. Code S. D. 1903, § Sanders' Civ. Code Mont. § 3420; Rev. 1815. See, also, Civ. Code Cal. § 2561; Codes N. D. 1899, § 4404.

he acts on the belief that the applicant is not in possession of any facts material to the risk which he does not disclose. It is, therefore, an elementary principle in marine insurance that the insurer has the right to exact, and it is the duty of the insured to make, a full disclosure of all facts known to him affecting the risk.

Reference may be made to *Blays v. Union Ins. Co.*, 3 Fed. Cas. 329; *Bulkley v. Protection Ins. Co.*, 4 Fed. Cas. 614; *Hubbard v. Coolidge*, 12 Fed. Cas. 779; *Kohne v. Insurance Co. of North America*, 14 Fed. Cas. 835; *Moses v. Delaware Ins. Co.*, 17 Fed. Cas. 891; *Ocean Ins. Co. v. Sun Mutual Ins. Co.*, 18 Fed. Cas. 540, affirmed in 107 U. S. 485, 1 Sup. Ct. 582, 27 L. Ed. 337; *Vale v. Phoenix Ins. Co.*, 28 Fed. Cas. 867; *McLanahan v. Universal Ins. Co.*, 1 Pet. 170, 7 L. Ed. 98; *Hodgson v. Mississippi Ins. Co.*, 2 La. 341; *Walden v. Louisiana Ins. Co.*, 12 La. 134, 32 Am. Dec. 116; *Graham v. General Mutual Ins. Co.*, 6 La. Ann. 432; *Hoyt v. Gilman*, 8 Mass. 336; *Rosenheim v. America Ins. Co.*, 33 Mo. 230; *Ely v. Hallett*, 2 Caines (N. Y.) 57; *Seton v. Low*, 1 Johns. Cas. (N. Y.) 1; *Howell v. Cincinnati Ins. Co.*, 7 Ohio, 276, pt. 1; *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452, 59 Am. Dec. 684; *Kohne v. Insurance Co. of North America*, 6 Bin. (Pa.) 219; *Stoney v. Union Ins. Co.*, Harp. (S. C.) 235; *Stoney v. Union Ins. Co.*, 3 McCord (S. C.) 387, 15 Am. Dec. 634; *Ingraham v. South Carolina Ins. Co.*, 3 Brev. (S. C.) 522.

It has been considered in numerous cases that the strict rules governing contracts of marine insurance do not always apply in fire insurance, and the principle has been asserted in relation to the duty to make disclosure of facts relating to the risk.

It is deemed sufficient to cite *Boggs v. American Ins. Co.*, 30 Mo. 63; *People v. Liverpool, L. & G. Ins. Co.*, 2 Thomp. & C. (N. Y.) 268; *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452, 59 Am. Dec. 684; *Burritt v. Saratoga County Mutual Fire Ins. Co.*, 5 Hill (N. Y.) 188, 40 Am. Dec. 345; *Merchants' & Manufacturers' Mut. Ins. Co. v. Washington Mut. Ins. Co.*, 1 Handy, 408, 12 Ohio Dec. 209.

But the rules will be applied in fire insurance as strictly as in marine, if the circumstances surrounding the contract are similar. This is illustrated in *Clarkson v. Western Ins. Co.*, 33 App. Div. 23, 53 N. Y. Supp. 508, where the subject of a fire policy was a vessel laid up in harbor several hundred miles from the place where the insurance was effected. The court says that the distinction between fire and marine risks in relation to concealment does not rest on the nature of the risk, so much as on the fact that the subject insured is at a distance, so that the underwriter is obliged to rely on what is

told him in relation thereto by the insured, and, though the present policy is one of fire insurance, the same doctrine applies as in the case of marine insurance.

Notwithstanding the fact that in fire insurance contracts the rule is relaxed according to circumstances, the general principle that all material facts must be disclosed has been supported in many cases involving that class of contracts.

Reference to the following cases is deemed sufficient: *Gelb v. Enterprise Co.*, 10 Fed. Cas. 156; *Waller v. Northern Assur. Co. (C. C.)* 10 Fed. 232; *Beebe v. Hartford County Mut. Fire Ins. Co.*, 25 Conn. 51, 65 Am. Dec. 553; *Norwich Fire Ins. Co. v. Boomer*, 52 Ill. 442, 4 Am. Rep. 618; *Keith v. Globe Ins. Co.*, 52 Ill. 518, 4 Am. Rep. 634; *Orient Ins. Co. v. Pelser*, 91 Ill. App. 278; *Protection Ins. Co. v. Hall*, 15 B. Mon. (Ky.) 411; *Southern California Ins. Co. v. Lucas*, 15 Ky. Law Rep. 574; *Biggs v. United States Fire Ins. Co. (La.)* 12 Ins. Law J. (N. S.) 182; *Strong v. Manufacturers' Ins. Co.*, 10 Pick. (Mass.) 40, 20 Am. Dec. 507; *Hill v. Lafayette Ins. Co.*, 2 Mich. 476; *Niles v. Farmers' Mut. Fire Ins. Co.*, 119 Mich. 252, 77 N. W. 983; *Planters' Ins. Co. v. Myers*, 55 Miss. 479, 30 Am. Rep. 521; *Boggs v. America Ins. Co.*, 30 Mo. 63; *Marshall v. Columbian Mut. Fire Ins. Co.*, 27 N. H. 157; *Jennings v. Cheneango County Mut. Ins. Co.*, 2 Denio (N. Y.) 75; *New York Bowery Fire Ins. Co. v. New York Fire Ins. Co.*, 17 Wend. (N. Y.) 359; *Skinner v. Norman*, 18 App. Div. 609, 46 N. Y. Supp. 65; *Smith v. Columbia Ins. Co.*, 17 Pa. 253, 55 Am. Dec. 546.

The duty binds an insurer applying for reinsurance, as well as the original insured.

Sun Mut. Ins. Co. v. Ocean Ins. Co., 107 U. S. 485, 1 Sup. Ct. 582, 27 L. Ed. 337; *New York Bowery Fire Ins. Co. v. New York Fire Ins. Co.*, 17 Wend. (N. Y.) 359. Indeed, in the latter case, the duty was regarded as even more imperative in the case of reinsurance.

(c) Same—Knowledge of facts.

The duty thus imposed on the applicant for insurance to disclose facts relating to the risk is, of course, limited to the disclosure of facts known to him. He cannot be expected to disclose facts of which he is ignorant.

This elementary principle is laid down in *Alsop v. Commercial Ins. Co.*, 1 Fed. Cas. 564; *Ruggles v. General Interest Ins. Co.*, 20 Fed. Cas. 1321; *Neptune Ins. Co. v. Robinson*, 11 Gill & J. (Md.) 256; *Boggs v. America Ins. Co.*, 30 Mo. 63; *Marsh v. Muir*, 1 Brev. (S. C.) 134, 2 Am. Dec. 648; *Merchants' & Manufacturers' Mut. Ins. Co. v. Washington Mut. Ins. Co.*, 1 Handy, 406, 12 Ohio Dec. 209.

Thus it was said, in *Biays v. Union Ins. Co.*, 3 Fed. Cas. 329, that if the insured communicates all the information which he has honestly obtained he cannot be charged with concealment, if it should afterwards appear that his informant knew more than he had disclosed. This is limited by the words "honestly obtained," because, if for a fraudulent purpose he avoids obtaining full and true information, the consequences would be the same as if he had himself concealed the information given him. Even if the fact does not actually exist, if the insured believes it to exist, he must disclose it, according to *Smith v. Insurance Co.*, 60 Vt. 682, 15 Atl. 353, 1 L. R. A. 216, 6 Am. St. Rep. 144; the ground of the decision being that the particular fact involved increased the moral hazard. In the leading case of *Daniels v. Hudson River Fire Ins. Co.*, 66 Mass. 416, it was said that silence as to some matters of fact which he does not consider important for the insurer to know is not a concealment on the part of the insured.

The same doctrine seems to have governed *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. C. 213, 15 S. E. 562; *Graham v. American Fire Ins. Co.*, 48 S. C. 195, 26 S. E. 323, 59 Am. St. Rep. 707; *Niagara Fire Ins. Co. v. Miller*, 120 Pa. 504, 14 Atl. 385, 6 Am. St. Rep. 726.

But, as said in *Dennison v. Thomaston Mut. Ins. Co.*, 20 Me. 125, 37 Am. Dec. 42, also a leading case, a fact which the insured should have known to be material must be disclosed.

These principles are also supported by *Stocker v. Merrimack Marine & Fire Ins. Co.*, 6 Mass. 220; *Lexington Fire, Life & Marine Ins. Co. v. Paver*, 16 Ohio, 324; *Pelzer Mfg. Co. v. St. Paul Fire & Marine Ins. Co.* (C. C.) 41 Fed. 271; *American Artistic Gold Stamping Co. v. Glens Falls Ins. Co.*, 1 Misc. Rep. 114, 20 N. Y. Supp. 646.

(d) Same—Materiality of facts.

In view of the definition of concealment, it is obvious that the duty resting on the insured is still further limited, in that the facts must be material. It is, therefore, important to fix upon a test of materiality. In the early case of *Ely v. Hallett*, 2 Caines (N. Y.) 57, it was said that a concealment is to be considered, not with reference to the event, but with reference to its effect at the time of making the contract. This principle is embodied in the statutory provisions of some states.² The general rule seems to be that the test of materiality in determining what should be disclosed is the same

² See Civ. Code Cal. § 2565; *Sanders' D.* 1899, § 4468; *Rev. Civ. Code S. D.* Civ. Code Mont. § 3424; *Rev. Codes N.* 1903, § 1819.

as that employed in determining the materiality of a representation. Any fact which would have a tendency to influence the insurer in accepting or declining the risk, or in fixing the rate of premium, must be regarded as material.

This rule is asserted in *Columbian Ins. Co. v. Lawrence*, 10 Pet. 507, 9 L. Ed. 512; *Alsop v. Commercial Ins. Co.*, 1 Fed. Cas. 564; *Ruggles v. General Interest Ins. Co.*, 20 Fed. Cas. 1321; *Hardman v. Firemen's Ins. Co. (C. C.)* 20 Fed. 594; *Pelzer Mfg. Co. v. St. Paul Fire & Marine Ins. Co. (C. O.)* 41 Fed. 271; *Biggs v. United States Fire Ins. Co. (La.)* 12 Ins. Law J. (N. S.) 182; *Rosenheim v. America Ins. Co.*, 33 Mo. 230; *Clark v. Union Mut. Fire Ins. Co.*, 40 N. H. 333, 77 Am. Dec. 721; *Clark v. Washington Mutual Ins. Co.*, 12 Barb. (N. Y.) 595; *Ely v. Hallett*, 2 Caines (N. Y.) 57; *Pine v. Vanuxem*, 3 Yeates, 30; *Mascott v. First Nat. Fire Ins. Co.*, 69 Vt. 116, 37 Atl. 255.

It was held in *De Longuemare v. Tradesmen's Ins. Co.*, 2 N. Y. Super. Ct. 629, that where the rate of premium was for the highest class of hazards, with an additional charge for extrahazardous risks, disclosure of facts which might otherwise have been regarded as material was not required.

In *Ritt v. Washington Marine & Fire Ins. Co.*, 41 Barb. (N. Y.) 353, a distinction was drawn between matters material to the question whether the insurer will insure and matters material to the risk. In *Loehner v. Home Mut. Ins. Co.*, 19 Mo. 628, and *Lexington Fire, Life & Marine Ins. Co. v. Paver*, 16 Ohio, 324, it was said that a fact is material only when the risk of loss is enhanced if it is not disclosed. In *Davis v. Ætna Mut. Fire Ins. Co.*, 68 N. H. 315, 44 Atl. 521, it was said that materiality depends on the physical hazard of fire, and not on whether there will be ultimate money loss to the insurer. Matters may, however, be made material by the charter, as in *Mutual Fire Ins. Co. v. Deale*, 18 Md. 26, 79 Am. Dec. 673. It seems that, according to *Pelzer Mfg. Co. v. St. Paul Fire & Marine Ins. Co. (C. C.)* 41 Fed. 271, it is not sufficient that the insurer deems the matter material, but it must be so in fact.

(e) Duty to disclose as dependent on character of facts.

To fulfill the duty imposed upon him, the insured must make his disclosure full and specific.

Reference may be made to *Ely v. Hallett*, 2 Caines (N. Y.) 57; *Stoney v. Union Ins. Co.*, 3 McCord, 387, 15 Am. Dec. 634; *Beebe v. Hartford County Mutual Fire Ins. Co.*, 25 Conn. 51, 65 Am. Dec. 553; *Smith v. Columbia Ins. Co.*, 17 Pa. 253, 55 Am. Dec. 546.

Though immaterial facts need not be disclosed, yet the disclosure should cover all matters of which the insured has exclusive knowledge.

These principles are asserted in *Walden v. New York Firemen's Ins. Co.*, 12 Johns. (N. Y.) 128; *Light v. Greenwich Ins. Co.*, 105 Tenn. 480, 58 S. W. 851; *Hoyt v. Gilman*, 8 Mass. 336; *Smith v. Columbia Ins. Co.*, 17 Pa. 253, 55 Am. Dec. 546; *Girard Fire & Marine Ins. Co. v. Stephenson*, 37 Pa. 293, 78 Am. Dec. 423.

Apparently a contrary rule governs those cases which, like *Gates v. Madison County Mut. Ins. Co.*, 5 N. Y. 469, 55 Am. Dec. 360, regard an inquiry by the insurer necessary to place on the insured the burden of disclosing particular facts. This phase of the question is discussed, however, at length in subdivision (i).

The general principle that the insured need not disclose that which the policy necessarily imports was laid down in *Hubbard v. Coolidge*, 12 Fed. Cas. 779. In accord with this is the further principle that matters covered by an express or implied warranty need not be disclosed, unless inquiry concerning them is made.

This is asserted in *Bulkley v. Protection Ins. Co.*, 4 Fed. Cas. 614; *Popleston v. Kitchen*, 19 Fed. Cas. 1048; *Schultz v. Pacific Ins. Co.*, 14 Fla. 73; *Augusta Insurance & Banking Co. v. Abbott*, 12 Md. 348; *Walden v. New York Firemen Ins. Co.*, 12 Johns. (N. Y.) 128.

(f) Same—Expectations, fears, and rumors.

The applicant for insurance is not, as a general rule, obliged to disclose his expectations or apprehensions, his hopes or his fears, so long as they are not founded on any special knowledge.

This rule is asserted in *Marshall v. Union Ins. Co.*, 16 Fed. Cas. 849; *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452, 59 Am. Dec. 684; *Smith v. Columbia Ins. Co.*, 17 Pa. 253, 55 Am. Dec. 546; *Marsh v. Muir*, 1 Brev. (S. C.) 134, 2 Am. Dec. 648; *Sanford v. Royal Ins. Co.*, 11 Wash. 653, 40 Pac. 609.

In *Folsom v. Mercantile Mut. Ins. Co.*, 9 Fed. Cas. 349, affirmed in 18 Wall. 237, 21 L. Ed. 827, the rule is stated to be that the insured is not bound to disclose opinions and speculations based on facts known to the insurer. It was said, in *McBride v. Republic Fire Ins. Co.*, 30 Wis. 562, that even in response to an inquiry the insured is not obliged to disclose mere rumors. The general doctrine is well stated in *Chalaron v. Insurance Co. of North America*, 48 La. Ann. 1582, 21 South. 267, 36 L. R. A. 742, where the court

said that the obligation to disclose is to be understood in a reasonable sense. The rule exacts the communication of facts, not contingencies. Matters of opinion, expectation, or belief do not affect the question, if there is no bad faith.*

This general rule must be modified to some extent. As was said in *Kohne v. Insurance Co. of North America*, 6 Bin. (Pa.) 219, circumstances giving just cause for suspicion must be disclosed. If the apprehension is based on special knowledge possessed by the insured, as where the insured has special and definite information as to the occurrence of severe storms after the vessel has sailed, the circumstances must be disclosed.

Ely v. Hallett, 2 Caines (N. Y.) 57; *Moses v. Delaware Ins. Co.*, 17 Fed. Cas. 891; *Vale v. Phoenix Ins. Co.*, 28 Fed. Cas. 867.

So, in *Ruggles v. General Interest Ins. Co.*, 20 Fed. Cas. 1321, while recognizing the general rule, the court nevertheless said that a concealment of material rumors will avoid the policy, but rumors of facts must be such as one party privately knows, and the other neither knows, nor has opportunity to know, nor reason to suspect. A similar rule governed *Orient Ins. Co. v. Peiser*, 91 Ill. App. 278. It is, therefore, under this rule, necessary to disclose rumors of loss.

Graham v. General Mut. Ins. Co., 6 La. Ann. 432; *Hart v. British & Foreign Marine Ins. Co.*, 80 Cal. 440, 22 Pac. 302.

In *Merchants' Ins. Co. v. Paige*, 60 Ill. 448, where one had shipped goods by a certain transportation company and learned that a boat belonging to such company had been lost, it was held that, though he did not absolutely know that his goods had been shipped by that particular boat, he was bound to disclose the fact of loss.

(g) Same—Matters arising after application is made.

It is a general principle that the applicant for insurance must use due diligence to communicate all matters affecting the risk arising after the application has been made.

Watson v. Delafield, 2 Caines (N. Y.) 224, 1 Johns. 150, 2 Johns. 526; *McLanahan v. Universal Ins. Co.*, 1 Pet. 170, 7 L. Ed. 98.

Upon this principle rests the duty to disclose knowledge of the loss of the subject-matter obtained after the application is made.

* See, also, Civ. Code Cal. § 2677.

In *McLanahan v. Universal Ins. Co.*, 1 Pet. 170, 7 L. Ed. 98, already referred to, the insurance was made in Baltimore, December 22d. It appeared that the vessel was lost near Havana early in December, and that information thereof might have reached Charleston, where the insured's agent was, December 15th, if sent promptly after the loss. The court held that the insured was not bound to use extraordinary diligence, but only due and reasonable diligence, in view of all the circumstances of the case; that if he believed intelligence of the loss could not be communicated to his agent or to the insurer by ordinary methods in time to countermand the order for insurance, his failure to so communicate was not a fraudulent concealment. It is only where the circumstances of the loss and the place of loss are such that prompt effort to communicate would be successful in all probability that extraordinary efforts should be used. In this particular case there was nothing to show that the insured was in position to make the necessary communication to his agents.

A similar doctrine seems to have governed *Green v. Merchants' Ins. Co.* (10 Pick.) Mass. 402, *Andrews v. Marine Ins. Co.*, 9 Johns. 82, and *Snow v. Mercantile Ins. Co.*, 61 N. Y. 164, where the insured, by the use of the Atlantic cable, might have notified the company of the loss prior to the issuance of the policy. The court held, however, that as, at the time, the cable had been in operation only a few months, it could not be considered as a usual method of mercantile communication, so that the insured was bound to use it, in the exercise of due diligence.

In *Neptune Ins. Co. v. Robinson*, 11 Gill & J. (Md.) 256, the insured procured the policy on April 20th. At that time there was lying in the post office a letter informing him of the loss of the vessel. He, however, knew nothing of it, and did not call for his mail again until the 24th. It was held that, as he was under no obligation to go to the post office and had no reason to expect information in regard to the vessel, negligence could not be imputed to him in that respect, so as to avoid the policy for a failure to notify the company of the loss. A leading case involving this question is *General Interest Ins. Co. v. Ruggles*, 12 Wheat. 408, 6 L. Ed. 674, affirming 20 Fed. Cas. 1321. It appeared that the master failed to communicate to the insured the loss of the vessel, though he might have done so. In fact, he delayed giving the information, in order that the insurance might be obtained. It was held that the master was not such an agent of the insured that his knowledge of the loss would be imputed to the principal. Nor was he such an agent

that his misconduct in failing to communicate the loss would be chargeable to the insured.

This principle was also applied in *Clement v. Phoenix Ins. Co.*, 5 Fed. Cas. 1020, *Folsom v. Mercantile Mutual Ins. Co.*, 9 Fed. Cas. 349, affirmed in 18 Wall. 237, 21 L. Ed. 827, and *Andrews v. Marine Ins. Co.*, 9 Johns. (N. Y.) 32, where the failure of the master or agent of the insured to communicate news of the loss promptly was involved.

(h) Same—Facts known to insurer.

The doctrine of concealment, even as applied in marine insurance, presupposes that the facts are not equally known to both parties. As was said in *Alsop v. Commercial Ins. Co.*, 1 Fed. Cas. 564, facts of a public nature, such as the length of voyages and the course of trade and navigation, however material to the risk, are supposed to be equally within the reach of both parties, and therefore the insured is not bound to disclose anything respecting them. So, in *Nelson v. Louisiana Ins. Co.*, 5 Mart. N. S. (La.) 289, the court said that there could be no fraudulent concealment as to the condition of a port in relation to pilotage, as the matter was equally within the knowledge of both parties. In *De Longuemere v. New York Fire Ins. Co.*, 10 Johns. (N. Y.) 120, where the policy was on a vessel for a voyage to a port of Yucatan, and it appeared that there was no safe haven at the port, it was said that, as this was a matter of general notoriety, equally open to the knowledge of both parties, it was not necessary that insured should disclose it. From these cases the rule may be deduced that facts which the insurer knows, or which he is bound to know, and may therefore be presumed to know, need not be disclosed.

This principle is supported by *Calbreath v. Gracy*, 4 Fed. Cas. 1030; *Maryland Ins. Co. v. Bathurst*, 5 Gill & J. (Md.) 159; *Green v. Merchants' Ins. Co.*, 10 Pick. (Mass.) 402; *Seton v. Low*, 1 Johns. Cas. (N. Y.) 1; *Skidmore v. Desdoity*, 2 Johns. Cas. (N. Y.) 77; *Jubel v. Rhinelander*, 2 Johns. Cas. (N. Y.) 120, affirmed in 2 Johns. Cas. (N. Y.) 487; *Le Roy v. United Ins. Co.*, 7 Johns. (N. Y.) 343; *Norris v. Insurance Co. of North America*, 3 Yeates (Pa.) 84, 2 Am. Dec. 360.

In *Stoney v. Union Ins. Co.*, 3 McCord (S. C.) 387, 15 Am. Dec. 634, it was said that, though the general facts are known to the insurer, if the insured knows specific facts, facts specially applying to the risk, he must disclose them. But the general rule seems to have

been approved on a subsequent hearing, reported as *Money v. Union Ins. Co.*, 4 McCord (S. C.) 511.

The general rule stated above apparently was not approved in *Dickenson v. Commercial Ins. Co.*, Anth. N. P. 92 (2d Ed. 126), where the plaintiff applied for insurance in a New York office, and was refused on account of newspaper information. The following day he secured insurance with the defendant company, without mentioning the report contained in the paper. As defendants were subscribers to the paper, plaintiff claimed that it was a matter of general information, which he need not disclose. The court said, however, that he should have disclosed the fact that such general intelligence was in the city. On the other hand, it is laid down in *Green v. Merchants' Ins. Co.*, 10 Pick. (Mass.) 402, and *Folsom v. Mercantile Ins. Co.*, 9 Fed. Cas. 349, affirmed in 18 Wall. 237, 21 L. Ed. 827, that general information given in public newspapers is presumed to be known to the insurer, and need not be disclosed. The rule is, however, qualified in *Ruggles v. General Interest Ins. Co.*, 20 Fed. Cas. 1321, where it is said that such news need not be disclosed, unless insured knows it applies particularly to his own case. In *Himely v. South Carolina Ins. Co.*, 1 Mill, Const. 154, 12 Am. Dec. 623, it was said that, if the facts were brought to the knowledge of a director of the company by publication in a paper before the company was formed, the insured was not relieved from his duty to disclose.

In *Jennings v. Chenango County Mut. Ins. Co.*, 2 Denio (N. Y.) 75, where concealment was pleaded because of the failure to disclose the existence of a machine in plain view of the insurer's agent, the court laid down the strict rule that it was the duty of the insured to disclose all matters material to the risk, whether obvious to the senses or not. On the ground that the rule as to disclosure is not to be so strictly applied in fire as in marine insurance, it was held, in *Merchants' & Manufacturers' Mut. Ins. Co. v. Washington Mut. Ins. Co.*, 1 Handy, 408, 12 Ohio Dec. 209, that if the facts are such as will be presumed in law to be within the knowledge of the insurer, or so connected with the subject of the insurance that the knowledge of the insurer may be presumed, there need be no disclosure. Similarly, in *Boggs v. America Ins. Co.*, 30 Mo. 63, and *Satterthwaite v. Mutual Beneficial Ins. Ass'n*, 14 Pa. 393, it was intimated that concealment could not be predicated of facts which might easily have been discovered by the actual survey and examination of the insured premises made by the insurer. In *Girard Fire & Marine Ins. Co.*

v. Stephenson, 37 Pa. 293, 78 Am. Dec. 423, the court asserts the principle that whatever is usually or necessarily connected with the subject-matter insured will be presumed to be known to the insurer, and need not be disclosed.

Similar principles seem to have governed *Keith v. Globe Ins. Co.*, 52 Ill. 518, 4 Am. Rep. 634, and *Hey v. Guarantors' Liability Indemnity Co.*, 181 Pa. 220, 87 Atl. 402, 59 Am. St. Rep. 644.

(4) Necessity of making inquiry and effect of failure to inquire.

In *Stocker v. Merrimack Marine & Fire Ins. Co.*, 6 Mass. 220, where a marine policy was involved, it was said that as against contingent events the insurer must protect himself by inquiry. In *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452, 59 Am. Dec. 684, the court said that, as the rule relating to disclosure is not to be so strictly applied in fire insurance, disclosure to the extent that inquiry is made is sufficient.

On the same grounds the principle was also asserted in *People v. Liverpool & London & Globe Ins. Co.*, 2 Thomp. & C. (N. Y.) 268; *Merchants' Ins. Co. v. Frick*, 5 Ohio Dec. 47, 2 Am. Law Rec. 336; *Burritt v. Saratoga County Mut. Fire Ins. Co.*, 5 Hill (N. Y.) 188, 40 Am. Dec. 345.

It is not always the duty of the insured to volunteer information.

Sanford v. Royal Ins. Co., 11 Wash. 653, 40 Pac. 609; *Alkan v. New Hampshire Ins. Co.*, 53 Wis. 136, 10 N. W. 91; *Dunbar v. Phenix Ins. Co.*, 72 Wis. 500, 40 N. W. 386.

It is the duty of the insurer to make inquiry.

Augusta Insurance & Banking Co. v. Abbott, 12 Md. 348; *Wytheville Ins. Co. v. Stultz*, 87 Va. 636, 13 S. E. 77.

So it has been laid down in many cases that, in the absence of inquiry, no disclosure need be made by the insured.

Reference to the following cases is deemed sufficient: *Howard Fire Insurance Co. v. Chase*, 5 Wall. 509, 18 L. Ed. 524; *Hooper v. Robinson*, 98 U. S. 528, 25 L. Ed. 219; *Kerr v. Union Marine Ins. Co. (D. C.)* 124 Fed. 835; *Norwich Fire Ins. Co. v. Boomer*, 52 Ill. 442, 4 Am. Rep. 618; *German-American Ins. Co. v. Norris*, 100 Ky. 29, 37 S. W. 267, 66 Am. St. Rep. 324; *Lancashire Ins. Co. v. Monroe*, 101 Ky. 12, 39 S. W. 434; *Continental Ins. Co. v. Gardner (Ky.)* 62 S. W. 886; *Clarke v. Firemen's Ins. Co.*, 18 La. 431; *McClelland v. Greenwich Ins. Co.*, 107 La. 124, 31 South. 691; *Gillman v. Dwelling House Ins. Co.*, 81 Me. 488, 17 Atl. 544; *Locke v. North American Ins. Co.*, 13 Mass. 61; *Wiggin v. Mercantile*

Ins. Co., 7 Pick. (Mass.) 271; Bixby v. Franklin Ins. Co., 8 Pick. (Mass.) 86; Strong v. Manufacturers' Ins. Co., 10 Pick. (Mass.) 40, 20 Am. Dec. 507; Commonwealth v. Hide & Leather Ins. Co., 112 Mass. 136, 17 Am. Rep. 72; Little v. Phoenix Ins. Co., 123 Mass. 330, 25 Am. Rep. 96; Washington Mills Emery Mfg. Co. v. Weymouth & Braintree Mut. Fire Ins. Co., 135 Mass. 503; O'Brien v. Ohio Ins. Co., 52 Mich. 131, 17 N. W. 726; Guest v. New Hampshire Fire Ins. Co., 66 Mich. 98, 33 N. W. 31; Boulware v. Farmers' & Laborers' Co-op. Ins. Co., 77 Mo. App. 639; German Ins. & Sav. Inst. v. Kline, 44 Neb. 396, 62 N. W. 857; Hanover Fire Ins. Co. v. Bohn, 48 Neb. 743, 67 N. W. 774, 58 Am. St. Rep. 719; Seal v. Farmers' & Merchants' Ins. Co., 59 Neb. 253, 80 N. W. 807; Duplanty v. Commercial Ins. Co., Anth. N. P. 114; Smith v. Home Ins. Co., 47 Hun (N. Y.) 30; Dohn v. Farmers' Joint Stock Ins. Co., 5 Lans. (N. Y.) 279; Niblo v. North American Fire Ins. Co., 3 N. Y. Super. Ct. 551; Aetna Fire Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90, affirming 12 Wend. 507; Kernochan v. New York Bowery Fire Ins. Co., 17 N. Y. 423; Cross v. National Fire Ins. Co., 132 N. Y. 133, 30 N. E. 390; Merchants' Ins. Co. v. Frick, 5 Ohio Dec. 47, 2 Am. Law Rec. 336; Koshland v. Hartford Fire Ins. Co., 31 Or. 402, 49 Pac. 866; Mascott v. First Nat. Fire Ins. Co., 69 Vt. 116, 37 Atl. 255; West Rockingham Mut. Fire Ins. Co. v. Sheets, 26 Grat. (Va.) 854; Campbell v. American Fire Ins. Co., 73 Wis. 100, 40 N. W. 661.

The doctrine of these cases seems to be based on the theory stated in *Union Assurance Society v. Nalls*, 101 Va. 613, 44 S. E. 896, 99 Am. St. Rep. 923, where it is said that persons applying for insurance are usually not aware of the necessity of making disclosures the importance of which underwriters have learned by long experience, or what disclosures are necessary. Insurance companies, on the other hand, cannot only protect themselves by making inquiries in regard to such matters as they consider material, but it is their habit to do so. And it was said, in *Browning v. Home Ins. Co.*, 6 Daly (N. Y.) 522, that, as it is the privilege of insurers to make inquiries as to all facts material to the risk, the insured is not, in the absence of fraud, responsible for an omission to state other facts to which his attention is not directed.

In view, however, of the general doctrine stated in subdivision (b), the principle now under discussion must be qualified as too broad a statement. The true rule probably is that when the matter is not material absolutely, but only relatively, a failure to disclose will be excused by a failure to make inquiry. Thus, in *Fletcher v. Commonwealth Ins. Co.*, 18 Pick. (Mass.) 419, the court held that, if the concealment was material, it would avoid the policy, notwith-

standing the insurance was requested in good faith. But, if the plaintiff has no intention to defraud, he may be silent as to various matters connected with the property insured. Many matters affect the risk indirectly, but need not be stated. Similarly, in *Graham v. American Fire Ins. Co.*, 48 S. C. 195, 26 S. E. 323, 59 Am. St. Rep. 707, following *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. C. 213, 15 S. E. 562, the doctrine is laid down that, where no inquiry is made by the company, the insured is not bound to disclose a fact, unless it is material and he has reason to believe that it is material.

Such, too, would seem to be the principle controlling *Delahay v. Memphis Ins. Co.*, 8 Humph. (Tenn.) 684; *Manhattan Ins. Co. v. Barker*, 7 Heisk. (Tenn.) 503; *Franklin Fire Ins. Co. v. Crockett*, 7 Lea (Tenn.) 725; *Southern Ins. Co. v. Estes*, 106 Tenn. 472, 52 L. R. A. 915, 62 S. W. 149, 82 Am. St. Rep. 892; *Niagara Fire Ins. Co. v. Miller*, 120 Pa. 504, 14 Atl. 385, 6 Am. St. Rep. 726.

It is evident that this principle must give way in the face of charter provisions, as in *Smith v. Bowditch Mut. Fire Ins. Co.*, 6 Cush. (Mass.) 448, and *Leonard v. American Ins. Co.*, 97 Ind. 299, and may be controlled by statute, as in *Harding v. Norwich Union Fire Ins. Co.*, 10 S. D. 64, 71 N. W. 755.⁴ Nevertheless the rule may apply with all its effect as broadly stated in certain instances. Thus, in *Kohne v. Insurance Co. of North America*, 14 Fed. Cas. 835, it was said that, if a foreign regulation which may affect the risk is known only to the insurer, he must ask for information whether the subject of insurance falls within such regulation; and in *Keith v. Globe Ins. Co.*, 52 Ill. 518, 4 Am. Rep. 634, and *Hey v. Guarantors' Liability Indemnity Co.*, 181 Pa. 220, 37 Atl. 402, 59 Am. St. Rep. 644, the rule was asserted that facts which in the very nature of the risk must have been known need not be disclosed, in absence of special inquiry.

(3) Same—Special provisions of policy.

It has been held in some cases that even where the policy contains a provision that an omission to make known every fact material to the risk will render the policy void, or other similar provision, a disclosure is not necessary, in the absence of special inquiry.

This principle is asserted in *Rumsey v. Phoenix Ins. Co.* (O. O.) 1 Fed. 896; *Ramsey v. Phoenix Ins. Co.* (C. C.) 2 Fed. 429; *Commonwealth v. Hide & Leather Ins. Co.*, 112 Mass. 136, 17 Am. Rep. 72; *Insurance Co. of North America v. Bachler*, 44 Neb. 549, 62 N. W. 911;

⁴ See Rev. Civ. Code S. D. 1903, § 1822.

Trade Ins. Co. v. Barracloff, 45 N. J. Law, 543, 46 Am. Rep. 792; Browning v. Home Ins. Co., 6 Daly (N. Y.) 522; Browning v. Home Ins. Co., 71 N. Y. 508, 27 Am. Rep. 86; Short v. Home Ins. Co., 90 N. Y. 16, 43 Am. Rep. 138; Arthur v. Palatine Ins. Co., 35 Or. 27, 57 Pac. 62, 76 Am. St. Rep. 450; Niagara Fire Ins. Co. v. Miller, 120 Pa. 504, 14 Atl. 385, 6 Am. St. Rep. 726; Morotock Ins. Co. v. Rodefer, 92 Va. 747, 24 S. E. 393, 53 Am. St. Rep. 846; Quarrier v. Peabody Ins. Co., 10 W. Va. 507, 27 Am. Rep. 582; Alkan v. New Hampshire Ins. Co., 53 Wis. 137, 10 N. W. 91; Van Kirk v. Citizens' Ins. Co., 79 Wis. 627, 48 N. W. 798.

The contrary doctrine is, however, asserted in *Gelb v. Enterprise Ins. Co.*, 10 Fed. Cas. 156, and *Mechanics' & Traders' Ins. Co. v. Mutual Real Estate & Bldg. Ass'n*, 98 Ga. 262, 25 S. E. 457.

Where the policy contains the declaration that the insured warrants the answers to be full and true, and that no matter material to the risk has been omitted, there must be a full disclosure, though no inquiry is made.

Reference may be made to *Fame Ins. Co. v. Thomas*, 10 Ill. App. 545; *Westchester Fire Ins. Co. v. Weaver*, 70 Md. 536, 17 Atl. 401, 5 L. R. A. 478; *Tebbetts v. Hamilton Mut. Ins. Co.*, 1 Allen (Mass.) 305, 79 Am. Dec. 740; *Van Buren v. St. Joseph County & Village Fire Ins. Co.*, 28 Mich. 398; *Patten v. Insurance Co.*, 40 N. H. 375; *Davis v. Aetna Mut. Fire Ins. Co.*, 67 N. H. 335, 39 Atl. 902.

(k) Same—Facts putting insurer on inquiry.

In *Vasse v. Ball*, 2 Yeates (Pa.) 178, where the insurer knew that the insured had received a certain letter stating facts relating to the risk, it was held that this knowledge was sufficient to put him on inquiry, and, as it lay in his power to procure the information contained in the letter, the duty of inquiry devolved on him. It may be said, in general, that, if any facts are known to the insurer which are sufficient to put him on inquiry, the inquiry must be followed up.

Reference may be made to *Alsop v. Commercial Ins. Co.*, 1 Fed. Cas. 564; *Hubbard v. Coolidge*, 12 Fed. Cas. 779; *Buck v. Chesapeake Ins. Co.*, 1 Pet. 151, 7 L. Ed. 90; *Fame Ins. Co. v. Mann*, 4 Ill. App. 485; *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53, 4 Am. Rep. 582; *Sibley v. Prescott Ins. Co.*, 57 Mich. 14, 23 N. W. 473; *Cross v. National Fire Ins. Co.*, 132 N. Y. 133, 30 N. E. 390.

The only question is what facts are sufficient to put the insurer on inquiry. In *Bebee v. Hartford Co. Mut. Fire Ins. Co.*, 25 Conn. 51, 65 Am. Dec. 553, where the insured made a general disclosure as to certain facts materially affecting the risk, the court held that

the insurer must inquire as to specific circumstances, if it desired the information.

A similar doctrine seems to have controlled in *Jackson Co. v. Boylston Mut. Ins. Co.*, 139 Mass. 508, 2 N. E. 103, 52 Am. Rep. 728, in *Buck v. Chesapeake Ins. Co.*, 1 Pet. 151, 7 L. Ed. 90, in *Pavey v. American Ins. Co.*, 56 Wis. 221, 13 N. W. 925, and in other cases where the sufficiency of the disclosure as to title and interest is involved.⁵

The logical rule seems to be that laid down in *Kernochan v. New York Bowery Fire Ins. Co.*, 12 N. Y. Super. Ct. 1, where the court said that the doctrine of constructive notice is applicable only when, from facts already known to the insurer, he is bound to infer the existence of other facts which, though material, were not communicated. It is only in such cases that the insurer, if he desires fuller information, is bound to make inquiry.

(1) General and special inquiries.

A general disclosure in answer to a general question is sufficient.

Hubbard v. Coolidge, 12 Fed. Cas. 779; *Augusta Ins. & Banking Co. v. Abbott*, 12 Md. 848.

But, if there is a special inquiry, there must be a full disclosure.

Birmingham v. Empire Ins. Co., 42 Barb. (N. Y.) 457; *Arthur v. Palatine Ins. Co.*, 35 Or. 27, 57 Pac. 62, 76 Am. St. Rep. 450.

The rule is probably based on the principle stated in *North America Fire Ins. Co. v. Throop*, 22 Mich. 146, 7 Am. Rep. 638, that matters specifically inquired about are necessarily material. In *Redman v. Hartford Ins. Co.*, 47 Wis. 89, 1 N. W. 393, 32 Am. Rep. 751, where concealment was pleaded, in view of the stipulation that the application contained a just, full, and true exposition of all facts and circumstances relating to the risk, so far as the same were known to the applicant and material to the risk, the court said that such stipulation should not be extended to facts and circumstances concerning which no interrogatory was made. Numerous questions were propounded in the application, calling for information upon every matter which would seem to be of any interest to the insurer, and there was no general interrogatory calling for information in respect to matters not especially inquired after. Under such circumstances the insured might well have believed that

⁵ See post, p. 1344.

every fact which the insurer deemed material to the risk was specially called for, and that the stipulation was intended only to bind him to good faith in his answers to the questions propounded. The insured, according to *Gates v. Madison Co. Mut. Fire Ins. Co.*, 5 N. Y. 469, 55 Am. Dec. 360, has the right to suppose that the insurer, in making inquiry as to particular facts, deems all others immaterial, or takes upon himself the knowledge of them.

A similar doctrine seems to have controlled in *Morrison v. Tennessee Marine & Fire Ins. Co.*, 18 Mo. 262, 59 Am. Dec. 299; *Browning v. Home Ins. Co.*, 6 Daly (N. Y.) 522; *Browning v. Home Ins. Co.*, 71 N. Y. 508, 27 Am. Rep. 86; *Short v. Home Ins. Co.*, 90 N. Y. 16, 43 Am. Rep. 188; *Dunbar v. Phenix Ins. Co.*, 72 Wis. 500, 40 N. W. 886; *Wytheville Ins. Co. v. Stultz*, 87 Va. 629, 18 S. E. 77.

Where there are special interrogatories, followed by a general interrogatory to the effect whether any matter relating to the risk has not been disclosed (*Liberty Hall Ass'n v. Housatonic Mut. Fire Ins. Co.*, 7 Gray [Mass.] 261), the latter must be regarded as referring to the matters covered by the special interrogatories, and the failure to disclose other and extrinsic facts cannot be regarded as a concealment.

(m) Failure to answer—Partial answers.

Concealment cannot be predicated on failure to answer a question propounded by the insurer.

Tiefenthal v. Citizens' Mut. Fire Ins. Co., 53 Mich. 306, 19 N. W. 9;
Carson v. Jersey City Ins. Co., 43 N. J. Law, 800, 39 Am. Rep. 584.

Nor can concealment be predicated on the failure to fill a blank in answer to a question in an application.

Bersche v. St. Louis Mut. Fire & Marine Ins. Co., 31 Mo. 555; *Parker v. Otsego County Farmers' Co-operative Fire Ins. Co.*, 61 N. E. 1182, 168 N. Y. 655, affirming 47 App. Div. 204, 62 N. Y. Supp. 199.

Even where the policy provides that an omission to make known every fact material to the risk would avoid it (*Armenia Ins. Co. v. Paul*, 91 Pa. 520, 36 Am. Rep. 676), the failure to answer a question in the application does not amount to concealment.

In the leading case of *Gates v. Madison County Mut. Ins. Co.*, 2 N. Y. 43, reversing 3 Barb. 73, it was said that, where the question is ambiguous, concealment cannot be predicated on the fact that the

disclosure in response thereto is not full in the sense in which the insurer understood the interrogatory, if it is complete according to the other construction of the question. This principle seems to have been applied in *Home Ins. Co. v. Feyerabend*, 7 Kan. App. 231, 52 Pac. 899.

If there is a partial disclosure, concealment cannot be predicated on the fact that the answer is not full, as it is the duty of the insurer to ask for further information, if not satisfied.

Reference may be made to *Thomas v. Fame Ins. Co.*, 108 Ill. 91; *Phenix Ins. Co. v. Stocks*, 149 Ill. 319, 36 N. E. 408; *Allen v. Charlestown Mut. Fire Ins. Co.*, 5 Gray (Mass.) 384; *Buffum v. Bowditch Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 540; *McCulloch v. Norwood*, 58 N. Y. 562.

This rule has been applied even where it is expressly stipulated that the statements are full and true, and that an omission to disclose material facts shall avoid the policy.

Miotke v. Milwaukee Mechanics' Ins. Co., 113 Mich. 166, 71 N. W. 463; *Haley v. Dorchester Mut. Fire Ins. Co.*, 12 Gray (Mass.) 545; *Lorillard Fire Ins. Co. v. McCulloch*, 21 Ohio St. 176, 8 Am. Rep. 52.

(a) Effect of concealment as dependent on materiality of facts concealed.

In view of the definition of concealment, it is elementary that the concealment of a material fact will avoid the policy.

Reference may be made to *Johnson v. Phoenix Ins. Co.*, 13 Fed. Cas. 782; *Marshall v. Union Ins. Co.*, 16 Fed. Cas. 849; *Moses v. Delaware Ins. Co.*, 17 Fed. Cas. 891; *Ocean Ins. Co. v. Sun Mut. Ins. Co.*, 18 Fed. Cas. 540, affirmed in 107 U. S. 485, 1 Sup. Ct. 582, 27 L. Ed. 337; *Vale v. Phoenix Ins. Co.*, 28 Fed. Cas. 867; *Hardman v. Firemen's Ins. Co. (O. C.)* 20 Fed. 594; *Hamblet v. City Ins. Co. (D. C.)* 36 Fed. 118; *Columbia Ins. Co. v. Lawrence*, 10 Pet. 507, 9 L. Ed. 512; *Hamburg-Bremen Fire Ins. Co. v. Lewis*, 4 App. D. C. 66; *Hart v. British & Foreign Marine Ins. Co.*, 80 Cal. 440, 22 Pac. 302; *McCormick v. Orient Ins. Co.*, 86 Cal. 260, 24 Pac. 1008; *Merchants' Ins. Co. v. Paige*, 60 Ill. 448; *Baldwin v. German Ins. Co.*, 105 Iowa, 379, 75 N. W. 326; *Graham v. General Ins. Co.*, 6 La. Ann. 432; *Oliver v. Greene*, 8 Mass. 133, 3 Am. Dec. 96; *Hoyt v. Gilman*, 8 Mass. 336; *Dickenson v. Commercial Ins. Co.*, Anth. N. P. (N. Y.) 92; *Ely v. Hallett*, 2 Caines (N. Y.) 57; *N. Y. Bowery Fire Ins. Co. v. N. Y. Fire Ins. Co.*, 17 Wend. (N. Y.) 359; *Clarkson v. Western Assur. Co.*, 53 N. Y. Supp. 508, 33 App. Div. 23; *Wilson v. Herkimer County Mut. Ins. Co.*, 6 N. Y. 53; *Smith v. Columbia Ins. Co.*, 17 Pa. 253, 55 Am. Dec. 546; *Fluch v. Lehigh Valley Ins. Co.*, 3 Wkly. N. C. (Pa.) 433; *Pollard*

v. Fidelity Fire Ins. Co., 1 S. D. 570, 47 N. W. 1060; Hanover Fire Ins. Co. v. National Exch. Bank (Tex. Civ. App.) 34 S. W. 333.

This rule applies when the intelligence concealed subsequently proves to be untrue, as in *Hoyt v. Gillman*, 8 Mass. 336.

It would seem to follow naturally that the converse of the proposition stated above must also be true, namely, that the concealment of an immaterial fact will not avoid the policy. This principle has, indeed, been stated in numerous cases, and, subject to some qualifications, to be noticed hereafter, it may be regarded as a settled rule.

It is deemed sufficient to refer to *Alsop v. Commercial Ins. Co.*, 1 Fed. Cas. 564; *Moses v. Delaware Ins. Co.*, 17 Fed. Cas. 891; *Ruggles v. General Interest Ins. Co.*, 20 Fed. Cas. 1321; *Pelzer Mfg. Co. v. St. Paul Fire & Marine Ins. Co.* (O. C.) 41 Fed. 271; *Livingston v. Maryland Ins. Co.*, 6 Cranch, 274, 3 L. Ed. 222; *Maryland Ins. Co. v. Ruden*, 6 Cranch, 338, 3 L. Ed. 242; *McLanahan v. Universal Ins. Co.*, 1 Pet. 170, 7 L. Ed. 98; *Phoenix Ins. Co. v. Hamilton*, 81 U. S. 504, 20 L. Ed. 729; *Hodgson v. Mississippi Ins. Co.*, 2 La. 341; *Franklin Fire Ins. Co. v. Coates*, 14 Md. 235; *Mutual Fire Ins. Co. v. Deale*, 18 Md. 26, 79 Am. Dec. 673; *Elliott v. Hamilton Mut. Ins. Co.*, 13 Gray (Mass.) 139; *Richmondville Union Seminary v. Hamilton Mut. Ins. Co.*, 14 Gray (Mass.) 459; *American Ins. Co. v. Gilbert*, 27 Mich. 429; *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247; *Rosenheim v. America Ins. Co.*, 33 Mo. 230; *Chase v. Washington Mut. Ins. Co. of Cincinnati*, 12 Barb. (N. Y.) 595; *Chase v. Hamilton Mutual Ins. Co.*, 22 Barb. (N. Y.) 527; *De Longuemare v. Tradesmen's Ins. Co.*, 2 N. Y. Super. Ct. 589; *McCarty v. Scottish Union & National Ins. Co.*, 126 N. C. 820, 36 S. E. 284; *Pine v. Vanuxem*, 3 Yeates (Pa.) 30; *Norris v. Insurance Co. of North America*, 3 Yeates (Pa.) 84, 2 Am. Dec. 360; *Light v. Greenwich Ins. Co.*, 58 S. W. 851, 105 Tenn. 480; *Mascott v. First Nat. Fire Ins. Co.*, 69 Vt. 116, 31 Atl. 255; *Southern Mut. Ins. Co. v. Kloeber*, 31 Grat. (Va.) 739; *Sanford v. Royal Ins. Co.*, 11 Wash. 653, 40 Pac. 609.

It is said, in *Lyon v. Commercial Ins. Co.*, 2 Rob. (La.) 266, that it is of no consequence whether the fact is material in the opinion of the defendants, but it must be material in the opinion of the jury. Where the policy provides that any concealment will avoid it, failure to disclose will have that effect, irrespective of the materiality or intent (*Burritt v. Saratoga County Mut. Fire Ins. Co.*, 5 Hill [N. Y.] 188, 40 Am. Dec. 345); but, if the policy provides that any omission to make known a fact material to the risk shall render the policy void (*American Ins. Co. v. Gilbert*, 27 Mich. 429), an omission to state a fact will have that effect only if the facts suppressed are material to the risk.

(c) Effect of concealment as dependent on knowledge and intent of applicant.

In view of the principle discussed in subdivision (c), it would seem that, in determining the effect of the concealment, the knowledge of the applicant is an important factor. The principle has, indeed, been stated that concealment avoiding the policy cannot be predicated on the failure to disclose a fact of which the insured had no knowledge.

The principle is asserted in *Blays v. Union Ins. Co.*, 8 Fed. Cas. 329; *Stocker v. Merrimack Marine & Fire Ins. Co.*, 6 Mass. 220; *Hall v. People's Mut. Ins. Co.*, 6 Gray (Mass.) 185; *Rowley v. Empire Ins. Co.*, 42 N. Y. (8 Keyes) 557.

The contrary doctrine was asserted in *Williams v. Smith*, 2 Caines (N. Y.) 13, involving a marine policy, where it was said that, if the fact was material, the insured must be presumed to know it.

In numerous cases the broad rule has been stated that a concealment, though only the effect of accident, negligence, inadvertence, or mistake, will, if material, be as fatal as if it were intentional and fraudulent.

It is deemed sufficient to refer to *Roth v. City Ins. Co.*, 20 Fed. Cas. 1255; *Beebe v. Hartford County Mut. Fire Ins. Co.*, 25 Conn. 51, 65 Am. Dec. 553; *Walden v. Louisiana Ins. Co.*, 12 La. 134, 32 Am. Dec. 116; *Biggs v. U. S. Fire Ins. Co. (La.)* 12 Ins. Law J. (N. S.) 182; *Dennison v. Thomaston Mut. Ins. Co.*, 20 Me. 125, 37 Am. Dec. 42; *Stetson v. Mass. Mutual Fire Ins. Co.*, 4 Mass. 330, 3 Am. Rep. 217; *Fletcher v. Con. Ins. Co.*, 18 Pick. (Mass.) 419; *Bryant v. Ocean Ins. Co.*, 22 Pick. (Mass.) 200; *Hill v. Lafayette Ins. Co.*, 2 Mich. 476; *Davis v. Aetna Mut. Fire Ins. Co.*, 67 N. H. 335, 39 Atl. 902; *Williams v. Smith*, 2 Caines (N. Y.) 13; *Watson v. Delafield*, 2 Johns. (N. Y.) 526; *N. Y. Bowery Fire Ins. Co. v. N. Y. Fire Ins. Co.*, 17 Wend. (N. Y.) 359; *Hayes v. U. S. Fire Ins. Co.*, 132 N. C. 702, 44 S. E. 404; *Howell v. Cincinnati Ins. Co.*, 7 Ohio, 276, pt. 1; *Stoney v. Union Ins. Co.*, Harp. (S. C.) 235; *Catron v. Tenn. Ins. Co.*, 6 Humph. (Tenn.) 176; *Mutual Assur. Co. v. Mahon*, 5 Call (Va.) 517; *Virginia Fire & Marine Ins. Co. v. Kloeber*, 31 Grat. (Va.) 749; *Welgle v. Cascade Fire & Marine Ins. Co.*, 12 Wash. 449, 41 Pac. 53.

In view of the modern definition of concealment, that it is the intentional withholding of facts material to the risk, the strict rule stated above has been qualified in same cases.

It was questioned in *Monroe Mutual Fire Ins. Co. v. Robinson*, 5 Wkly. Notes Cas. (Pa.) 339; and in *Sanford v. Royal Ins. Co.*, 11 Wash.

653, 40 Pac. 609, and *Johnson v. Scottish Union Nat. Ins. Co.*, 93 Wis. 223, 67 N. W. 416, it was said that the concealment must not only be material, but also fraudulent.

In view of the provisions of the North Carolina statute relating to representations,⁶ it was held, in *McCarty v. Imperial Ins. Co.*, 126 N. C. 820, 36 S. E. 284, that a failure to disclose must be material or fraudulent to avoid the policy.⁷ The principle on which *Lexington Fire, Life & Marine Ins. Co. v. Paver*, 16 Ohio, 324, was decided seems to be that a bona fide concealment of a fact which would have influenced the company in taking the risk will not avoid the policy, unless such fact was actually a material fact and likely to increase the risk of loss.

While it is true, as stated in *Patten v. Insurance Co.*, 40 N. H. 375, that an intentional concealment of a material fact will avoid the policy, it is equally true, as said in *German-American Ins. Co. v. Paul*, 53 S. W. 442, 2 Ind. T. 625, that fraud will not be presumed from the fact of concealment. That a concealment must be fraudulent to avoid the policy was asserted in the well-known case of *McLanahan v. Universal Ins. Co.*, 1 Pet. 170, 7 L. Ed. 98.

The principle has been approved in *Daniels v. Hudson River Fire Ins. Co.*, 12 Oush. (Mass.) 416, 59 Am. Dec. 192; *Clement v. British America Assur. Co.*, 141 Mass. 298, 5 N. E. 847; *Mercantile Mutual Ins. Co. v. Calebs*, 20 N. Y. 173; *National Fire Ins. Co. v. United States Bldg. & Loan Ass'n (Ky.)* 54 S. W. 714. In *Ritt v. Washington Marine & Fire Ins. Co.*, 41 Barb. (N. Y.) 358, it is apparently asserted that, if the concealment is fraudulent, it will avoid the policy, though the fact concealed was not material.⁸

It would seem, from the decision in *Fame Ins. Co. v. Thomas*, 10 Ill. App. 545, that the court was of the opinion that a failure to disclose will avoid the policy, irrespective of the intent of the applicant, only when inquiry has been made, possibly on the theory that an inquiry shows the materiality. However that may be, there are many cases laying down the rule that, where no inquiry is made by the insurer, a failure to disclose will not avoid the policy, unless the failure is due to the fraudulent intent to deceive.

This rule is asserted in *Firemen's Fund Ins. Co. v. Meschendorf*, 14 Ky. Law Rep. 757; *Continental Ins. Co. v. Gardner (Ky.)* 62 S. W.

⁶ Acts 1898, c. 299, §§ 8, 9.

⁸ See *Sanders' Civ. Code Mont.* §

⁷ See, also, *Civ. Code Ga.* 1895, § 3428.
2099.

886; *Locke v. North American Ins. Co.*, 13 Mass. 61; *Washington Mills Emery Mfg. Co. v. Weymouth & Braintree Mut. Fire Ins. Co.*, 135 Mass. 503; *O'Brien v. Ohio Ins. Co.*, 52 Mich. 131, 17 N. W. 726; *Insurance Co. of North America v. Bachler*, 44 Neb. 549, 62 N. W. 911; *Hanover Fire Ins. Co. v. Bohn*, 48 Neb. 743, 67 N. W. 774, 58 Am. St. Rep. 719; *Browning v. Home Ins. Co.*, 6 Daly (N. Y.) 522; *Smith v. Home Ins. Co.*, 47 Hun (N. Y.) 30; *Kernochan v. N. Y. Bowery Fire Ins. Co.*, 17 N. Y. 428; *Browning v. Home Ins. Co.*, 71 N. Y. 508, 27 Am. Rep. 86; *Arthur v. Palatine Ins. Co.*, 35 Or. 27, 57 Pac. 62, 76 Am. St. Rep. 450; *West Rockingham Mut. Fire Ins. Co. v. Sheets*, 26 Grat. (Va.) 854; *Dooly v. Hanover Fire Ins. Co.*, 16 Wash. 155, 47 Pac. 507, 58 Am. St. Rep. 26; *Alkan v. New Hampshire Ins. Co.*, 53 Wis. 136, 10 N. W. 91; *Campbell v. American Fire Ins. Co.*, 73 Wis. 100, 40 N. W. 661; *Van Kirk v. Citizens' Ins. Co.*, 79 Wis. 627, 48 N. W. 798.

(p) Pleading.

The principle that it is not necessary for the plaintiff to allege that there was no concealment is stated in *Phoenix Ins. Co. v. Moog*, 78 Ala. 284, 56 Am. Rep. 31. On the contrary, it is so well settled as to be elementary that concealment must be pleaded by the insurer to be available as a defense to the policy.

Reference to the following cases is deemed sufficient: *Pino v. Merchants' Mut. Ins. Co.*, 19 La. Ann. 214, 92 Am. Dec. 529; *Theodore v. New Orleans Mut. Ins. Ass'n*, 28 La. Ann. 917; *Mulry v. Mohawk Valley Ins. Co.*, 5 Gray (Mass.) 541, 66 Am. Dec. 380; *Caplis v. American Fire Ins. Co.*, 60 Minn. 376, 62 N. W. 440, 51 Am. St. Rep. 535; *Sussex County Mut. Ins. Co. v. Woodruff*, 26 N. J. Law, 541; *Hynds v. Schenectady County Mut. Ins. Co.*, 16 Barb. (N. Y.) 119; *White v. Hudson River Ins. Co.*, 7 How. Prac. (N. Y.) 341; *Owen Ins. Co. v. Leonard*, 9 Ohio Cir. Ct. R. 46, 6 O. O. D. 49.

A general allegation of concealment is sufficient, in the absence of a demand for a more specific statement, according to *Jackson v. St. Paul Fire & Marine Ins. Co.*, 33 Hun (N. Y.) 60. Where, as in *Insurance Company of North America v. Bachler*, 44 Neb. 549, 62 N. W. 911, the insured, in his reply to a plea of concealment, merely set up a general denial, and the defendant, at the time of the trial, did not object that testimony of plaintiff going to prove that he did not know that it was his duty to communicate the fact on which the concealment was predicated was irrelevant under the pleadings, they cannot raise the question for the first time in the appellate court.

(g) Evidence.

In *Duguet v. Rhineland*, 2 Johns. Cas. (N. Y.) 476, it was said that concealment, being a fraud, will not be presumed. Nor can the materiality of the fact concealed be presumed, according to *Oliver v. Greene*, 3 Mass. 133, 3 Am. Dec. 96. In *Folsom v. Mercantile Ins. Co.*, 9 Fed. Cas. 349, it was said that, because a fact does not appear in the application, there is no presumption that it was not disclosed, in the absence of evidence to show that such fact was material. The burden is on the insurer to show the concealment of the material fact.

Folsom v. Mercantile Ins. Co., 9 Fed. Cas. 349; *Fiske v. New England Marine Ins. Co.*, 15 Pick. (Mass.) 310; *Cole v. Germania Fire Ins. Co.*, 99 N. Y. 36, 1 N. E. 38.

In *Green v. Merchants' Ins. Co.*, 10 Pick. (Mass.) 402, a paper was regarded as admissible to show that insurer had knowledge of facts alleged to have been concealed, but which were published in such paper. The question whether expert testimony is admissible to show the materiality of the fact concealed has been raised in several cases. In *Protection Ins. Co. v. Harmer*, 2 Ohio St. 452, where proof of a custom was offered, the court held that such proof was not admissible, but apparently on the ground that the witnesses were not experts. In *Hill v. Lafayette Ins. Co.*, 2 Mich. 476, the court did not directly pass on the question of admissibility, but decided that the evidence offered was by no means conclusive. In *Hawes v. New England Mut. Ins. Co.*, 11 Fed. Cas. 874, the court regarded expert testimony as to the materiality of the concealment to be admissible, saying that, while a witness could not testify as to what he himself as an underwriter would have done, yet, if he knew what underwriters generally would do under such circumstances, his testimony was competent.

Expert evidence to show materiality of fact concealed was also deemed admissible in *Ocean Ins. Co. v. Sun Mut. Ins. Co.*, 18 Fed. Cas. 540, affirmed in 107 U. S. 485, 1 Sup. Ct. 582, 27 L. Ed. 337.

In *Oricnt Ins. Co. v. Weaver*, 22 Ill. App. 132, the court said that, where the defense is concealment, it is incumbent on the insurer to prove the facts by a preponderance of evidence only, and not beyond a reasonable doubt. The sufficiency of the evidence to show concealment of a material fact was also considered in *Fiske v. New England Mut. Ins. Co.*, 15 Pick. (Mass.) 310. That a failure to dis-

close is not shown cannot be raised for the first time on appeal (*Cole v. Germania Fire Ins. Co.*, 99 N. Y. 36, 1 N. E. 38).

(v) Questions for jury and instructions.

As said in *Sussex County Mut. Ins. Co. v. Woodruff*, 26 N. J. Law, 541, and *People v. Liverpool, London & Globe Ins. Co.*, 2 Thomp. & C. (N. Y.) 268, the general question whether there has been a concealment is for the jury. What constituted due diligence in disclosing facts material to the risk is also a question for the jury according to *McLanahan v. Universal Ins. Co.*, 1 Pet. 170, 7 L. Ed. 98. In the same case it was said that the intent of the insured in failing to disclose is for the jury, and the principle is again asserted in *Virginia Fire & Marine Ins. Co. v. Kloeber*, 31 Grat. (Va.) 749.

That the materiality of the facts concealed is a question for the jury is an established principle.

Reference to the following cases is deemed sufficient: *Eddy St. Iron Foundry v. Hampden Stock & Mut. Fire Ins. Co.*, 8 Fed. Cas. 300; *Marshall v. Union Ins. Co.*, 16 Fed. Cas. 852; *Hardman v. Firemen's Ins. Co.* (C. C.) 20 Fed. 594; *Maryland Ins. Co. v. Ruden*, 6 Cranch, 338, 3 L. Ed. 242; *Livingston v. Maryland Ins. Co.*, 6 Cranch, 274, 3 L. Ed. 222; *McLanahan v. Universal Ins. Co.*, 1 Pet. 170, 7 L. Ed. 98; *Columbia Ins. Co. v. Lawrence*, 10 Pet. 507, 9 L. Ed. 512; *State Ins. Co. v. Du Bois*, 7 Colo. App. 214, 44 Pac. 756; *Franklin Fire Ins. Co. v. Coates*, 14 Md. 285; *Mutual Fire Ins. Co. v. Deale*, 18 Md. 26, 79 Am. Dec. 673; *Fletcher v. Com. Ins. Co.*, 18 Pick. (Mass.) 419; *Caplis v. American Fire Ins. Co.*, 60 Minn. 376, 62 N. W. 440, 51 Am. St. Rep. 535; *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247; *Rosenheim v. America Ins. Co.*, 33 Mo. 230; *Clark v. Union Mut. Fire Ins. Co.*, 40 N. H. 333, 77 Am. Dec. 721; *New York Firemen's Ins. Co. v. Walden*, 12 Johns. (N. Y.) 513, 7 Am. Dec. 340; *Sexton v. Montgomery County Mut. Ins. Co.*, 9 Barb. (N. Y.) 191; *White v. Hudson River Ins. Co.*, 7 How. Prac. (N. Y.) 341; *Tyler v. Aetna Ins. Co.*, 12 Wend. (N. Y.) 507, affirmed in 16 Wend. (N. Y.) 385, 30 Am. Dec. 90; *New York Bowery Fire Ins. Co. v. N. Y. Fire Ins. Co.*, 17 Wend. (N. Y.) 359; *McCarty v. Scottish Union & Nat. Ins. Co.*, 126 N. C. 820, 36 S. E. 284; *Fluch v. Lehigh Valley Ins. Co.*, 3 Wkly. Notes Cas. (Pa.) 433; *Money v. Union Ins. Co.*, 4 McCord (N. Y.) 511; *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. C. 213, 15 S. E. 562; *Mascott v. First National Fire Ins. Co.*, 69 Vt. 116, 37 Atl. 255; *Virginia Fire & Marine Ins. Co. v. Kloeber*, 31 Grat. (Va.) 749.

A general instruction that concealment will avoid the policy is not sufficient, if the insurer asks an instruction to the effect that, if a specific fact was concealed, the policy is void (*Mutual Ins. Co. v.*

Deale, 18 Md. 26, 79 Am. Dec. 673). Where the trial judge charged only as to fraudulent representations (Reed v. Williamsburg City Fire Ins. Co., 74 Me. 537), the court said that the judge undoubtedly had in mind express representations only, and that, if more explicit instructions were desired, they should have been requested, and the distinction that fraud might result from concealment should have been presented to the mind of the court.

7. PERSONS AFFECTED BY MISREPRESENTATION, BREACH OF WARRANTY, OR CONCEALMENT.

- (a) Policy payable to mortgagee as interest may appear.
- (b) Rights of mortgagee under "union mortgage clause."
- (c) Same—Qualification of rule.
- (d) Same—Policy issued at instance of mortgagee.
- (e) Effect as to rights of assignees.
- (f) Creditors.

(a) Policy payable to mortgagee as interest may appear.

An important question sometimes arises as to the extent to which a mortgagee whose interest is covered by the policy is affected by a misrepresentation, breach of warranty, or concealment by the person taking out the policy. In the leading case, *Carpenter v. American Ins. Co.*, 5 Fed. Cas. 105, it was held that a false representation made by the owner would avoid the policy, even as against a mortgagee to whom the policy was payable; the principle being based, apparently, on the ground that the person making the representation was in effect the mortgagee's agent, for whose acts the latter was bound. In *Lowell v. Middlesex Mut. Fire Ins. Co.*, 8 Cush. (Mass.) 127, where the loss was made payable to the mortgagee, it was said that the mortgagee's right was derivative only, and dependent on the validity of the contract in the hands of the person insured. Therefore, if the insured could not recover, there was nothing on which the mortgagee could base a right to recover. It seems to be the theory generally that a policy taken out by the owner, payable to the mortgagee as his interest may appear, is directly upon the owner's interest, and therefore the mortgagee's right is wholly dependent on the validity of the policy in the hands of the insured.

These principles appear to have governed *Friemansdorf v. Watertown Ins. Co.* (C. C.) 1 Fed. 68; *Phoenix Ins. Co. v. Public Parks Amuse-*

ment Co., 37 S. W. 959, 63 Ark. 187; Fitchburg Sav. Bank v. Amazon Ins. Co., 125 Mass. 431; Merwin v. Star Fire Ins. Co., 7 Hun (N. Y.) 659, affirmed without opinion 72 N. Y. 603; Lewis v. Guardian Life & Fire Ins. Co., 93 App. Div. 157, 87 N. Y. Supp. 525; Flaherty v. Germania Ins. Co., 1 Wkly. Notes Cas. (Pa.) 352.

On the other hand, it was held, in *Burrows v. McCalley*, 17 Wash. 269, 49 Pac. 508, that, in the absence of a written application, a policy payable to a mortgagee as his interest may appear is not avoided as to such mortgagee by a misrepresentation. In *Liverpool & London & Globe Ins. Co. v. Davis*, 56 Neb. 684, 77 N. W. 66, where the policy was really obtained by the mortgagee, and provided that the policy should be void if the insured concealed or misrepresented any material fact, "the insured" was considered as referring to the mortgagee, so that the policy was not void as to him for a misrepresentation or concealment of which the owner was guilty. In *Smith v. Union Ins. Co. (R. I.)* 55 Atl. 715, where the policy was issued to the mortgagor, loss payable to the mortgagee as his interest might appear, it was held that the policy in effect contained two separate contracts, so that a breach of condition by the mortgagor did not affect the mortgagee's right of recovery to the extent of his mortgage.

(b) Rights of mortgagee under "union mortgage clause."

When the policy is intended as a protection to a mortgagee, there is usually attached to it a provision that "this insurance, as to the interest of the mortgagee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured." This clause, though a comparatively recent addition to policies, was construed as early as 1878, in *Hastings v. Westchester Fire Ins. Co.*, 73 N. Y. 141, affirming 12 Hun, 416, as recognizing the mortgagee to be a distinct party in interest, and as creating a new contract, the terms of which had no relation to the contract between the company and the original insured. In *Phenix Ins. Co. v. Omaha Loan & Trust Co.*, 41 Neb. 834, 60 N. W. 133, 25 L. R. A. 679, it was held in effect that the conditions upon which payment should be made, as between the insurer and the insured, did not qualify the right of the mortgagee, in view of the mortgage clause, and therefore the right of the mortgagee to recover was not affected by conditions which, as between insurer and insured, would avoid the policy. This decision was subsequently followed in *State Ins. Co. v. New Hampshire Trust Co.*, 47 Neb. 62, 66 N. W. 9 (on rehearing 66 N. W. 1106).

In *Hanover Fire Ins. Co. v. Bohn*, 48 Neb. 743, 67 N. W. 774, 58 Am. St. Rep. 719, where a renewal policy was involved, the court held that the mortgage clause in effect constituted a contract of insurance between the mortgagee and the company, and that under it no act or omission of the insured in stating his interest, either at the time of the issuance of the policy or subsequent thereto, would invalidate the policy as to the mortgagee. The effect of this clause was considered at length in *Syndicate Ins. Co. v. Bohn*, 65 Fed. 165, 12 C. C. A. 531, 27 L. R. A. 614, and the court concluded that its effect was to make a new and separate contract between the mortgagee and the company, and a separate insurance on the interest of the mortgagee, depending for its validity solely on the course of action of the mortgagee, and unaffected by the act or neglect of the mortgagor, of which the mortgagee was ignorant, whether such act or neglect was done or permitted prior or subsequent to the attachment of the mortgage clause. The rule adopted in these cases was reasserted in *North British & M. Ins. Co. v. Bohn*, 49 Neb. 572, 68 N. W. 942, though more stress was laid on the mortgagee's lack of knowledge than in former cases.

The same effect was given to this clause in *Hare v. Headley*, 54 N. J. Eq. 545, 35 Atl. 445, and *Magoun v. Firemen's Fund Ins. Co.*, 86 Minn. 496, 91 N. W. 5, 91 Am. St. Rep. 370.¹

(c) Same—Qualification of rule.

If the policy is invalid by reason of a breach of condition when the mortgage clause is attached, the rule stated above will not apply, according to *Baldwin v. German Ins. Co.*, 105 Iowa, 379, 75 N. W. 326, where the policy was regarded as void under the condition that, if the property is incumbered, it must be so represented to the company and expressed in the policy. The facts in *Hanover Fire Ins. Co. v. National Exchange Bank* (Tex. Civ. App.) 34 S. W. 333, were similar, and the court held that the mortgage clause could not be construed as intended to annul other express provisions of the contract. This principle was also approved in *Genesee Falls Permanent Savings & Loan Ass'n v. United States Fire Ins. Co.*, 16 App. Div. 587, 44 N. Y. Supp. 979. In *American Central Ins. Co. v. Cowan* (Tex. Civ. App.) 34 S. W. 461, the court, while recognizing the general rule, said that the mortgage clause did not create

¹ See, also, *Laws Me.* 1895, c. 18, p. 14; *Rev. St. Me.* 1903, c. 49, § 4; *Pub. St. Mass.* c. 119, § 139; *Rev. Laws Mass.* c. 118, § 60; *Laws Minn.* 1895, c. 175, § 53.

an immunity as to the mortgagee from the result of acts or neglect of which the mortgagee was charged with notice, or in which he participated, or to which he consented. In this case the mortgagee was charged with notice of the acts and misrepresentations in obtaining the policy, and therefore such misrepresentations were attributed to the mortgagee as principal, rendering the policy void as to him. The fact that the mortgagee had notice was also regarded as an important factor in *Genesee Falls Permanent Savings & Loan Ass'n v. United States Fire Ins. Co.*, 16 App. Div. 587, 44 N. Y. Supp. 979, already referred to.

(d) Same—Policy issued at instance of mortgagee.

In *Graham v. Fireman's Ins. Co.*, 87 N. Y. 69, 41 Am. Rep. 348, affirming 9 Daly, 341, where the policy was obtained by the mortgagee, with a representation that the owner was a widow, when in fact she was an infant, the court held that the clause declaring that the insurance as to the interest of the mortgagee should not be invalidated by any act or neglect of the mortgagor clearly contemplated a case where the owner could act or could neglect, and not a case where the policy was issued in the name of an infant, and that such a misrepresentation as to the owner cannot be regarded of itself as an act or neglect within the terms of the clause. In *Genesee Falls Permanent Savings & Loan Ass'n v. United States Fire Ins. Co.*, 16 App. Div. 587, 44 N. Y. Supp. 979, the policy provided that it should be void if the interest of the insured was not truly stated, or was other than unconditional and sole ownership. The title to the premises was in the insured and his wife as tenants by the entirety, but this fact was not communicated to the company. It was contended, however, that, as the policy contained the mortgage clause, the mortgagee was relieved from the consequences of the failure of the mortgagor to truly state his interest. The court, relying on the *Graham Case*, remarked that a policy obtained by misrepresentation as to the owner cannot be considered as embraced within the meaning of the clause referred to. It is doubtful, however, if the court means to construe the *Graham Case* as asserting the broad rule that misrepresentations as to ownership never fall within the mortgage clause. This is evident, as the court goes on to say that the reason why such a misrepresentation does not come within the mortgage clause is that such a violation of the contract, while in one sense an act or neglect of the owner, is in fact one which avoids the policy from the outset, so that there is no

valid contract upon which the mortgagee's independent contract could rest. Moreover, the court is also of the opinion that in this particular case the mortgagee could not recover, because the application was made at his instance, and he knew or must have known that the insured was not the sole owner, as he was required to be by the terms of the policy, and with this knowledge nevertheless failed to notify the company of the real condition of the title. The latter portion of the reasoning in this case is based on *Cole v. German Fire Ins. Co.*, 99 N. Y. 36, 1 N. E. 38, where the policy was also taken out at the instance of the mortgagee. The court, in considering the effect of a failure to disclose certain facts increasing the risk, said that the clause did not protect the mortgagee's interest, as it was his own act or default, and not that of the mortgagor or owner.

(c) Effect as to rights of assignees.

The rules discussed in the foregoing paragraphs relating to the rights of mortgagees are applied with similar effect where the rights of assignees are involved. In *Citizens' Fire Ins., Security & Land Co. v. Doll*, 35 Md. 89, 6 Am. Rep. 360, where the policy was void at its inception because of a misrepresentation, it was held to be equally void in the hands of an assignee who had participated in the misrepresentation. In *Bowditch Mut. Ins. Co. v. Winslow*, 8 Gray (Mass.) 38, where the policy was assigned with the consent of the company to a mortgagee, the court held that the company might show, as against the assignee, that the policy was void by reason of a misrepresentation by the insured in his original application. The assignment transferred the policy of the insured only, and did not create a new contract. A similar principle was announced in *Richmond v. Niagara Fire Ins. Co.*, 15 Hun (N. Y.) 248, where it was said that the assignee or appointee to receive the money can claim only by virtue of the contract.

The general rule that an assignee cannot recover if the policy is voidable by reason of misrepresentation by the insured is also asserted in *Barrett v. Union Mut. Fire Ins. Co.*, 7 Oush. (Mass.) 175, *Reed v. Windsor Co. Mut. Fire Ins. Co.*, 54 Vt. 413, and *Simonds v. Firemen's Fund Ins. Co.* (Tex. Civ. App.) 35 S. W. 800.

In *Leavitt v. Western Marine & Fire Ins. Co.*, 7 Rob. (La.) 351, the court seems to regard an assignment of the policy as effecting a new contract; and in *Ellis v. Insurance Co. of North America* (C. C.) 32 Fed. 646, such a doctrine is fairly stated and made the basis of a decision. The policy in this case was assigned with the con-

sent of the company, and it was held that by the consent to the assignment there was created a new contract, so that the assignee took the policy free from all vitiating circumstances.

This doctrine was also asserted in *City Fire Ins. Co. v. Mark*, 45 Ill. 482, and *Ellis v. Council Bluffs Ins. Co.*, 64 Iowa, 507, 20 N. W. 782.

In *Ellis v. State Ins. Co.*, 68 Iowa, 578, 27 N. W. 762, 56 Am. Rep. 865, the policy provided that, if the title to the property was incumbered, the policy should be void. An incumbrance was placed on the property subsequent to the issuance of the policy, but prior to its assignment. The court took the position that, when the assignee became a party to the condition, he virtually agreed that, if there was then or should thereafter be an incumbrance on the property, he should not be entitled to recover. The act of the parties originally insured in casting an incumbrance on the property did not vitiate the policy in the hands of the assignee, but it was his agreement that it was not incumbered at the time it was assigned. The court distinguishes the case of *Ellis v. Council Bluffs Ins. Co.*, 64 Iowa, 510, 20 N. W. 782, in that the fraudulent representation was made by the insured in that case, and it did not appear that at the time of the assignment the risk was greater than the company had agreed to carry.

(f) Creditors.

It would seem to be axiomatic that one not a party to the policy, either as assignee or appointee, even though a creditor, cannot evade the effect of a misrepresentation avoiding the policy as to the insured. Yet such a question was raised in *Dunham v. Citizens' Ins. Co.*, 34 Wash. 205, 75 Pac. 804. Persons who had furnished material and labor for the building of a house demanded payment or security, and the owner promised to obtain insurance on the house which he stated should secure all the creditors. He obtained a policy in his own name, without informing the insurer that the policy was for the benefit of any one but himself. It was held that the misrepresentation in procuring the insurance was available to the insurer as a defense in an action by such creditors on the policy.

**8. EFFECT OF CONCEALMENT, MISREPRESENTATION, OR
BREACH OF WARRANTY IN MARINE POL-
ICIES IN GENERAL.**

- (a) In general.
- (b) Loss of vessel.
- (c) Condition of vessel.
- (d) Nationality and neutrality of vessel.
- (e) Location of risk.
- (f) Time and place of sailing.
- (g) Character of cargo in general.
- (h) Nationality and neutrality of cargo.
- (i) Time and place of loading cargo.
- (j) Value of vessel or cargo.
- (k) Title or interest of insured—Incumbrances—Other insurance.
- (l) Pleading.
- (m) Evidence—Presumption and burden of proof.
- (n) Same—Admissibility.
- (o) Same—Weight and sufficiency.
- (p) Questions for jury and instructions.

(a) In general.

In marine insurance certain affirmative warranties are implied on the part of the insured. These are seaworthiness, proper documentation, and proper stowing of cargo. As said in *Natchez Ins. Co. v. Stanton*, 2 Smedes & M. (Miss.) 340, 41 Am. Dec. 592, these warranties are implied as well by the owner of the cargo as by the owner of the vessel, except that a warranty as to proper documentation does not extend to the owner of the cargo. Aside from the implied warranties mentioned, misrepresentations and concealments are construed against the insured with more strictness in marine insurance than in fire insurance. In *Clarkson v. Western Assur. Co.*, 33 App. Div. 23, 53 N. Y. Supp. 508, it is said that the distinction thus drawn does not depend on the nature of the risk so much as on the fact that the property insured is at a distance, so that the underwriter is obliged to rely on what is told him in relation thereto by the insured. It appears to be the well-settled rule that material facts known by the insured, expressly or impliedly, and unknown to the insurer, must be disclosed. So it was held, in *Sperry v. Delaware Ins. Co.*, 22 Fed. Cas. 923, that, where instructions to a master are contrary to the rules established by the court of admiralty in England, such instructions must be communicated to the underwriter, though the rules of the court are

against the law of nations. But a matter of such public nature that the underwriter is presumed to have knowledge thereof need not be disclosed. So it was held, in *Norris v. Insurance Company of North America*, 3 Yeates (Pa.) 84, 2 Am. Dec. 360, that it was not the duty of the insured to disclose matters relative to the usage and course of trade in different countries, and in *De Longuemere v. New York Fire Ins. Co.*, 10 Johns. (N. Y.) 120, that the dangerous character of the port of destination need not be disclosed. In *Nelson v. Louisiana Ins. Co.*, 5 Mart. N. S. (La.) 289, a failure to disclose the custom of vessels to enter the port of destination without the assistance of a pilot, there being no pilot at that port, was not considered a concealment which would avoid the policy. Likewise a failure to disclose that the bills of lading are general will not vitiate a policy, if it is usual to carry general bills of lading, according to *Hurtin v. Phoenix Ins. Co.*, 12 Fed. Cas. 1047. In *Hubbard v. Coolidge*, 12 Fed. Cas. 779, it seems to be regarded as immaterial whether a communication from the master that permission be obtained to stop at a certain point was disclosed to the underwriter, as it appeared that vessels usually stopped at the port named.

It is elementary that, in the absence of bad faith, a policy will not be avoided by a concealment of an immaterial matter; but it is often difficult to determine what is material. In *Hodgson v. Mississippi Ins. Co.*, 2 La. 341, the fact that a brig whose freight was insured sailed under a charter party was held immaterial; and in *Batchelder v. Insurance Co. of North America* (D. C.) 30 Fed. 459, it was said that the insured need not disclose previous damage to a cargo on which insurance was sought, nor the condition of the vessel carrying it. In *Adams v. Warren Ins. Co.*, 22 Pick. (Mass.) 163, it was regarded as immaterial in a policy on freight that part of the cargo was to be carried on deck, as the policy would not attach to the freight earned in that manner. *Ocean Ins. Co. v. Sun Mut. Ins. Co.*, 18 Fed. Cas. 540, was a libel to recover reinsurance on a second charter on a ship. Two charters existed concurrently. The first covered a voyage coextensive with that described in the policy and a full cargo, so that no freight could be carried under the second, which was for a longer route, until the first voyage had been completed. The reinsurer paid the insurance on the first charter, but resisted payment on the second, on the ground that its existence had not been disclosed. The District Court held that the risk insured did not include the second charter, but was reversed by the

Circuit Court in 18 Fed. Cas. 547. On the hearing in the Supreme Court (*Sun Mut. Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 485, 1 Sup. Ct. 582, 27 L. Ed. 337), it was held that, if it was intended to cover the second charter, the concealment of its existence would avoid the policy. Three of the justices dissented from this holding, on the ground that it extended to the reinsurer the rights of an original insurer, which it was not entitled to by its former dealings, during which it had reinsured without inquiry as to particulars. The stowage of gold in the run under the cargo, instead of under the captain's cabin, as was usual, was, in *Leitch v. Atlantic Mut. Ins. Co.*, 66 N. Y. 100, considered a breach of the implied condition that the cargo should be stowed in a safe and proper manner and in the usual and customary place. In *Ingraham v. South Carolina Ins. Co.*, 3 Brev. (S. C.) 522, it appeared that the insured represented to the underwriter that he had received a letter showing that the natives of the country, whom the underwriter knew had been unfriendly to the captain, were now friendly, and concealed the fact that the supercargo had written him a letter of opposite tenor. This was held to constitute a misrepresentation and concealment. The concealment of a master's carelessness and want of economy was considered immaterial in *Walden v. New York Fireman's Ins. Co.*, 12 Johns. (N. Y.) 128, the policy covering barratry as well as sea risks; but the Court of Appeals (12 Johns. 513, 7 Am. Dec. 340) considered the materiality to be a question of fact.

A misdescription of the mark on certain hogsheads of sugar was not considered material to the risk in *Ruan v. Gardner*, 20 Fed. Cas. 1295. In *Hughes v. Mercantile Mut. Ins. Co.*, 44 How. Prac. (N. Y.) 351, the application described the vessel as named "Empress," while the policy insured her by that name or any other name she should be known by. The vessel lost was the *St. Mary*. As the application was not made a part of the policy, there was no warranty as to the name, and consequently the mistake or uncertainty in regard thereto was not a ground for avoidance. But on an appeal, reported in 55 N. Y. 265, 14 Am. Rep. 254, it was held that there was no contract, as it appeared that a description of the vessel in the application, copied from Lloyd's Register at the request of the insured's agent, described another vessel, which bore the name "Empress." In *Ruggles v. General Interest Ins. Co.*, 20 Fed. Cas. 1321, a statement that the vessel might go to a certain port, when in fact she had cleared for that port, was not regarded as a material

misrepresentation. So in *Clason v. Smith*, 5 Fed. Cas. 990, a statement in a letter applying for insurance that insured had no doubt but that they could get the insurance for a certain rate was not considered a material representation, even though the insurance had in fact been refused by other offices. In *Baker v. Central Ins. Co.*, 3 Ohio Dec. 478, an insurance on the "steamer Sioux City," was held to be a warranty that the subject-matter was a vessel or craft propelled by steam. As to the effect of statutes qualifying the rule as to misrepresentation, it is said, in *Durkee v. India Mut. Ins. Co.*, 159 Mass. 514, 34 N. E. 1133, that such a statute¹ applies to marine insurance also.

(b) Loss of vessel.

The rule governing the necessity to disclose a loss is stated in *McLanahan v. Universal Ins. Co.*, 1 Pet. 179, 7 L. Ed. 98, to be that where a party orders insurance, and afterwards receives intelligence of the loss, he ought to communicate it to the agent as soon as with due and reasonable diligence it can be communicated, for the purpose of countermanding the order or laying the circumstances before the underwriter. If he omits so to do, and by due and reasonable diligence the information might have been communicated, so as to have countermanded the insurance, the policy is void.

This principle is also asserted in *Watson v. Delafield*, 2 Johns. (N. Y.) 526, s. c., 1 Johns. (N. Y.) 152. The doctrine requiring a disclosure of the loss known at the time of taking out the insurance is further supported by *Johnson v. Phoenix Ins. Co.*, 13 Fed. Cas. 782, *Merchants' Mut. Insurance Co. v. Lyman*, 15 Wall. 664, 21 L. Ed. 246, *Merchants' Ins. Co. v. Paige*, 60 Ill. 448, and *Livingston v. Delafield*, 8 Caines (N. Y.) 49.

A failure to disclose a rumor or general intelligence of the loss of the vessel will avoid a policy.

Hart v. British & F. M. Ins. Co., 80 Cal. 440, 22 Pac. 302; *Graham v. General Mut. Ins. Co.*, 6 La. Ann. 432; *Dickenson v. Commercial Ins. Co.*, Anth. N. P. (N. Y.) 92.

But, as said in *Folsom v. Mercantile Mut. Ins. Co.*, 9 Fed. Cas. 349, it is not a material concealment if the insurer has possession of the same information as the insured. In *Ely v. Hallett*, 2 Caines (N. Y.) 57, the insured stated generally that there had been blowing weather since the vessel sailed, when in fact he had knowledge of a

¹ St. Mass. 1887, p. 785, c. 214, § 21.

particular storm, which the jury found had increased the risk. It was held that this amounted to a material concealment. But Lewis, C. J., dissented on the ground that general information was sufficient to apprise the insurer of an increase of risk.

It appears to be a general rule that unusual means need not be resorted to in order to countermand an order for insurance.

Green v. Merchants' Ins. Co., 10 Pick. (Mass.) 402, and *McLanahan v. Universal Ins. Co.*, 1 Pet. 179, 7 L. Ed. 98.

So it was held in *Snow v. Mercantile Ins. Co.*, 61 N. Y. 164, that an insured was not bound to resort to the cable which had been in operation only about three months and was not used more than a few times a day, and in *Andrews v. Marine Ins. Co.*, 9 Johns. (N. Y.) 32, a master was not considered guilty of negligence because he did not write the insured of the wreck before sailing, expecting to reach home before a letter could have been received. In *Neptune Ins. Co. v. Robinson*, 11 Gill & J. (Md.) 256, a failure to go to the post office for a letter containing information of a loss, was not considered negligence so as to avoid the policy, as the insured had no cause to expect the letter. An owner is not chargeable with the knowledge of a loss possessed by an agent who is not in any way connected with the procurement of the insurance (*Clement v. Phoenix Ins. Co.*, 5 Fed. Cas. 1020). In accordance with this rule, it was held in *General Interest Ins. Co. v. Ruggles*, 12 Wheat. 408, 6 L. Ed. 674, affirming 20 Fed. Cas. 1321, that a master of a vessel was not such an agent that his failure to communicate a loss would be chargeable to the owner. A statement that a vessel which had sailed after the one on which insurance was sought, had arrived, though she had in fact been in port 33 days, was, in *Alsop v. Commercial Ins. Co.*, 1 Fed. Cas. 564, held sufficient to put the insurer on inquiry. According to *Horter v. Merchants' Mut. Ins.*, 28 La. Ann. 730, the mere fact that a vessel was past due will not avoid the contract when there was no reason to suppose that she was lost, and in *Rolker v. Great Western Ins. Co.*, 4 Abb. Dec. (N. Y.) 76, it was held that the mere fact that a vessel was out of time, did not exonerate an insurer for refusing to enter a risk on an open policy. A representation that a vessel had been out about nine weeks when she had in fact been out ten weeks and 4 days, was in *Mackay v. Rhinelander*, 1 Johns. Cas. (N. Y.) 408, held immaterial, if ten weeks and four days were within the usual period for voyages.

(c) Condition of vessel.

As a marine policy embraces an implied warranty of seaworthiness, the insured is not bound to communicate the age or condition of the vessel, unless inquiry is made in regard thereto.

Such is the doctrine announced in *Popleston v. Kitchen*, 19 Fed. Cas. 1048; *Straas v. Marine Ins. Co.*, 23 Fed. Cas. 210; and *Silloway v. Neptune Ins. Co.*, 12 Gray (Mass.) 73.

A modification of the rule appears to be applied in *Hamblet v. City Ins. Co.* (D. C.) 36 Fed. 118, where a policy was held avoided by a failure to disclose that the steamboat insured was tied up for repairs, having been injured in a collision, and was not in a condition to run at all, and was without master, officers or crew.² If there is a material misrepresentation in answer to inquiries by the underwriter as to the age and condition of the vessel, it will avoid the policy, and this rule was in *Bulkley v. Protection Ins. Co.*, 4 Fed. Cas. 614, extended to embrace information given voluntarily. In *Kohne v. Insurance Company of North America*, 14 Fed. Cas. 835, the vessel was represented to be an "excellent" one. It was held that if she deserved the character given her, a concealment of a previous accident was immaterial. In *Lexington Fire, Life & Mar. Ins. Co. v. Paver*, 16 Ohio, 324, a concealment of the construction of the hull, which might have influenced the underwriters in taking the risk, was held not to avoid the policy, as it did not appear that the risk was actually increased thereby. In *Hazard v. New England Mar. Ins. Co.*, 8 Pet. 557, 8 L. Ed. 1043, reversing 11 Fed. Cas. 934, a representation in a letter from a vessel owner in New York to an underwriter in Boston that a vessel, lying in the former port was "coppered," was considered as meaning that the ship was coppered according to the meaning of those words in the port of New York and not according to the construction placed on them in Boston. The lower court construed the statement as a mere representation, not a warranty, that the vessel was copper sheathed; and a similar principle was asserted in *Martin v. Fishing Co.*, 20 Pick. (Mass.) 389, 32 Am. Dec. 220, in regard to a provision in a policy that the insurer was not to be liable for damages to or from a vessel's sheathing. A vessel owner is not bound by a representa-

² See, also, *Clarkson v. Western Assur. Co.*, 88 App. Div. 23, 53 N. Y. Supp. 508, where it was held that a failure to disclose that a large quan-

tity of oil had been poured into the sea avoided a fire policy on a ship laid up in a harbor.

tion as to the vessel's condition made without his knowledge by his broker to another underwriter in procuring insurance for a co-owner of a vessel (*Harmony Fire & Marine Ins. Co. v. Hazlehurst*, 30 Md. 380).

(d) Nationality and neutrality of vessel.

If insurance is effected in war time, a warranty of neutrality is usually required. In *Schwartz v. Insurance Co. of North America*, 21 Fed. Cas. 768, the court says that a warranty of neutrality means that the property insured is neutral in fact and shall be so in appearance and in conduct; that the property belongs to neutrals; that it shall be so documented as to prove its neutrality, and that no act shall be done by the insured or its agents which can compromise neutrality.

That the warranty implies proper documentation is further asserted in *Ludlow v. Union Ins. Co.*, 2 Serg. & R. (Pa.) 119, *Livingston v. Martland Ins. Co.*, 7 Cranch, 506, 8 L. Ed. 421, and *Murray v. Alsop*, 8 Johns. Cas. (N. Y.) 47.

But this warranty in regard to an American vessel is satisfied if there is a sea letter on board. A register is not necessary.

Barker v. Phoenix Ins. Co., 8 Johns. (N. Y.) 307, 5 Am. Dec. 339, and *Griffith v. Insurance Co. of North America*, 5 Bin. (Pa.) 464.

The warranty of neutrality must be expressly incorporated in the policy. If this is not done, the underwriter will be considered to have assumed a war risk.

Barnewall v. Church, 1 Caines (N. Y.) 217, 2 Am. Dec. 180, and *Elting v. Scott*, 2 Johns. (N. Y.) 157. But in *Stocker v. Merrimack Mar. & F. Ins. Co.*, 6 Mass. 220, it is said that the neutrality of the vessel is always understood in an insurance made by a citizen of a neutral state, resident there, of his own property. No express representation or warranty is needed in such a case.

In *Price v. Depeau*, 1 Brev. (S. C.) 452, 2 Am. Dec. 680, it was held that even though a warranty as to sea letters was complied with, a concealment of a matter affecting the national character of the vessel would vitiate the policy, and it was considered immaterial whether the matter concealed contributed to the loss or not. So in *Goicoechea v. Louisiana State Ins. Co.*, 6 Mart. N. S. (La.) 51, 17 Am. Dec. 175, the breach of a warranty against illicit trade was held to avoid a policy, though the loss was not occasioned thereby.

If an adjective indicating nationality is used to qualify the name

of the vessel in the policy, this amounts to a warranty of the vessel's nationality. Thus a policy on the "American ship *Minerva*" was in *Goix v. Low*, 1 Johns. Cas. (N. Y.) 341, held to warrant the ship to be American.

This doctrine is also asserted in *Murray v. United Ins. Co.*, 2 Johns. Cas. (N. Y.) 168; *Higgins v. Livermore*, 14 Mass. 106; *Lewis v. Thatcher*, 15 Mass. 431; *Atherton v. Brown*, 14 Mass. 152; and *Mackie v. Pleasants*, 2 Bin. (Pa.) 363. In the *Higgins* Case it was held sufficient if the ship was regularly documented as of the nationality indicated, but this was in the *Lewis* Case, considered an unfortunate qualification. In the *Mackie* Case, the court was undetermined as to whether the adjective amounted to a warranty, or was only a representation or description. At any rate the clause was complied with if the owner of the vessel was of the indicated nationality.

According to the *Lewis* Case, a warranty of neutrality is not controlled by the usage to the effect that a vessel need only be documented as neutral, while in fact not neutral; but if it is customary for a vessel to be documented as a foreign vessel while engaged in foreign trade, this need not be disclosed (*Calbreath v. Gracy*, 4 Fed. Cas. 1030), as the underwriters will be presumed to have knowledge of the custom. In the early cases of *Jackson v. New York Ins. Co.*, 2 Johns. Cas. (N. Y.) 191, and *Duguet v. Rhineland*, 1 Johns. Cas. (N. Y.) 360, it was held that the naturalization of an immigrant *flagrante bello* was not sufficient to satisfy a warranty of neutrality; but the ruling of the lower court in the *Rhineland* Case was reversed in 2 Johns. Cas. (N. Y.) 191, 1 *Caines' Cas.* (N. Y.) xxv, and the doctrine thus laid down was afterwards followed in *Coulon v. Bowne*, 1 *Caines* (N. Y.) 288. The policy involved in *Seamans v. Loring*, 21 Fed. Cas. 920, warranted the vessel to be an English prize vessel, but the colors and documents had been changed to give her a Swedish character. It was held that this avoided the policy. A conditional sale of a vessel to a foreigner to be consummated on the completion of the voyage, was not considered a breach of warranty of neutrality in *Murgatroyd v. Crawford*, 3 Dall. (Pa.) 491, 1 L. Ed. 692. Similarly it was held in *Murray v. United Ins. Co.*, 2 Johns. Cas. (N. Y.) 168, that a vessel in which a foreigner had a vested interest was not American. If the destination of a vessel is stated in general terms, when in fact, she is bound for a port in which she will be liable to confiscation, a concealment of the actual destination will avoid the policy (*Hoyt v. Gilman*, 8 Mass. 336). But if a vessel, bound for a belligerent port, follows a

custom and clears for a neutral one (*McFee v. South Carolina Ins. Co.*, 2 McCord [S. C.] 503, 13 Am. Dec. 757), a concealment of the port for which the vessel cleared will not vitiate a policy, on the ground that the risk is diminished by the spurious clearance. However, in *Price v. Depeau*, 1 Brev. (S. C.) 452, 2 Am. Dec. 680, the court held that insured should have disclosed that he was merely acting for a belligerent, even though he had complied with a warranty that the vessel was to sail with an American sea letter. In *Maryland Ins. Co. v. Bathurst*, 5 Gill & J. (Md.) 159, an application for insurance on all risks, and a subsequent indorsement that there would be contraband goods on board, but that still insurance was wanted against all possible risks, was held not to amount to a warranty or representation of neutrality, with permission to carry some contraband goods.

(e) Location of risk.

It appears to be a general rule that a misrepresentation as to the location of the vessel is material and will avoid the policy. Such a statement is regarded as a warranty that the ship is safe at the place named.

That a misrepresentation as to location will avoid the policy is asserted in *Sawyer v. Coasters' Mut. Ins. Co.*, 6 Gray (Mass.) 221; *Blays v. Union Ins. Co.*, 8 Fed. Cas. 329; *Callaghan v. Atlantic Ins. Co.*, 1 Edw. Ch. (N. Y.) 64, and *Schroeder v. Stocks & Material Ins. Co.*, 46 Mo. 174.

But, if the insurance is effected by a time policy, a representation as to the vessel's whereabouts is neither a warranty nor material.

Such is the rule in *Manly v. United Marine & Fire Ins. Co.*, 9 Mass. 85, 6 Am. Dec. 40; *Vigoreaux v. Lime Rock Ins. Co.*, 59 Me. 457, 8 Am. Rep. 428; *Martin v. Fishing Co.*, 20 Pick. (Mass.) 389, 32 Am. Dec. 220.

A concealment of the length of time a vessel has been at a certain port did not avoid a policy on the vessel "at and from" the port (*Kemble v. Bowne*, 1 Caines [N. Y.] 75), as the risk had not commenced until on the day it was represented that the vessel was safe at the port.

(f) Time and place of sailing.

If an insurer intends to exact a literal compliance with the statement as to the time and place of sailing, he must, as said in *Allegré's Adm'rs v. Maryland Ins. Co.*, 2 Gill & J. (Md.) 136, 20 Am.

Dec. 424, make such statement a subject of warranty. Such a rule is also deducible from *Whitney v. Haven*, 13 Mass. 172. **Generally a representation as to the time and place of sailing is not material, so as to avoid a policy if false.**

Such is the doctrine of *Rice v. New England Ins. Co.*, 4 Pick. (Mass.) 439; *Allegre's Adm'rs v. Maryland Ins. Co.*, 2 Gill & J. (Md.) 136, 20 Am. Dec. 424; *Williams v. Delafield*, 2 Caines (N. Y.) 329; *Kohne v. Insurance Company of North America*, 14 Fed. Cas. 835.

There may, however, be circumstances which will render a misrepresentation of this nature material. Thus, where a misrepresentation as to the time of sailing of a vessel on which insurance was requested was made in reply to a specific question asked by the insurer in the application, it will be conclusively presumed to have been material to the risk (*Kerr v. Union Marine Ins. Co.*, 130 Fed. 415, 64 C. C. A. 617, reversing [D. C.] 124 Fed. 835). So a misrepresentation will be regarded as material, if a true statement would have shown that the vessel was missing.

Baxter v. New England Ins. Co., 2 Fed. Cas. 1058; *Ourell v. Ins. Co.*, 8 La. 358.

The general rule governing misrepresentation applies also to concealments as to the time and place of sailing.

This doctrine is asserted in *Fiske v. New England Mar. Ins. Co.*, 15 Pick. (Mass.) 310; *McLanahan v. Universal Ins. Co.*, 1 Pet. 179, 7 L. Ed. 98; *Simmes v. Marine Ins. Co.*, 22 Fed. Cas. 150.

But, if a disclosure of the time and place of sailing would have shown the vessel to be missing or to have been in a storm, the concealment becomes material.

Johnson v. Phoenix Ins. Co., 13 Fed. Cas. 782; *Livingston v. Delafield*, 3 Caines (N. Y.) 49. A representation that a vessel would sail with a convoy was held material in *Alsop v. Coit*, 12 Mass. 40.

(g) Character of cargo in general.

It appears to be the well-settled rule that a concealment of the nature of the cargo insured will not vitiate the policy, unless an inquiry in regard thereto was made by the underwriter.

This is the doctrine enunciated in *Duplanty v. Commercial Ins. Co.*, Anth. N. P. (N. Y.) 114; *Wiggin v. Mercantile Ins. Co.*, 7 Pick. (Mass.) 271; *Locke v. North American Ins. Co.*, 13 Mass. 61.

The contrary doctrine is asserted in *Allegre's Adm'rs v. Maryland Ins. Co.*, 8 Gill & J. (Md.) 190, 29 Am. Dec. 538.

On authority of *Hearn v. Equitable Safety Ins. Co.*, 11 Fed. Cas. 965, it may be said that a misrepresentation as to the cargo will not avoid the policy, unless it appears to have been material and influenced the underwriters; but, if there is a warranty as to the nature of the cargo, a breach thereof will, of course, avoid the policy (*Sawyer v. Coasters' Mut. Ins. Co.*, 6 Gray [Mass.] 221). In *Brooke v. Louisiana State Ins. Co.*, 4 Mart. N. S. (La.) 640, it was said that the high rate of premium charged excluded the idea that information was not given as to the nature of the cargo. In *Thwing v. Great Western Ins. Co.*, 103 Mass. 401, 4 Am. Rep. 567, a warranty not to take on more than the registered tonnage of merchandise, including coal, was not considered broken by the loading of an excessive amount of coal as dunnage, though freight was paid on the excess. A similar view was taken by the United States Circuit Court in a suit between the same parties which arose on insurance on the same voyage, reported in 10 Fed. Cas. 1051; but the United States Supreme Court, in an opinion reported in 13 Wall. 672, 20 L. Ed. 607, held that the warranty was broken. To this, however, Chase, C. J., and Clifford and Swayne, JJ., dissented. On a subsequent hearing of the Massachusetts case, reported in 111 Mass. 93, that court reaffirmed its former ruling and refused to accept the doctrine that an article for which freight was paid could not be received and used as dunnage.

(h) Nationality and neutrality of cargo.

A warranty that property is neutral means that it must be neutral in fact, in appearance, and in conduct (*Smith v. Delaware Ins. Co.*, 22 Fed. Cas. 509). This imports that the property shall be accompanied with proper documents to establish its neutrality, as said in *Blagge v. New York Ins. Co.*, 1 Caines (N. Y.) 549, and this imports that there shall be no documents on board compromising the neutral character of the cargo; but, if it is customary to have documents of a doubtful character on voyages between certain ports, such custom will be deemed to be known by the underwriter, and he cannot avoid the policy because it is not disclosed that spurious papers will be on board.

Carrere v. Union Ins. Co., 8 Har. & J. (Md.) 824, 5 Am. Dec. 437;
Craig v. United States Ins. Co., 6 Fed. Cas. 733; *Le Roy v. United Ins. Co.*, 7 Johns. (N. Y.) 343; *Livingston v. Maryland Ins. Co.*, 6 Cranch, 274, 3 L. Ed. 222.

In *Calbreath v. Gracy*, 4 Fed. Cas. 1030, it was held that, if it was the usual course of trade to have a Spanish supercargo and Spanish papers and colors on an American vessel sailing between Spain and her colonies, the underwriters were bound to know this, and could not complain because such circumstances were not disclosed to them. In *Stocker v. Merrimack Marine & Fire Ins. Co.*, 6 Mass. 220, it is said that, where the insurance is on freight only of a neutral vessel, there is no necessary inference that the cargo carried in it shall be neutral; for a neutral vessel may be lawfully employed in carrying belligerent property. A statement in the policy that the goods "belong" to an American citizen (*Walton v. Bethune*, 2 Brev. [S. C.] 453, 4 Am. Dec. 597) is a warranty of neutrality. And in *Craig v. United States Ins. Co.*, 6 Fed. Cas. 733, a statement that there was a "Sidmouth license" on board was held to be an affirmative warranty, which would be broken if the ship had no such license. **The warranty of neutrality is broken if part of the property is belligerent.**

Blagge v. New York Insurance Co., 1 Caines (N. Y.) 549; *Phoenix Ins. Co. v. Pratt*, 2 Bin. (Pa.) 308; *Bayard v. Massachusetts Fire & Marine Ins. Co.*, 2 Fed. Cas. 1065.

But in *Livingston v. Maryland Ins. Co.*, 6 Cranch, 274, 3 L. Ed. 222, it was held that the warranty was complied with if the interest of the insured was neutral, as it could not be understood that the whole cargo was warranted to be neutral. A similar doctrine was asserted in *Baltimore Ins. Co. v. Taylor*, 3 Har. & J. (Md.) 198, with the further qualification that in that case the interest of the insured was greater than the amount covered by the policy, and that the goods complained of were placed on board by the master without the insured's knowledge. A warranty of neutrality will be broken if one of the owners is a merchant domiciled in the enemy's country at the commencement of hostilities (*Elbers v. United Ins. Co.*, 16 Johns. [N. Y.] 128); and in *Arnold v. United Ins. Co.*, 1 Johns. Cas. 363, it was said that the fact that such merchant was also the consul of his government did not vary the rule. The nationality of a cargo is not changed by the fact that it was placed in bond for exportation in a port of another country and then suffered to remain on the importing vessel, as this will not constitute a bona fide exportation (*Kohne v. Insurance Co. of North America*, 6 Bin. [Pa.] 219; *Id.*, 14 Fed. Cas. 835). In the leading case of *Seton v. Low*,

1 Johns. Cas. (N. Y.) 1, it was held that contraband goods were "lawful goods," within the meaning of that term in a marine policy.

This doctrine is also asserted in *Skidmore v. Desdouty*, 2 Johns. Cas. (N. Y.) 77; *American Ins. Co. v. Dunham*, 12 Wend. (N. Y.) 463; *Rhineland v. Juhel*, 2 Johns. Cas. (N. Y.) 487, affirming *Juhel v. Rhineland*, 2 Johns. Cas. (N. Y.) 120.

The general rule governing concealments applies to concealments of nationality and neutrality. A policy will not be avoided unless the concealment is fraudulent or of a material matter. (*Maryland Ins. Co. v. Ruden*, 6 Cranch, 338, 3 L. Ed. 242.) As a general proposition it may be stated that a failure to disclose the belligerent character of a cargo is a material concealment, if the fact is known to the insured.

Bauduy v. Union Ins. Co., 2 Fed. Cas. 1039; *Marsh v. Muir*, 1 Brev. (S. C.) 134, 2 Am. Dec. 648; *Kohne v. Ins. Co. of North America*, 6 Bin. (Pa.) 219; *Id.*, 14 Fed. Cas. 835; *Marshall v. Union Ins. Co.*, 16 Fed. Cas. 849.

However, if insurance is taken out by a neutral on a cargo for whom it may concern, and the character of the voyage and risk is such that it is likely that belligerent property will be included, it is not necessary to disclose this fact (*Buck v. Chesapeake Ins. Co.*, 1 Pet. 151, 7 L. Ed. 90). A warranty of the nationality of a cargo will not be broken by the fact that the goods have been conditionally sold to a foreigner, the sale to be consummated on delivery of the goods at the port of destination.

Such is the rule in *Ludlow v. Bowne*, 1 Johns. (N. Y.) 1, 3 Am. Dec. 277, and *New York Firemen's Ins. Co. v. De Wolf*, 2 Cow. (N. Y.) 56, affirming *De Wolf v. New York Firemen's Ins. Co.*, 20 Johns. (N. Y.) 214.

A corollary to this doctrine is stated in *Warden v. Horton*, 4 Bin. (Pa.) 529, wherein it is said that a warranty of nationality is not satisfied by a conditional purchase of the property insured. In the *Ludlow Case* it is stated that it is lawful for neutrals to ship goods to belligerents under an agreement that the latter may purchase the goods after their arrival at the port of destination at an agreed price.

A breach of a warranty against illicit trade avoids a policy, according to *Goicoechea v. Louisiana State Ins. Co.*, 6 Mart. N. S. (La.) 51, 17 Am. Dec. 175. But in *De Peyster v. Gardner*, 1 Caines (N. Y.) 492, a warranty against illicit trade and contraband goods

in a policy on the commissions of a master on lawful goods consigned to him was not considered broken by a consignment of illicit goods, of which the insured had no knowledge.

(3) Time and place of loading cargo.

A representation as to the time and place of loading the cargo is not in itself material.

Schroeder v. Stock & Mut. Ins. Co., 46 Mo. 174; *Pine v. Vanuxem*, 3 Yeates (Pa.) 80.

But a failure to disclose the place of loading was considered a material concealment in *Stoney v. Union Ins. Co.*, Harp. (S. C.) 235, and *Stoney v. Union Ins. Co.*, 8 McCord (S. C.) 887, 15 Am. Dec. 634, as a disclosure would have showed the goods to have been loaded at a port which rendered them subject to seizure by privateers. A similar view appears to be taken in *Money v. Union Ins. Co.*, 4 McCord (S. C.) 511, though the rule is modified, so as to exonerate an insured if the underwriter had knowledge of the facts.

The words "at and from" a certain port in a marine policy do not constitute a warranty that the cargo was loaded at the designated port, so as to avoid the policy if the cargo was in fact loaded at a previous point.

Such is the principle stated in *Silloway v. Neptune Insurance Co.*, 12 Gray (Mass.) 73; *Clark v. Higgins*, 132 Mass. 586; *Gardner v. Columbian Ins. Co.*, 9 Fed. Cas. 1165; *Money v. Union Ins. Co.*, 4 McCord (S. C.) 511.

In the *Clark Case* it is suggested that the words quoted would receive a different construction if they were followed and qualified by a phrase making the beginning of the venture date from the loading. A similar rule may be inferred from *Stoney v. Union Ins. Co.*, Harp. 235, 3 McCord (S. C.) 387, where it was held that such a qualification in a cargo policy would apply also to a policy on the vessel effected by the same parties at the same time.

(4) Value of vessel or cargo.

A gross or fraudulent overvaluation of the subject-matter insured will avoid a marine policy.² So it was held, in *Lewis v. Eagle Ins. Co.*, 10 Gray (Mass.) 508, that a representation that a vessel cost \$6,000, when in fact it cost only \$2,150, avoided the policy. A

² Rev. Codes N. D. § 4593, provides fraudulent in fact entitles the insured that in marine insurance a valuation to rescind the contract.

similar doctrine as to the effect of excessive overvaluation is also asserted in *Storm v. Great Western Ins. Co.*, 40 How. Prac. (N. Y.) 423; and in *Howell v. Cincinnati Ins. Co.*, 7 Ohio, 276, pt. 1, it was held that a material overvaluation would avoid a policy, though innocently made. But a mere overvaluation is not necessarily proof of fraud (*Ocean Ins. Co. v. Fields*, 18 Fed. Cas. 532). In *Hodgson v. Marine Ins. Co.*, 5 Cranch, 100, 3 L. Ed. 48, it was said that an innocent immaterial overvaluation would not avoid the policy. The opinion of the court appears to be that a vessel actually worth \$3,000 could be honestly valued at \$10,000, if she cost the last amount. In *Fosdick v. Norwich Ins. Co.*, 3 Day (Conn.) 108, a policy on profits was not regarded as avoided by a valuation of the cargo expected, based on advices, at \$20,000 and \$25,000, though the vessel actually sailed with a cargo of about \$9,000. Likewise it was held, in *Voisin v. Providence Washington Ins. Co.*, 51 App. Div. 553, 65 N. Y. Supp. 333, and *Phoenix Ins. Co. v. Moog*, 78 Ala. 284, 56 Am. Rep. 31, that an assured was not responsible for an overvaluation honestly based on representations made by third persons with whom he was in no way connected. According to *Akin v. Mississippi Marine Ins. Co.*, 4 Mart. N. S. (La.) 661, a policy is not avoided because the cargo was valued higher than its invoice price. In the absence of a showing of a profit to the insured, a policy will not be avoided by an overvaluation of a cargo (*Brooke v. Louisiana State Ins. Co.*, 4 Mart. N. S. [La.] 640). The rule governing overvaluation in valued policies is said, in *Alsop v. Commercial Ins. Co.*, 1 Fed. Cas. 564, to be that if the valued policy is procured in entire good faith, if there is no intent to deceive, and if there is a substantial interest, the overvaluation, whatever it may be, is unimportant.

A similar rule is also asserted in *Sturm v. Atlantic Mut. Ins. Co.*, 63 N. Y. 77, 38 N. Y. Super. Ct. 281, *Same v. Williams*, 38 N. Y. Super. Ct. 325, and *Funke v. Orient Mut. Ins. Co.*, 38 N. Y. Super. Ct. 349.

(k) Title or interest of insured—Incumbrances—Other insurance.

The exact nature of the title or interest of the insured in a marine policy need not be disclosed, unless an inquiry is made in regard thereto; and this appears to be true, regardless of whether the interest of the insured is equitable or legal.

This general rule is supported by *Locke v. North American Ins. Co.*, 13 Mass. 61; *Finney v. Warren Ins. Co.*, 1 Metc. (Mass.) 16, 35 Am. Dec. 843; *Chase v. Washington Mut. Ins. Co. of Cincinnati*, 12

Barb. (N. Y.) 595; *Lawrence v. Van Horne*, 1 Caines (N. Y.) 276; *Bixby v. Franklin Ins. Co.*, 8 Pick. (Mass.) 86; *Oliver v. Greene*, 3 Mass. 133, 8 Am. Dec. 96; *Bartlet v. Walter*, 18 Mass. 267, 7 Am. Dec. 148; *Wells v. Philadelphia Ins. Co.*, 9 Serg. & R. (Pa.) 103.

Of course, this does not apply to a fraudulent and intentional concealment. The general rule as to bona fide concealments appears to be modified in *Ohl v. Eagle Ins. Co.*, 18 Fed. Cas. 630, so as to require disclosure of the title of the insured, if it is equitable, especially if it is a mere palpable trust, in opposition to the ship's papers. But in *Russel v. Union Ins. Co.*, 21 Fed. Cas. 28, it was not regarded necessary to disclose the specific nature of the interest of one who insured a cargo on securing it after condemnation by a foreign court in admiralty; the insured having mentioned the circumstances of the capture and the delivery of the cargo to him. According to *Riley v. Delafield*, 7 Johns. (N. Y.) 522, and *Huth v. New York Mut. Ins. Co.*, 8 Bosw. (N. Y.) 538, it is necessary for a charterer to disclose his interest when effecting insurance on freight, as the use of the word "freight" is regarded to imply that the insured is the owner of the vessel. But a contrary view is taken in *Clark v. Ocean Ins. Co.*, 16 Pick. (Mass.) 289; the court there coming to the conclusion that, as between the stranger who shipped the cargo and the insured, freight *eo nomine* was payable by the stranger to the insured, and might be described as such. In *Bell v. Western Marine & Fire Ins. Co.*, 5 Rob. (La.) 423, 39 Am. Dec. 542, an insurance for "whom it may concern" was held to be a sufficient disclosure that others than the applicant were also interested in the property; and in *Livingston v. Maryland Ins. Co.*, 7 Cranch, 506, 3 L. Ed. 421, it was said that a letter applying for insurance and naming certain owners of the vessel was not a representation that there were no other owners, in the absence of a statement to that effect. A policy obtained on representation that the insured is the owner of the vessel is not avoided by a mere showing that the insured's interest was based on a bond for conveyance on payment of the remaining portion of the purchase price (*Simmes v. Marine Ins. Co.*, 22 Fed. Cas. 150). But in *Hebner v. Sun Ins. Co.*, 157 Ill. 144, 41 N. E. 627, it is said that a condition requiring insured to be the sole and unconditional owner is broken, if insured only owns a part interest in the vessel.

It is, of course, elementary that an agent of an insurance company cannot effect insurance on property in which he is interested without a disclosure of this fact. This principle is applied in *Ritt*

v. Washington Marine & Fire Ins. Co., 41 Barb. (N. Y.) 353, where it is said that an insurance obtained without a disclosure of the agent's interest is void on the ground of public policy, and not because of the materiality of the concealment. But a concealment by an insured that the master of a vessel sails her on shares will not in itself avoid the policy (Russ v. Waldo Mut. Ins. Co., 52 Me. 187). In Levy v. Merrill, 4 Greenl. (Me.) 180, a policy on the cargo was not considered avoided because the goods insured were not shipped in the name of the true owners, as it was distinctly noted in the policy that they were shipped in the name of another to protect the property from capture.

The policy involved in Bidwell v. Northwestern Ins. Co., 19 N. Y. 179, stated the insurance to be on account of C., with loss payable to B., and contained a warranty against incumbrances. C. was the owner of the vessel, and B. was the mortgagee, of which fact the insurer had notice; but there existed prior mortgages which were not disclosed. It was held that the policy was avoided by the concealment of these prior mortgages.

In Murray v. Insurance Co. of Pennsylvania, 17 Fed. Cas. 1048, it was held that a policy would not be avoided by the concealment of prior insurance, when it contained a stipulation that, if there was such insurance, the insurers should be liable only for deficiencies. And in St. Nicholas Ins. Co. v. Merchants' Mut. Fire & Marine Ins. Co., 11 Hun (N. Y.) 108, it was said that a reinsurance policy providing for a pro rata division of the loss was not avoided by a previous policy issued by the original insurer. In Wells v. Philadelphia Ins. Co., 9 Serg. & R. (Pa.) 103, it was held that insurance on a cargo by different parties having different interests was not double insurance; but a policy containing the usual clause as to prior insurance was, in *Seamans v. Loring*, 21 Fed. Cas. 920, said to be vitiated by a prior insurance on the same voyage, existing at the time, but canceled before the commencement of the risk. In *Mussey v. Atlas Mut. Ins. Co.*, 14 N. Y. 79, policies containing warranties not to secure more insurance were not considered vitiated by a prior policy, which had become forfeited. And a similar rule is asserted in *Peters v. Delaware Ins. Co.*, 5 Serg. & R. (Pa.) 473.

(1) Flooding.

A plea seeking to avoid a policy on account of fraudulent misrepresentations, which does not assert that the representations were fraudulent or material, is bad (*Hodgson v. Marine Ins. Co.*, 5

Cranch, 100, 3 L. Ed. 48). A similar rule seems to be asserted in *Straas v. Marine Ins. Co.*, 23 Fed. Cas. 210. It is necessary to plead specially matters in avoidance of the policy.

Gardner v. Columbian Ins. Co., 9 Fed. Cas. 1165; *Marine Ins. Co. v. Hodgson*, 6 Cranch, 206, 8 L. Ed. 200.

But in *Swain v. Boylston Ins. Co.* (C. C.) 37 Fed. 766, a plea that plaintiff had not fulfilled all the conditions was regarded as sufficient. An answer alleging generally that a representation was false and fraudulent does not require proof of both falsity and fraud, as the latter may be deduced from the proof of falsity (*Lewis v. Eagle Ins. Co.*, 10 Gray [Mass.] 508).

(m) Evidence—Presumption and burden of proof.

A gross overvaluation furnishes a presumption of fraud, according to *Alsop v. Commercial Ins. Co.*, 1 Fed. Cas. 564; but, as said in *Sturm v. Atlantic Mut. Ins. Co.*, 63 N. Y. 77, it is not conclusive evidence. In the latter case it was also held that overvaluation in a valued policy could not be shown without first introducing evidence of the true value, and that the insurer had the burden of proving matters in avoidance of the policy.

That is the rule of *Clement v. Phoenix Ins. Co.*, 5 Fed. Cas. 1020; *Silloy v. Neptune Ins. Co.*, 12 Gray (Mass.) 73; *Folsom v. Mercantile Mut. Ins. Co.*, 9 Fed. Cas. 349; *Sturm v. Atlantic Mut. Ins. Co.*, 38 N. Y. Super. Ct. 281.

(n) Same—Admissibility.

It is indicated in *Buck v. Chesapeake Ins. Co.*, 4 Fed. Cas. 545, that the practice of other insurance offices might be inquired into, with a view of showing whether the relation existing in 1822, and other years about that period, between the Spanish colonies and Spain, was one which such offices regarded as belligerent. In *Higginson v. Dall*, 13 Mass. 96, it was held that representations as to the condition of a vessel and the description of the voyage might be proved by oral or written testimony, when the object was to falsify those representations. In an action on a valued policy, evidence of the meaning of the word "invoice," used to designate the value, is admissible.

Funke v. Orient Mut. Ins. Co., 38 N. Y. Super. Ct. 349; *Sturm v. Williams*, 38 N. Y. Super. Ct. 325.

In the *Sturm* Case it was said that, in determining an overvaluation of goods having no market value, the comparison should be between the value stated and what could have been recovered on an open policy; but in *Sturm v. Atlantic Mut. Ins. Co.*, 38 N. Y. Super. Ct. 281, which was evidently a policy on the same property, it was held that the criterion of value was the market value of such property, plus expenses of insurance and transportation. Though the valuation given in a valued policy is ordinarily binding, evidence of overvaluation is competent to show fraud, according to *Voisin v. Commercial Mut. Ins. Co.*, 62 Hun, 4, 16 N. Y. Supp. 410; and on a motion for a new trial in a case with the same title, reported in 32 Misc. Rep. 393, 66 N. Y. Supp. 638, it was held that the validity of the bill of lading on which the valuation was based could be shown, though the insured had no knowledge of its falsity. In *Green v. Merchants' Ins. Co.*, 10 Pick. (Mass.) 402, a paper containing news of the arrival of a vessel which had sailed subsequently to the one insured was considered competent on a showing that it was taken by the insurer, and that its president had heard the news from some source or other. The legal owner of property insured by the real owner is a competent witness in an action on the policy (*Locke v. North American Ins. Co.*, 13 Mass. 61). On an issue as to whether a misrepresentation of the location of the risk was material on account of a storm (*Durkee v. India Mut. Ins. Co.*, 159 Mass. 514, 34 N. E. 1133), the testimony of a vessel owner as an expert as to his experience in insuring a similar vessel of inferior class in the same waters and at the same time of the year related wholly to a collateral matter. In *Hawes v. New England Mut. Marine Ins. Co.*, 11 Fed. Cas. 874, expert testimony was held admissible to show the materiality of the concealment that a vessel was grounded on a bar in the river; and in *Rankin v. American Ins. Co.*, 1 Hall (N. Y.) 682, a stevedore employed to stow a cargo was held competent to testify as to its proper stowage.

(c) Same—Weight and sufficiency.

A copy of a ship's register, certified to by the register of the treasury, and verified by the secretary of the treasury, is *prima facie* evidence that the register was on board the vessel during the voyage.

Pacific Ins. Co. v. Catlett, 4 Wend. 75; *Catlett v. Pacific Ins. Co.*, 1 Wend. (N. Y.) 561. But in *Coolidge v. New York Firemen's Ins. Co.*, 14 Johns. (N. Y.) 308, it was held that a copy signed by the collector and naval officer on board was not sufficient. In *Peyton v.*

Hallett, 1 Caines (N. Y.) 363, it is intimated that a warranty of nationality is proved by the reputation, employment, and domicile of the owner.

A sentence of an admiralty court as to the nationality and neutrality is conclusive in an action on the policy.

Such is the rule in *Murray v. U. Ins. Co.*, 2 Johns. Cas. (N. Y.) 168; *Duguet v. Rhinelander*, 1 Johns. Cas. (N. Y.) 360; *Goix v. Low*, 1 Johns. Cas. (N. Y.) 341; *De Wolf v. New York Firemen's Ins. Co.*, 20 Johns. (N. Y.) 214.

But this general rule will not apply, if the sentence was by an incompetent court, or if it is ambiguous and does not state the ground of condemnation, or if it was based on municipal, instead of international, law.

Ocean Ins. Co. v. Frances, 2 Wend. (N. Y.) 64, 19 Am. Dec. 549; *Walton v. Bethune*, 2 Brev. (S. C.) 453, 4 Am. Dec. 597; *Vandervoort v. Smith*, 2 Caines (N. Y.) 155; *Vasse v. Ball*, 2 Yeates (Pa.) 178; *Marsh v. Muir*, 1 Brev. (S. C.) 134, 2 Am. Dec. 648.

Likewise, if there is a stipulation in the policy that the proof of nationality and neutrality shall be made in the local port, a sentence by a foreign court is not conclusive.

Arnold v. United Ins. Co., 1 Johns. Cas. (N. Y.) 363; *Sperry v. Delaware Ins. Co.*, 22 Fed. Cas. 923. And in *Calbreath v. Gracy*, 4 Fed. Cas. 1030, it was said that a sentence was not conclusive, if the policy contained a special provision to that effect.

(p) Questions for jury and instructions.

It is for the jury to determine the materiality of misrepresentations and concealments, and whether they are due to fraud, accident, or mistake.

This principle is supported by *Hazard v. New England Marine Ins. Co.*, 11 Fed. Cas. 934; *Rosenhelm v. American Ins. Co.*, 33 Mo. 230; *Moses v. Delaware Ins. Co.*, 17 Fed. Cas. 891; *Schroeder v. Stock & Mut. Ins. Co.*, 46 Mo. 174; *Vale v. Phoenix Ins. Co.*, 28 Fed. Cas. 867; *Sturm v. Atlantic Mut. Ins. Co.*, 38 N. Y. Super. Ct. 281; *Maryland Ins. Co. v. Ruden*, 6 Cranch, 338, 3 L. Ed. 242.

Where the issue is whether a vessel was "laid up" at a certain port, and the evidence is conflicting, it is a question for the jury, according to *Clarkson v. Western Assur. Co.*, 92 Hun, 527, 37 N. Y. Supp. 53. In *Lexington Fire, Life & Marine Ins. Co. v. Paver*, 16 Ohio, 324, a requested instruction that a vessel had been misrep-

resented as a "good steamboat" was held to be too indefinite, without an explanation of the words quoted. In *Phoenix Ins. Co. v. Moog*, 81 Ala. 335, 1 South. 108, an error in an instruction, by omitting the defense of overvaluation in the statement of the insurer's defense, was held cured by a further charge that overvaluation was also relied on as a defense.

An objection to the verdict as contrary to the law and evidence was, in *Howell v. Cincinnati Ins. Co.*, 7 Ohio, 276, pt. 1, held too broad to raise an objection to a particular instruction on misrepresentations and concealments.

9. WARRANTY OF SEAWORTHINESS AND EFFECT OF BREACH THEREOF.

- (a) Nature of warranty in general.
- (b) Warranty implied.
- (c) Same—Time policies.
- (d) Scope of warranty.
- (e) When warranty becomes operative.
- (f) Necessity of disclosure as to seaworthiness.
- (g) What constitutes seaworthiness in general.
- (h) Age and condition of vessel.
- (i) Equipment, stores, and cargo.
- (j) Competency and sufficiency of officers and crew.
- (k) Employment of pilot.
- (l) Effect of misrepresentation, concealment, or breach of warranty.
- (m) Conclusiveness of survey showing ship to be rotten or unsound.
- (n) Questions of practice—Pleading.
- (o) Same—Presumptions.
- (p) Same—Burden of proof.
- (q) Same—Admissibility and sufficiency of evidence.
- (r) Same—Trial and review.

(a) Nature of warranty in general.

A warranty of seaworthiness is a necessary incident to a contract of marine insurance. It involves a condition of the subject-matter which it is essential that the insured should warrant, as it is unquestionably of as much importance to the insurer that the vessel shall be seaworthy as that she shall be in existence at all. This warranty is construed strictly. In *Capen v. Washington Ins. Co.*, 12 Cush. (Mass.) 517, it is said that the warranty of seaworthiness is not merely a stipulation that the insured shall be responsible for the direct consequences of its breach; but, according to the old peculiar

doctrine of warranty in the English common law, it is a rigorous unbending condition precedent, which admits of no equivalent and no substitute, and no excuse for a strict literal performance. This doctrine has often been regarded as a harsh one, but has been applied to voyage policies ever since the law of insurance has grown up, and is therefore well established.

That the warranty is a condition precedent in a voyage policy is asserted in *Starbuck v. New England Mar. Ins. Co.*, 19 Pick. (Mass.) 198; *Merchants' Ins. Co. v. Morrison*, 62 Ill. 242, 14 Am. Rep. 93; *Fernandes v. Great Western Ins. Co.*, 28 N. Y. Super. Ct. 457; *Osborne v. New York Mut. Life Ins. Co.*, 127 N. Y. 658, 28 N. E. 254, affirming 53 Hun, 633, 6 N. Y. Supp. 108; *Paddock v. Franklin Ins. Co.*, 11 Pick. (Mass.) 227; *Tidmarsh v. Washington Fire & Mar. Ins. Co.*, 23 Fed. Cas. 1197; *Van Wickle v. Mechanics' & Traders' Ins. Co.*, 97 N. Y. 350, affirming 48 N. Y. Super. Ct. 95; *Berwind v. Greenwich Ins. Co.*, 114 N. Y. 281, 21 N. E. 151; *Moses v. Sun Mut. Ins. Co.*, 11 N. Y. Leg. Obs. 78; *Deshon v. Merchants' Ins. Co.*, 11 Metc. (Mass.) 199; and *Borland v. Mercantile Mut. Ins. Co.*, 46 N. Y. Super. Ct. 433.

A less severe rule was applied in *Lapene v. Sun Mut. Ins. Co.*, 8 La. Ann. 1, 58 Am. Dec. 668, and *Barret v. New Orleans Ins. Co.*, 8 La. Ann. 3. It was there held that if a vessel was unseaworthy at the commencement of the voyage, but the defect was cured before loss, a recovery could be had on the policy. And a similar rule was applied in *Mackie v. Pleasants*, 2 Bin. (Pa.) 363, where the court refused to disturb a finding for the insured, though it appeared that the vessel was leaky when it first started out and had to return to port for small repairs. But in *Prescott v. Union Ins. Co.*, 1 Whart. (Pa.) 399, 30 Am. Dec. 207, it was held that, if the vessel was unseaworthy at the commencement of the voyage, no recovery could be had, though the vessel arrived in port with safety.

(b) Warranty implied.

Since the insured is the only one of the parties who is supposed to have knowledge of the condition of the vessel insured, there is always an implied warranty of seaworthiness in a marine policy covering the voyage of a vessel.

This is asserted in *American Ins. Co. v. Ogden*, 20 Wend. (N. Y.) 287, affirming 15 Wend. (N. Y.) 532; *Union Ins. Co. v. Smith*, 124 U. S. 405, 8 Sup. Ct. 534, 31 L. Ed. 497; *Higgle v. American Lloyds (D. C.)* 14 Fed. 143; *Seaman v. Enterprise Fire & Mar. Ins. Co. (C. C.)* 21 Fed. 778; *Bulkley v. Protection Ins. Co.*, 4 Fed. Cas. 614; *Bullard v. Roger Williams Ins. Co.*, Id. 643; *Popleston v. Kitchen*, 19

Fed. Cas. 1048; *Tidmarsh v. Washington Fire & Mar. Ins. Co.*, 23 Fed. Cas. 1197; *Guy v. Citizens' Mut. Ins. Co.* (D. C.) 30 Fed. 695; *Long Dock Mills & Elevator Co. v. Mannheim Ins. Co.* (D. C.) 116 Fed. 886; *Merchants' Ins. Co. v. Morrison*, 62 Ill. 242, 14 Am. Rep. 93; *Dupeyre v. Western Mar. & Fire Ins. Co.*, 2 Rob. (La.) 457, 38 Am. Dec. 218; *McCargo v. Merchants' Ins. Co.*, 10 Rob. (La.) 334; *Whitney v. Ocean Ins. Co.*, 14 La. 485, 33 Am. Dec. 595; *Marcy v. Sun Mut. Ins. Co.*, 11 La. Ann. 748; *Donnally v. Merchants' Mut. Ins. Co.*, 28 La. Ann. 939, 26 Am. Rep. 129; *Hutchins v. Ford*, 82 Me. 363, 19 Atl. 832; *Dodge v. Boston Mar. Ins. Co.*, 85 Me. 215, 27 Atl. 105; *Field v. Insurance Co. of North America*, 3 Md. 244; *Augusta Ins. & Banking Co. v. Abbott*, 12 Md. 348; *Porter v. Bussey*, 1 Mass. 436; *Starbuck v. New England Mar. Ins. Co.*, 19 Pick. (Mass.) 198; *Natchez Ins. Co. v. Stanton*, 2 Smedes & M. (Miss.) 340, 41 Am. Dec. 592; *Rosenheim v. American Ins. Co.*, 33 Mo. 230; *Silva v. Lowe*, 1 Johns. Cas. (N. Y.) 184; *Warren v. United Ins. Co.*, 2 Johns. Cas. (N. Y.) 231, 1 Am. Dec. 164; *Barnewall v. Church*, 1 Caines (N. Y.) 217, 2 Am. Dec. 180; *Talcot v. Commercial Ins. Co.*, 2 Johns. (N. Y.) 124, 3 Am. Dec. 406; *Same v. Marine Ins. Co.*, 2 Johns. (N. Y.) 130; *Walden v. New York Firemen's Ins. Co.*, 12 Johns. (N. Y.) 128; *Moses v. Sun Mut. Ins. Co.*, 8 N. Y. Super. Ct. 159; *Howard v. Orient Mut. Ins. Co.*, 25 N. Y. Super. Ct. 539; *Fernandez v. Great Western Ins. Co.*, 26 N. Y. Super. Ct. 457; *Sturm v. Atlantic Mut. Ins. Co.*, 38 N. Y. Super. Ct. 231; *Thebaud v. Phoenix Ins. Co.*, 52 Hun, 495, 5 N. Y. Supp. 619; *Van Wickie v. Mechanics' & Traders' Ins. Co.*, 97 N. Y. 350, affirming 48 N. Y. Super. Ct. 95; *Berwind v. Greenwich Ins. Co.*, 114 N. Y. 231, 21 N. E. 151; *Thebaud v. Great Western Ins. Co.*, 155 N. Y. 516, 50 N. E. 284, affirming 84 Hun, 1, 31 N. Y. Supp. 1084; *Ingraham v. South Carolina Ins. Co.*, 2 Tread. Const. (S. C.) 707; *Hudson v. Williamson*, 3 Brev. (S. C.) 342, 1 Tread. Const. (S. C.) 360; *Ludlow v. Union Ins. Co.*, 2 Serg. & R. (Pa.) 119; *Peters v. Phoenix Ins. Co.*, 3 Serg. & R. (Pa.) 25; *Marine Fire Ins. Co. v. Burnett*, 29 Tex. 433.

This implied warranty is also extended to marine policies on goods, on the ground that the insured has the right to select the vessel which is to carry them.

This doctrine is supported by *Van Valkenburgh v. Astor Mut. Ins. Co.*, 14 N. Y. Super. Ct. 61; *Warren v. United Ins. Co.*, 2 Johns. Cas. (N. Y.) 231, 1 Am. Dec. 164; *Natchez Ins. Co. v. Stanton*, 2 Smedes & M. (Miss.) 340, 41 Am. Dec. 592; *Howard v. Orient Mut. Ins. Co.*, 25 N. Y. Super. Ct. 539.

In *Marine Fire Ins. Co. v. Burnett*, 29 Tex. 433, it is said that this implied warranty may be modified by express agreement. The policy involved in that case covered cotton on board vessels "ap-

proved by the company." It was held that by this condition the insurer deprived the insured of the privilege to select the vessels, and thereby relieved him of his warranty of seaworthiness. But the mere fact that a vessel has been surveyed before sailing does not modify the warranty.

Warren v. United Ins. Co., 2 Johns. Cas. (N. Y.) 231, 1 Am. Dec. 164;
Rogers v. Sun Mut. Ins. Co., 46 N. Y. Super. Ct. 65.

(c) Same—Time policies.

While it is the well-settled rule that the warranty attaches to voyage policies, there is a difference of opinion among the authorities whether or not it is also implied in time policies under all circumstances. In the early case of *American Ins. Co. v. Ogden*, 20 Wend. (N. Y.) 287, affirming 15 Wend. (N. Y.) 532, it was assumed that the warranty was implied in a time policy, as well as in one on a voyage. But in the leading case of *Capen v. Washington Ins. Co.*, 12 Cush. (Mass.) 517, it is said that the reasons and grounds on which a warranty is implied in a voyage policy do not apply with the same force to a time policy, though they are to a considerable extent analogous. Seaworthiness is a relative term, dependent on the nature and extent of the risk. When the term is applied to a voyage, the nature, length, and extent of which are fixed by the description of the voyage, it becomes intelligible and definite, and means "sufficient for such a vessel and voyage." But since, in a time policy, no limits of termini are given, except the days named which fix the term, which may be long or short, covering a vessel at home or at sea, a warranty of seaworthiness would require a vessel to be equipped for any perils of navigation, in every part of the world, in all climates, and under all circumstances. It was consequently held in that case, which involved a time policy on a vessel at sea, that there was no warranty of seaworthiness. And this rule was followed in *Macy v. Mutual Mar. Ins. Co.*, 12 Gray (Mass.) 497. A similar rule was also asserted in *Jones v. Insurance Co.*, 13 Fed. Cas. 982, though the court therein appears to extend its holding to embrace time policies in general; and in *Hathaway v. Sun Mut. Ins. Co.*, 21 N. Y. Super. Ct. 33, doubt was expressed as to whether there was any implied warranty in a time policy. Likewise it was intimated, in *Paddock v. Franklin Ins. Co.*, 11 Pick. (Mass.) 227, that the rule implying a warranty of seaworthiness ought to be modified as to a time policy on a vessel at sea.

A distinction between time policies on vessels at sea and on vessels

in port is made in the case of *Hoxie v. Pacific Mut. Ins. Co.*, 7 Allen (Mass.) 211. The court there states that it is reasonable to hold that the warranty is not implied in time policies on vessels at sea, as the insured has no means of knowing the actual condition of the vessel, or of restoring her to seaworthiness if she is injured or out of repair, but that it is fallacious to go further, and say that, because in certain instances of insurance on time there is no implied affirmative warranty of seaworthiness, there is no such implied warranty in any time policy. This brings the court to the conclusion that in a time policy on a vessel in port there is an implied warranty of seaworthiness, the same as in the case of a voyage policy.

This principle is also supported by *Hoxie v. Home Ins. Co.*, 82 Conn. 21, 85 Am. Dec. 240, *Dallam v. Insurance Co.*, 6 Phila. (Pa.) 15, and *Rouse v. Insurance Co.*, 20 Fed. Cas. 1269, though in the *Rouse* Case this rule was only extended to insurance on a vessel in her home port.

The policy involved in *Pope v. Swiss Lloyd Ins. Co.* (D. C.) 4 Fed. 153, was made binding on the parties under the provisions of the California Code,¹ which provide for an implied warranty of seaworthiness in a time policy, and it was held that thereby the parties became doubly bound. However, in *Merchants' Ins. Co. v. Morrison*, 62 Ill. 242, 14 Am. Rep. 93, it was held that there was no implied warranty in a time policy; but the decision in this case was apparently, to a large extent, based on the fact that the subject-matter of the insurance was a boat navigating the Lakes, and not a sea-going vessel. In *Mark v. National Fire Ins. Co.*, 24 Hun (N. Y.) 565, it was held that there was no implied warranty of seaworthiness in an ordinary fire policy on a vessel.

(d) Scope of warranty.

By the warranty of seaworthiness is meant that the vessel shall at the time of sailing be in a fit state, as to repairs, equipment, crew, and in all other respects, to perform the voyage insured and to encounter the ordinary perils of sea. The warranty is, in *Merchants' Ins. Co. v. Morrison*, 62 Ill. 242, 14 Am. Rep. 93, defined as importing that the vessel is staunch and sound in material and construction, with sufficient sail, tackle, anchor, cable, stores, and supplies, a master of competent skill and capacity, a competent and sufficient crew, and a pilot when necessary. In *Capen v. Washing-*

¹ Civ. Code, §§ 2681-2683.

ton Ins. Co., 12 Cush. (Mass.) 517, it is said that the warranty also includes proper documentation; but in *Elting v. Scott*, 2 Johns. (N. Y.) 157, the court is inclined to hold differently, on the ground that proper documents are only material to a warranty or representation as to national character.

A description of a vessel as a "steamship" was in the early case of *Howard v. Orient Ins. Co.*, 25 N. Y. Super. Ct. 539, considered to imply that she must be fully and adequately equipped, manned, and provisioned both as a steamer and as a sailing vessel; and in *Fernandez v. Great Western Ins. Co.*, 26 N. Y. Super. Ct. 457, it is said that in marine insurance on a steam vessel the implied warranty of seaworthiness extends to the machinery, the competency of the engineer, and the sufficiency of coal or other fuel supplies.

The rule that a vessel shall be fit for the voyage insured applies to a vessel, built for river or inland water navigation, which is insured for an ocean voyage, even though the insurer knows the service for which it was constructed.

Such is the rule asserted in *Rogers v. Sun Mut. Ins. Co.*, 46 N. Y. Super. Ct. 65, and *Myers v. Girard Ins. Co.*, 26 Pa. 192.

But in *Thebaud v. Phoenix Ins. Co.*, 52 Hun, 495, 5 N. Y. Supp. 619, and *Same v. Great Western Ins. Co.*, 53 Hun, 629, 5 N. Y. Supp. 623, it was held that, if the insurer knew that the vessel was built for river navigation only, it was sufficient to make her as nearly seaworthy for an ocean voyage as it was possible to make a vessel of her kind; and this principle was reasserted on a subsequent appeal of the latter case, reported in 84 Hun, 1, 31 N. Y. Supp. 1084, and affirmed in 155 N. Y. 516, 50 N. E. 284. Likewise it was held, in *Marcy v. Sun Mut. Ins. Co.*, 11 La. 748, that marine insurance on a floating dock only implied that the dock was well built, staunch and capable for the business in which it was employed, and fitted with proper machinery.

It is obvious that the standard of seaworthiness varies in different ports and countries. Equipments required in one port or country to make a vessel seaworthy are perhaps not deemed necessary in another. On account of this variation, it often becomes important to determine which standard shall govern when a vessel belonging to one port or country is insured in another. Generally it is held that, where a policy is underwritten on a foreign vessel belonging to a foreign port, the insurer must be presumed to underwrite on the condition that the vessel shall be seaworthy in her

equipment according to the general custom of the port, or at least the country to which she belongs.

This doctrine is supported by *Tidmarsh v. Washington Fire & Marine Ins. Co.*, 23 Fed. Cas. 1197, and *Cobb v. New England Mut. Mar. Ins. Co.*, 6 Gray (Mass.) 192.

It is a general rule that in both voyage and time policies the warranty embraces the condition of the vessel only at the commencement of the voyage, and not her seaworthiness on leaving intermediate ports.

Reference may be made to *Union Ins. Co. v. Smith*, 124 U. S. 405, 8 Sup. Ct. 534, 31 L. Ed. 497; *American Ins. Co. v. Ogden*, 20 Wend. (N. Y.) 287, affirming 15 Wend. (N. Y.) 532; *Hathaway v. Sun Mut. Ins. Co.*, 21 N. Y. Super. Ct. 33.

It is true that in *Van Valkenburgh v. Astor Mut. Ins. Co.*, 14 N. Y. Super. Ct. 61, Bosworth, J., expressed as his opinion that in a policy on a cargo the warranty attached at the commencement of each separate stage of the voyage; but Hoffman, J., took a different view, and the question was not determined by the court. However in California there is a statutory provision² to the effect that in a time policy and in insurance on cargoes the warranty attaches on leaving each intermediate port.

(c) When warranty becomes operative.

It appears to be a well-settled rule that in marine insurance in general the warranty of seaworthiness attaches at the commencement of the risk.

This principle is asserted in *Dodge v. Boston Mar. Ins. Co.*, 85 Me. 215, 27 Atl. 105; *Miller v. Russell*, 1 Bay (S. C.) 309; *Prescott v. Union Ins. Co.*, 1 Whart. (Pa.) 399, 30 Am. Dec. 207; *Bullard v. Roger Williams Ins. Co.*, 4 Fed. Cas. 643; *Howard v. Orient Mut. Ins. Co.*, 25 N. Y. Super. Ct. 539; *Starbuck v. New England Mar. Ins. Co.*, 19 Pick. (Mass.) 198; *Moses v. Sun Mut. Ins. Co.*, 11 N. Y. Leg. Obs. 78; *Peters v. Phoenix Ins. Co.*, 3 Serg. & R. (Pa.) 25; *Berwind v. Greenwich Ins. Co.*, 114 N. Y. 231, 21 N. E. 151; *Adderly v. American Mut. Ins. Co.*, 1 Fed. Cas. 166.

This rule applies to time policies on vessels in port, as well as to voyage policies.

Union Ins. Co. v. Smith, 124 U. S. 405, 8 Sup. Ct. 534, 31 L. Ed. 497; *American Ins. Co. v. Ogden*, 20 Wend. (N. Y.) 287, affirming 15 Wend. (N. Y.) 532.

² Civ. Code, § 2683.

In *Paddock v. Franklin Ins. Co.*, 11 Pick. (Mass.) 227, it was intimated that in a policy on a whaler for the balance of a cruise, effected after sailing, the warranty related back and attached at the commencement of the voyage. And in *Higgie v. American Lloyds* (D. C.) 14 Fed. 143, it was said that in a policy on a freight list of a vessel, lost or not lost, the condition of the vessel in respect to seaworthiness at the time of the commencement of the risk was a material part of the contract.

In *Taylor v. Lowell*, 3 Mass. 331, 3 Am. Dec. 141, it is said that, in a policy on a vessel "at and from" a certain port, it is sufficient if the vessel is seaworthy at the time of sailing; and this doctrine is followed in *Merchants' Ins. Co. v. Clapp*, 11 Pick. (Mass.) 56. But evidently this holding refers only to the seaworthiness required of a vessel at the commencement of a voyage; for, in *McLanahan v. Universal Ins. Co.*, 1 Pet. 170, 7 L. Ed. 98, wherein a similar doctrine is asserted, the court distinguishes between the seaworthiness required of a vessel in port and of one sailing on a voyage, and holds that a policy "at and from" a port will attach, even though the vessel is not seaworthy for a voyage at the commencement of the risk, as it is sufficient if she is so at the time of sailing. A rule similar to that of the *McLanahan* Case is asserted by Colcock, J., in *Ingraham v. South Carolina Ins. Co.*, 3 Brev. (S. C.) 522. In *Treadwell v. Union Ins. Co.*, 6 Cow. (N. Y.) 270, it was held that, in insurance on the cargo "at and from" North Carolina to New York, the warranty did not attach until the ship passed out of the waters of North Carolina, as the risk did not commence until then.

(2) Necessity of disclosure as to seaworthiness.

Since in marine insurance a warranty of seaworthiness is implied, the insured is not bound to communicate facts as to the condition and equipment of the vessel which are included in the warranty, unless specific inquiry is made in regard thereto.

Reference may be made to *Bulkley v. Protection Ins. Co.*, 4 Fed. Cas. 614; *Popleston v. Kitchen*, 19 Fed. Cas. 1048; *Batchelder v. Insurance Co.* (D. C.) 30 Fed. 459; *Schultz v. Pacific Ins. Co.*, 14 Fla. 73; *Augusta Ins. & Banking Co. v. Abbott*, 12 Md. 348; *Silloway v. Neptune Ins. Co.*, 12 Gray (Mass.) 73; *Walden v. New York Firemen's Ins. Co.*, 12 Johns. (N. Y.) 128; *Cox v. Charleston Fire & Mar. Ins. Co.*, 3 Rich. Law (S. C.) 331, 45 Am. Dec. 771.

But a contrary view appears to have been taken by two of the justices in *Ingraham v. South Carolina Ins. Co.*, 3 Brev. (S. C.)

522. They held that the condition of the vessel insured when in port should be disclosed. But, as it appears that the vessel was destroyed before leaving port, their holding was apparently due to the fact that the warranty of seaworthiness for a voyage had not attached. However, if the owner of a vessel constructed for the navigation of inland waters wishes to avoid the implied warranty in insuring the vessel for an ocean voyage, he must make a full and complete disclosure as to the construction and condition of the vessel. It is not sufficient that the insurer is in a general way informed of the trade for which the vessel was intended.

Rogers v. Sun Mut. Ins. Co., 46 N. Y. Super. Ct. 65; *Myers v. Girard Ins. Co.*, 28 Pa. 192.

As has been stated, a disclosure must be made if there are specific inquiries; but in *Augusta Ins. & Banking Co. v. Abbott*, 12 Md. 348, a question as to the "condition of the Orb as to seaworthiness" was considered too general to require a disclosure of specific facts in regard to the condition of the vessel insured.

(g) What constitutes seaworthiness in general.

Seaworthiness is a relative term. As said in *Cobb v. New England Mar. Ins. Co.*, 6 Gray (Mass.) 192, it requires that the vessel shall be fit for the service in which she is engaged, whether it be lying in port or starting on a voyage, and will vary with varying conditions and circumstances. In that case it was held that, as the insurance was by its terms on an unfinished vessel being completed in port, it was not required that the vessel insured be seaworthy for an ocean voyage. Likewise it was held that a second policy, effected only six weeks after the first, on the vessel at and from the port of construction to another port, did not require the vessel to be of the same seaworthiness as a finished vessel; it being customary to tow uncompleted vessels from the one port to the other for equipments. Similarly it was said, in *McLanahan v. Universal Ins. Co.*, 1 Pet. 170, 7 L. Ed. 98, that seaworthiness in port for temporary purposes, such as mere change of position in harbor, or proceeding out of port, or lying in the offing, may be one thing, and seaworthiness for the whole voyage, quite another. Thus the seaworthiness required of a vessel in port undergoing repairs is quite different from that deemed necessary when she sails on a voyage. So, in *Merchants' Ins. Co. v. Algeo*, 31 Pa. 446, it was held that ice boats in use on a river would not be considered unseaworthy because the

towboat used was not of sufficient strength to manage them, when no custom was shown requiring the use of towboats capable of fully managing the boats towed. A policy on a raft of logs was involved in *Moore v. Louisville Underwriters* (C. C.) 14 Fed. 226, and it was there said that the warranty of seaworthiness did not require the best and most skillful form of construction, but only such a construction as was sufficient for the kind of raft insured and the services in which it was engaged.

(h) Age and condition of vessel.

A vessel is not conclusively unseaworthy because she is so constructed that her pumps cannot be utilized to free a particular part from water flowing in from exceptional causes (*Starbuck v. Phenix Ins. Co.*, 10 App. Div. 198, 41 N. Y. Supp. 901 [Williams, J., dissenting], 19 App. Div. 139, 45 N. Y. Supp. 995, 47 App. Div. 621, 62 N. Y. Supp. 264). But if a vessel is old and rotten, so that she is not competent to withstand ordinary attacks of winds and waves, she is unseaworthy.

Warren v. United Ins. Co., 2 Johns. Cas. (N. Y.) 231, 1 Am. Dec. 165; *Morse v. St. Paul Fire & Mar. Ins. Co.* (C. C.) 124 Fed. 451. In *Hudson v. Williamson*, 3 Brev. (S. C.) 342, 1 Tread. Const. (S. C.) 360, the majority of the court considered this to be so, even though it might have been possible for the ship to have completed her voyage in fine weather and under good management.

Similarly a vessel eight or nine years of age, which sprang a leak with no apparent cause, was to be considered unseaworthy.

Talcot v. Commercial Ins. Co., 2 Johns. (N. Y.) 124, 3 Am. Dec. 406; *Same v. Marine Ins. Co.*, 2 Johns. (N. Y.) 130. But in *Patrick v. Hallett*, 1 Johns. (N. Y.) 241, reversing 3 Johns. Cas. (N. Y.) 76, a vessel only two years old and built of the best material was not considered unseaworthy because she sprang a leak from no apparent cause, there being evidence that the best vessel might do this by striking a rock or sunken log, or being struck by a fish. Kent, C. J., dissented on the ground that in such a case the law would presume unseaworthiness.

A vessel which sinks without apparent cause while lying at her wharf and taking on a cargo is unseaworthy, according to *Wex v. Boatman's Fire Ins. Co.*, 11 N. Y. St. Rep. 713, as a vessel, to be seaworthy, must be capable of receiving her cargo in the ordinary manner of loading it without material detriment to herself. But in this case the point arose on a question of exception of risk, not on

a breach of warranty. In *Wright v. Orient Mut. Ins. Co.*, 19 N. Y. Super. Ct. 269, the court considered as unseaworthy a vessel which leaked so badly when out only four hours that she was obliged to put back to port, though the wind was merely a "strong double-reef topsail breeze."

The mere fact that small repairs are rendered necessary in the course of a voyage, and are made, does not show a breach of the warranty of seaworthiness according to *Donnell v. Columbian Ins. Co.*, 7 Fed. Cas. 889. Likewise it was held, in *The Orient* (C. C.) 16 Fed. 916, that a vessel was not unseaworthy because her mizzen-mast was to a certain extent affected with dry rot, and because her seams had been opened by the heat while lying in port taking on cargo. Similarly the fact that a vessel was worm-eaten does not conclusively establish unseaworthiness, when it is not shown that the leak causing the sinking of the vessel was due thereto, according to *Voisin v. Providence Washington Ins. Co.*, 51 App. Div. 553, 65 N. Y. Supp. 333. So in *Singleton v. Phenix Ins. Co.*, 132 N. Y. 298, 30 N. E. 839, the court did not feel justified in holding a boat unseaworthy whose cargo of lime had slacked, as it appeared that the boat had been recently overhauled and had only one inch of water in the hold, and it was not shown that the slacking of the lime was caused by a leak.

In *Cort v. Delaware Ins. Co.*, 6 Fed. Cas. 604, it was held that a vessel was seaworthy which was shown to have been sound when starting out, and which reached an intermediate port in a staunch and tight condition, so that she needed no repairs. And in *Watson v. Insurance Co.*, 29 Fed. Cas. 431, it was held that a condemnation of a vessel on a report that many of her timbers were unsound and rotten, and that on account of her condition and the lack of docking facilities she could not be repaired, did not establish a breach of warranty of seaworthiness.

(1) Equipment, stores, and cargo.

To render a ship seaworthy for the use and service intended by the insurance, she must not only be sufficiently staunch and sound and adequately constructed, but she must be furnished with equipment sufficient to enable her to make her voyage with reasonable safety.

Thus it was indicated, in *Lawton v. Royal Canadian Ins. Co.*, 50 Wis. 183, 6 N. W. 505, and *Pope v. Swiss Lloyd Ins. Co.* (D. C.) 4 Fed. 153, that anchor cables or ground tackles of insufficient strength or material would make a vessel unseaworthy. So in *Richelleu*

& *O. Nav. Co. v. Boston Mar. Ins. Co.*, 136 U. S. 408, 10 Sup. Ct. 934, 34 L. Ed. 398, a vessel with a defective compass was considered unseaworthy; and in *American Ins. Co. v. Ogden*, 20 Wend. (N. Y.) 287, affirming 15 Wend. (N. Y.) 532, it was held that a vessel lacking proper anchors was unseaworthy. But in *Donnally v. Merchants' Mut. Ins. Co.*, 28 La. Ann. 939, 26 Am. Rep. 129, it was said that a flatboat on the Mississippi river was not unseaworthy because she had no anchor, as it was not usual for such boats to carry anchors.

If the insurance is on a steamer, the warranty implies that the vessel's machinery is properly constructed and of sufficient power. Thus in *Myers v. Girard Ins. Co.*, 26 Pa. 192, evidence of an engine's inability to make steam, though no peril was encountered, was held to show unseaworthiness. But in *Cleveland & B. Transit Co. v. Insurance Co. (D. C.)* 115 Fed. 431, it was held that a latent defect in the engine's bed plates did not render the vessel unseaworthy. In *Seaman v. Enterprise Fire & Mar. Ins. Co. (C. C.)* 21 Fed. 778, it was said that the lack of wing rudders was not a want of seaworthiness, if it did not materially affect the risk or prevent the maintenance of good control of the ship.

In *Fontaine v. Phoenix Ins. Co.*, 10 Johns. (N. Y.) 58, it was held that a vessel was unseaworthy which sailed on a voyage which usually required from 30 to 35 days with a supply of firewood, oil, and candles which gave out in 42 days. And in *Moses v. Sun Mut. Ins. Co.*, 8 N. Y. Super. Ct. 159, the court was inclined to regard as unseaworthy a vessel which became short of water when out only 19 or 20 days. But a mere failure to store part of the water supply under deck, as required by statute * does not render a vessel unseaworthy.

Warren v. Manufacturers' Ins. Co., 13 Pick. (Mass.) 518, 25 Am. Dec. 341; *Deshon v. Merchants' Ins. Co.*, 11 Metc. (Mass.) 190.

In *Rogers v. Sun Mut. Ins. Co.*, 46 N. Y. Super. Ct. 65, it is said that a vessel having permission to stop at intermediate ports is not required to be equipped with provisions for the entire voyage. It is enough if she has provisions sufficient for each stage of the voyage.

According to *Borland v. Mercantile Mut. Ins. Co.*, 46 N. Y. Super. Ct. 433, the stowage of part of the cargo on deck raises a strong presumption of unseaworthiness, as such storing tends to raise the center of gravity and to incumber the deck.

* Act Cong. July 20, 1790, c. 29, § 9 (1 Stat. 135).

(3) Competency and sufficiency of officers and crew.

Seaworthiness implies, not only a good and well-equipped vessel, but also a competent master and a sufficient and competent crew.

Reference may be made to *Caldwell v. Western Marine & Fire Ins. Co.*, 19 La. 42, 36 Am. Dec. 667; *Silva v. Low*, 1 Johns. Cas. (N. Y.) 184; *Louisville Ins. Co. v. Monarch*, 99 Ky. 578, 36 S. W. 563; *Draper v. Commercial Ins. Co.*, 11 N. Y. Super. Ct. 234

But in *Lapene v. Sun Mut. Ins. Co.*, 8 La. Ann. 1, 58 Am. Dec. 668, it was held that a vessel was not unseaworthy because the captain was absent when the vessel proceeded to leave port, if he joined her before the accident, which was due to other causes. And in *McLanahan v. Universal Ins. Co.*, 1 Pet. 170, 7 L. Ed. 98, it was said that the mere fact that a ship got under way and proceeded into the offing without her master, and there stood off until he came on board, was not conclusive evidence of unseaworthiness. So in *Draper v. Commercial Ins. Co.*, 21 N. Y. 378, it was held that a vessel was not unseaworthy because the one in whose name she had for certain reasons been registered was not a competent navigator, when the owner had in fact placed a competent navigator in full charge. By this ruling the court reversed the decision of the lower court, reported in 11 N. Y. Super. Ct. 234. However, the Chief Justice and two of his associates dissented.

In *Silva v. Low*, 1 Johns. Cas. (N. Y.) 184, it was held that an intention to stop at an intermediate port for seamen proved that the vessel did not have a sufficient crew and that consequently she was unseaworthy. But in the *McLanahan* Case it was held that a vessel was not conclusively unseaworthy because she proceeded into the offing with part of her crew; and in *Louisville Ins. Co. v. Monarch*, 99 Ky. 578, 36 S. W. 563, it was said that a river steamer making only daylight runs was not unseaworthy because she did not have a night crew. An open policy covering goods on board vessels "approved" by the insurer was involved in *Marine Fire Ins. Co. v. Burnett*, 29 Tex. 433. The insurer had issued a certificate insuring produce on a boat "while she remained in like good order and while under command of the same master." It was held that the requirement of approval was satisfied by the certificate, and that the insured was not bound to see to it that the vessel was in the same order and under the same master at the time of shipment as when the inspection was made.

(k) Employment of pilot.

The employment of a pilot is often regarded necessary to the seaworthiness of a vessel, especially in coast, harbor, and river navigation. Thus it was held, in *Whitney v. Ocean Ins. Co.*, 14 La. 485, 33 Am. Dec. 595, that the want of a competent pilot on a steamboat passing out the mouth of the Mississippi, when one could have been procured, showed unseaworthiness. It was not sufficient that the captain was skillful and experienced. But in *Hathaway v. St. Paul Fire & Marine Ins. Co.* (C. C.) 1 Fed. 197, it was held that the fact that the officers navigating a boat on the Missouri river were not licensed pilots did not prima facie render the vessel unseaworthy. And in *Thebaud v. Great Western Ins. Co.*, 155 N. Y. 516, 50 N. E. 284, affirming 84 Hun, 1, 31 N. Y. Supp. 1084, it was said that a vessel was not unseaworthy as a matter of law on account of the absence of a pilot during certain parts of the voyage. So, in *Cox v. Charleston Fire & Marine Ins. Co.*, 3 Rich. Law (S. C.) 331, 45 Am. Dec. 771, it was held that a custom exempting insured from employing a branch pilot in a certain coasting trade was reasonable. But in the *Whitney Case* it was said that a usage of that nature must be shown by the most positive proof.

In *Borland v. Mercantile Mut. Ins. Co.*, 46 N. Y. Super. Ct. 433, it was said that under Laws N. Y. 1857, c. 243, § 29, requiring masters of foreign vessels to take on licensed pilots in sailing out of New York, a vessel sailing without a pilot was presumptively unseaworthy, and that this was not overcome by the fact that the master took her out in safety. But in *Old Dominion Ins. Co. v. Frank*, 7 Ohio Dec. 302, 2 Wkly Law Bul. 93, it was held that Rev. St. U. S. § 4463 [U. S. Comp. St. 1901, p. 3045], which provides that no steamer carrying passengers shall depart from any port unless she have a full equipment of licensed officers, did not apply to a steamer carrying only cargo, officers, and crew, and not having on board any passengers, and that such vessel was not unseaworthy because she did not have a licensed pilot on board.

(l) Effect of misrepresentation, concealment, or breach of warranty.

It is elementary that a breach of the implied warranty of seaworthiness will avoid the policy, the same as a breach of any warranty; and since the implied warranty is generally, if not always, regarded as a condition precedent, the insured need not pay a premium note in case of a breach, or, if he has paid the premium, he can recover it.

Commonwealth Ins. Co. v. Whitney, 1 Metc. (Mass.) 21; *Porter v. Bussey*, 1 Mass. 436. But in *Scaman v. Enterprise Fire & Marine*

Ins. Co. (C. C.) 21 Fed. 778, the court lays down the rule that even if a boat be found to have been unseaworthy on leaving port, yet, if the loss was not due thereto, the effect of the unseaworthiness would be destroyed. So in *Lapene v. Sun Mut. Ins. Co.*, 8 La. Ann. 1, 58 Am. Dec. 668, and *Barret v. New Orleans Ins. Co.*, 8 La. Ann. 8, it was held that recovery could be had if the vessel had been made seaworthy before loss.

A misrepresentation as to the rating of a vessel in procuring insurance will avoid a policy, according to *Higgie v. American Lloyds* (D. C.) 14 Fed. 143. And in *Bulkley v. Protection Ins. Co.*, 4 Fed. Cas. 614, the court was inclined to hold that a like misrepresentation made voluntarily had the same effect, though they regarded the materiality thereof a question for the jury. In *Ingraham v. South Carolina Ins. Co.*, 3 Brev. (S. C.) 522, two of the judges regarded a policy avoided by a concealment of the vessel's condition before reaching port and while lying there.

(m) Conclusiveness of survey showing ship to be rotten or unsound.

When the policy contains a clause releasing the insurer from liability if the vessel on regular survey be declared unseaworthy on account of being unsound or rotten, a regular survey declaring a vessel to be unsound or rotten is conclusive against the insured, and precludes him from proving seaworthiness at the inception of the voyage.

This doctrine is supported by *Steinmetz v. United States Ins. Co.*, 2 Serg. & R. (Pa.) 293; *Rogers v. Niagara Ins. Co.*, 2 N. Y. Super. Ct. 101; *Dorr v. Pacific Ins. Co.*, 7 Wheat. 581, 5 L. Ed. 528; *Innes v. Alliance Mut. Ins. Co.*, 3 N. Y. Super. Ct. 810.

This survey may be made after the termination of the voyage, but it must show that the rotten or unsound condition of the vessel was the sole cause of condemnation.

Such is the rule laid down in *Dorr v. Pacific Ins. Co.*, 7 Wheat. 581, 5 L. Ed. 528, *Griswold v. National Ins. Co.*, 3 Cow. (N. Y.) 96, and *Watson v. Ins. Co.*, 29 Fed. Cas. 431.

However, in the *Dorr Case*, this requirement was regarded as complied with by a survey which showed that the vessel was "altogether unworthy of being repaired, and that she ought to be condemned as being unsafe and unfit ever to go to sea again." And in *Brandegee v. National Ins. Co.*, 20 Johns. (N. Y.) 328, a survey finding a vessel rotten, and containing a general conclusion that she was unseaworthy, was con-

sidered sufficient. Likewise, in *Janney v. Columbian Ins. Co.*, 10 Wheat. 411, 6 L. Ed. 354, a survey was considered sufficient which found the timbers and bottom planks so much decayed that the vessel ought to be condemned. But in *Haff v. Marine Ins. Co.*, 8 Johns. (N. Y.) 163, 5 Am. Dec. 331, a survey which did not proceed alone on the unsoundness of the vessel, but also on other defects, was held insufficient; and in *Innes v. Alliance Mut. Ins. Co.*, 3 N. Y. Super. Ct. 310, it was held that a survey based on a breach in the quarter-deck, starting of the breast hooks, and decay of a great number of the timbers did not show unseaworthiness due to rottenness. In *Marine Ins. Co. v. Wilson*, 3 Cranch, 187, 2 L. Ed. 406, a survey finding a vessel rotten, but referring it to a date subsequent to that of sailing, instead of that date, was held insufficient.

In *Dorr v. Pacific Ins. Co.*, 7 Wheat. 581, 5 L. Ed. 528, it was said that a survey which had passed through the admiralty court might well be adjudged regular; and in *Janney v. Columbian Ins. Co.*, 10 Wheat. 411, 6 L. Ed. 354, a survey made by the master and warden of the port of New Orleans was considered regular. Likewise a survey made by American shipmasters at the request of the American consul was regarded regular in *Innes v. Alliance Mut. Ins. Co.*, 3 N. Y. Super. Ct. 310. But the court held that this survey must be considered in connection with surveys made by other parties.

If the "rotten" clause is not relied on, the report of a survey is merely evidence that a survey has been made, but not of the facts contained in the report, according to *Watson v. Insurance Co. of North America*, 29 Fed. Cas. 431. However, in *Batchelder v. Insurance Co.* (D. C.) 30 Fed. 459, it was said that the report of a survey showing a vessel to be in good condition was sufficient to show seaworthiness.

(a) Questions of practice—Pleading.

Since seaworthiness is a condition precedent, it is in many jurisdictions held that it must be alleged by the insured.

Reference may be made to *Van Wickle v. Mechanics' & Traders' Ins. Co.*, 97 N. Y. 350, affirming 48 N. Y. Super. Ct. 95; *Ward v. China Mutual Ins. Co.* (C. C.) 44 Fed. 43; *Moses v. Sun Mut. Ins. Co.*, 11 N. Y. Leg. Obs. 78.

In *McLain v. British & Foreign Marine Ins. Co.*, 14 Misc. Rep. 650, 35 N. Y. Supp. 827, it is said that a general allegation of performance of all the conditions is sufficient. However, in *Earnmoor v. California Ins. Co.* (D. C.) 40 Fed. 847, it is said that seaworthiness is presumed, and hence the insurer must plead a breach of the implied warranty if

he wishes to rely thereon; and this rule is supported by *Guy v. Citizens' Mut. Ins. Co.* (D. C.) 30 Fed. 695.

Though the insurer unnecessarily pleads unseaworthiness as a defense, he need not furnish a bill of particulars (*Ward v. China Mut. Ins. Co.* [C. C.] 44 Fed. 43). If, in an action on a time policy, unseaworthiness is relied on as a defense, the plea must state such facts and circumstances as show either that at the time the insurance commenced the ship was in port and commenced her voyage in an unseaworthy condition, or that, having come into a distant port in a damaged condition, before or after the commencement of a risk, where she ought to have been repaired, the owner neglected to make such repairs (*Jones v. Insurance Co.*, 13 Fed. Cas. 982). A plea relying on misrepresentations as to the age of a vessel, which avers that the misrepresentation was material, is good (*Straas v. Marine Ins. Co.*, 23 Fed. Cas. 210).

When a policy contains the usual clause against unsoundness, a plea setting out the facts of a survey and the finding therein that the ship was so unsound as to render her unseaworthy is sufficient, according to *Rogers v. Niagara Ins. Co.*, 2 N. Y. Super. Ct. 101; and in *Griswold v. National Ins. Co.*, 3 Cow. (N. Y.) 96, it is said that a plea under the condition which avers that the survey was regular is good. In *Brandegee v. National Ins. Co.*, 20 Johns. (N. Y.) 328, it was said to be proper to set out the survey in a special plea.

If a stipulation requiring a vessel to be commanded by a certified captain is made a part of the policy, so as to become a warranty thereof, a breach thereof may be shown under a general denial; but if it is merely a representation it must be specially pleaded (*Swan v. Boylston Ins. Co.* [C. C.] 37 Fed. 766). An objection that the declaration does not allege that the boat was provided with master and crew, as provided by a condition in the policy, should be raised by a demurrer (*Lexington Fire, Life & Marine Ins. Co. v. Paver*, 16 Ohio, 324). An allegation of seaworthiness is not contradicted by a statement that a vessel sunk while in port, though this raises a violent presumption of unseaworthiness (*Gartside v. Orphans' Benefit Ins. Co.*, 62 Mo. 322).

(e) Same—Presumptions.

Generally seaworthiness is in the first instance to be presumed.

Reference may be made to *Ludlow v. Union Ins. Co.*, 2 Serg. & R. (Pa.) 119; *Adderly v. American Mut. Ins. Co.*, 1 Fed. Cas. 166; *Bullard v. Roger Williams Ins. Co.*, 4 Fed. Cas. 648; *Hutchins v. Ford*, 82 Me. 363, 19 Atl. 832; *The Gulnare* (C. C.) 42 Fed. 861; *Paddock v. Franklin Ins. Co.*, 11 Pick. (Mass.) 227; *Miller v. South Carolina Ins. Co.*, 2 McCord (S. C.) 336, 13 Am. Dec. 734.

But if a vessel becomes leaky, or sinks without apparent cause shortly after leaving port, the presumption arises that she was unseaworthy.

This doctrine is supported by *Prescott v. Union Ins. Co.*, 1 Whart. (Pa.) 399, 30 Am. Dec. 207; *Sturm v. Great Western Ins. Co.*, 40 How. Prac. (N. Y.) 423; *Dodge v. Boston Marine Ins. Co.*, 85 Me. 215, 27 Atl. 105; *Barnewall v. Church*, 1 Caines (N. Y.) 217, 2 Am. Dec. 180; *Wright v. Orient Mut. Ins. Co.*, 19 N. Y. Super. Ct. 269; *Deshon v. Merchants' Ins. Co.*, 11 Metc. (Mass.) 199; *Myers v. Girard Ins. Co.*, 26 Pa. 192; *Higgle v. American Lloyds (D. C.)* 14 Fed. 143; *Porter v. Bussey*, 1 Mass. 436; *Tidmarsh v. Washington Fire & Marine Ins. Co.*, 23 Fed. Cas. 1197; *The Gulnare (C. C.)* 42 Fed. 861; *Paddock v. Franklin Ins. Co.*, 11 Pick. (Mass.) 227; *Van Wickle v. Mechanics' & Traders' Ins. Co.*, 48 N. Y. Super. Ct. 95, affirmed in 97 N. Y. 350; *Starbuck v. Phenix Ins. Co.*, 54 N. Y. Supp. 293, 34 App. Div. 293; *Miller v. South Carolina Ins. Co.*, 2 McCord (S. C.) 336, 13 Am. Dec. 734; *Patrick v. Hallett*, 3 Johns. Cas. (N. Y.) 76; *Dupeyre v. Western Marine & Fire Ins. Co.*, 2 Rob. (La.) 457, 38 Am. Dec. 218; *Gartside v. Orphan's Benefit Ins. Co.*, 62 Mo. 322; *Parker v. Union Ins. Co.*, 15 La. Ann. 688; *Treat v. Union Ins. Co.*, 56 Me. 231, 96 Am. Dec. 447; *Van Wickle v. Mechanics' & Traders' Ins. Co.*, 97 N. Y. 354; *Cort v. Delaware Ins. Co.*, 6 Fed. Cas. 604; *Field v. Insurance Co.*, 3 Md. 244; *Voisin v. Commercial Mut. Ins. Co.*, 67 Hun, 362, 22 N. Y. Supp. 348; *Rugely, Blair & Co. v. Sun Mut. Ins. Co. of New York*, 7 La. Ann. 279, 56 Am. Dec. 608; *Wallace v. Depau*, 2 Bay (S. C.) 503.

In opposition to the doctrine of the cases just cited, it is said, in *Sherwood v. Ruggles*, 4 N. Y. Super. Ct. 55, that the mere fact that the vessel was found to be leaking within a few hours after sailing, there being no unusual stress of weather, did not afford a legal presumption that the vessel was unseaworthy; and in *Schultz v. Pacific Ins. Co.*, 14 Fla. 73, it was held that, if the leakage was counteracted by the pumps and by the throwing overboard of a small portion of the cargo, the presumption of unseaworthiness was rebutted. Likewise the presumption of unseaworthiness is rebutted by a showing that the vessel was in fact seaworthy.

Pointer v. Merchants' Mut. Ins. Co., 20 La. Ann. 100; *Moores v. Louisville Underwriters (C. C.)* 14 Fed. 226; *Palmer v. Great Western Ins. Co.*, 116 N. Y. 599, 23 N. E. 5.

In *Snethen v. Memphis Ins. Co.*, 3 La. Ann. 474, 48 Am. Dec. 462, it was said that the presumption was overcome by showing that the vessel was built recently and was in good condition; and in *Walsh v. Washington Marine Ins. Co.*, 32 N. Y. 427, the presumption of unseaworthiness was considered rebutted by showing that the vessel had been

repaired and that she had met with bad weather, which caused her to roll and was, on account of her cargo, more injurious than very severe gales.

(p) Same—Burden of proof.

In certain jurisdictions, notably New York, the burden of proving seaworthiness is held to be on the insured in the first instance.

Reference may be made to *Moses v. Sun Mut. Ins. Co.*, 8 N. Y. Super. Ct. 159; *Borland v. Mercantile Mut. Ins. Co.*, 46 N. Y. Super. Ct. 483; *Van Wickle v. Mechanics' & Traders' Ins. Co.*, 97 N. Y. 350, affirming 48 N. Y. Super. Ct. 95; *Moses v. Sun Mut. Ins. Co.*, 11 N. Y. Leg. Obs. 78; *Sturm v. Atlantic Mut. Ins. Co.*, 88 N. Y. Super. Ct. 281; *Brown v. Girard*, 4 Yeates (Pa.) 115, 2 Am. Dec. 400; *Van Vliet v. Greenwich Ins. Co.*, 14 Daly (N. Y.) 496; *Van Vliet v. Greenwich Ins. Co.*, 15 N. Y. St. Rep. 875; *Watson v. Insurance Co.*, 29 Fed. Cas. 481.

However, if it appears that the vessel was exposed to severe gales or storms during the voyage, the burden of proof shifts to the insurer.

This is asserted in *Watson v. Insurance Co.*, 29 Fed. Cas. 481; *Baker v. Merchants' Mut. Ins. Co. (C. C.)* 16 Fed. 916; *Watson v. Insurance Co.*, 29 Fed. Cas. 481.

In most jurisdictions the insurer is held to have the burden of proving unseaworthiness, probably on the ground that there is in the first instance a presumption of seaworthiness in favor of the insured.

This doctrine is supported by *Paddock v. Franklin Ins. Co.*, 11 Pick. (Mass.) 227; *Deshon v. Merchants' Ins. Co.*, 11 Metc. (Mass.) 199; *Myers v. Girard Ins. Co.*, 26 Pa. 192; *Treat v. Union Ins. Co.*, 56 Me. 231, 96 Am. Dec. 447; *Nome Beach Lighterage & Transportation Co. v. Munich Assur. Co. (C. C.)* 123 Fed. 820; *Adderly v. American Mut. Ins. Co.*, 1 Fed. Cas. 166; *Bullard v. Roger Williams Ins. Co.*, 4 Fed. Cas. 643; *Hutchins v. Ford*, 82 Me. 363, 19 Atl. 882; *Batchelder v. Insurance Co. (D. C.)* 80 Fed. 459.

But, if something has occurred during the voyage which renders it doubtful that the vessel was seaworthy, the burden of proof is held to shift to the insured.

Reference may be made to *Ludlow v. Union Ins. Co.*, 2 Serg. & R. (Pa.) 119; *Dupeyre v. Western Marine & Fire Ins. Co.*, 2 Rob. (La.) 457, 38 Am. Dec. 218; *Treat v. Union Ins. Co.*, 56 Me. 231, 96 Am. Dec. 447; *Rugely v. Sun Mut. Ins. Co.*, 7 La. Ann. 279, 56 Am. Dec. 603.

The burden of proving the falsity of representations as to a vessel's age and condition is on the insurer, according to *Silloway v. Neptune Ins. Co.*, 12 Gray (Mass.) 73, and *Tidmarsh v. Washington Fire & Marine Ins. Co.*, 23 Fed. Cas. 1197. And in *Treadwell v. Union Ins. Co.*, 6 Cow. (N. Y.) 270, it is said that, where the insured has proved the general competency of the master, the insurer has the burden of proving his incompetency in order to establish the defense of unseaworthiness.

(q) Same—Admissibility and sufficiency of evidence.

A witness who examined a vessel's hull at Norfolk June 1, 1882, and found it worm-eaten and without copper sheathing, is incompetent to express an opinion as to whether such hull was seaworthy at Tecolutla, Mexico, about the middle of March, 1882, though he testified that he was acquainted with the action of worms on unprotected wood in the waters at Tecolutla; and a witness who speaks only from the facts that a vessel which had no copper on her was slightly touched with worms in the fall of 1881, and had been in tropical waters without protection for five months thereafter, is incompetent to express an opinion as to whether or not she was seaworthy at the end of that time (*Voison v. Commercial Mut. Ins. Co.*, 90 Hun, 392, 35 N. Y. Supp. 873). On an issue of unseaworthiness, the testimony of the master that the boat might strike an obstruction and the contact not be perceivable to those on the boat is competent and relevant (*Louisville Ins. Co. v. Monarch*, 99 Ky. 578, 36 S. W. 563).

If a report of a survey is introduced by insured merely to show that a survey has been made, this does not preclude him from introducing contradictory evidence to impeach the surveyor (*Watson v. Insurance Co.*, 29 Fed. Cas. 432). Where the survey and condemnation was not wholly based on unsoundness, and insured included it in his preliminary proof, but the insurer introduced it in chief, the testimony of one of the persons making the survey was admissible on behalf of the insured to contradict the report (*Haff v. Marine Ins. Co.*, 8 Johns. [N. Y.] 163, 5 Am. Dec. 331).

On an issue as to the seaworthiness of a vessel for a voyage from San Francisco to Nome, the contention of defendant being that, as the vessel was not sheathed, she was not reasonably fitted to encounter the ice which she might be expected to meet in Bering Sea, it was not error to admit evidence that vessels generally making such voyage were not sheathed, though in fact the navigation of Nome first commenced that season and its conditions and requirements had not been established (*Nome Beach Lighterage & Transportation Co. v. Munich*

Assur. Co. [C. C.] 123 Fed. 820). The testimony of the master that he had acted in good faith in selecting the mate, claimed to have been incompetent, was admissible on an issue of unseaworthiness (*Hutchins v. Ford*, 82 Me. 363, 19 Atl. 832).

Where the captain testified that the boat was seaworthy and fit for the voyage, and the owner testified as to repairs of the boat from time to time, that before the voyage she had been thoroughly overhauled, and that to him she appeared to be right, there was sufficient prima facie proof of seaworthiness (*Heilner v. China Mut. Ins. Co.* [Super. Ct. N. Y.] 18 N. Y. Supp. 177). Where the owner of goods being transported in a lighter to a steamship brought action against the lighterage company for a loss of the goods, and obtained judgment on the ground that the lighter was unseaworthy (*Chesapeake Lighterage & Towing Co. v. Western Assur. Co.* [Md.] 58 Atl. 16), such judgment was not conclusive in an action brought by the lighterage company on a policy of insurance covering goods on board its lighters.

(v) *Same—Trial and review.*

Generally the question of seaworthiness is for the jury.

Reference may be made to *De Longuemere v. New York Fire Ins. Co.*, 10 Johns. (N. Y.) 120; *Popleston v. Kitchen*, 19 Fed. Cas. 1048; *Brown v. Girard*, 4 Yeates (Pa.) 115, 2 Am. Dec. 400; *Rosenheim v. American Ins. Co.*, 33 Mo. 230; *Starbuck v. Phenix Ins. Co. of Brooklyn*, 62 N. Y. Supp. 264, 47 App. Div. 621, 166 N. Y. 593, 59 N. E. 1130; *Thebaud v. Great Western Ins. Co.*, 50 N. E. 284, 155 N. Y. 516, affirming 31 N. Y. Supp. 1084, 84 Hun, 1; *Voisin v. Commercial Mut. Ins. Co.*, 67 Hun, 365, 22 N. Y. Supp. 348; *Osborne v. New York Mut. Ins. Co.*, 53 Hun, 633, 6 N. Y. Supp. 103, judgment affirmed 127 N. Y. 656, 28 N. E. 254; *Voisin v. Providence Washington Ins. Co.*, 65 N. Y. Supp. 333, 51 App. Div. 553; *McFee v. South Carolina Ins. Co.*, 2 McCord (S. C.) 503, 18 Am. Dec. 757; *Field v. Insurance Co. of North America*, 3 Md. 244; *Gartside v. Orphan's Benefit Ins. Co.*, 62 Mo. 322.

The materiality of misrepresentation as to a vessel's age and rating is for the jury (*Bulkley v. Protection Ins. Co.*, 4 Fed. Cas. 614).

Though the instructions given at the request of the insurer are objectionable in omitting to inform the jury what facts would constitute unseaworthiness, the insurer cannot complain thereof (*Rosenheim v. American Ins. Co.*, 33 Mo. 230). Though, in the absence of a specific inquiry, the insured is not bound to disclose the contents of the captain's letter showing trouble in getting insurance, and facts known to him tending to show the insufficiency of the vessel to carry coal, and the discrediting of the vessel as unseaworthy in marine reports, yet such facts

should be submitted to the jury on the issue of unseaworthiness (*Augusta Ins. & Banking Co. v. Abbott*, 12 Md. 348).

A finding by the jury, on conflicting evidence, that a vessel was unseaworthy, will not be disturbed.

Such is the principle asserted in *Fuller v. Alexander*, 1 Brev. (S. C.) 149; *Caldwell v. Union Ins. Co.*, Dud. (S. C.) 263; *Trimble's Syndics v. New Orleans Ins. Co.*, 3 Mart. O. S. (La.) 394; *Brown v. Girard*, 4 Yeates (Pa.) 115, 2 Am. Dec. 400.

A defense based on the conclusiveness of a surveyor's report under a condition against unsoundness of a vessel cannot be raised for the first time on appeal (*Insurance Co. v. Mordecai*, 22 How. 111, 16 L. Ed. 329).

10. EFFECT OF MISDESCRIPTION OF PROPERTY INSURED IN GENERAL.

- (a) Matter of description as warranty or representation.
- (b) Description of building insured.
- (c) Same—Location.
- (d) Same—Material and construction.
- (e) Same—Age of building.
- (f) Description of personal property.
- (g) Same—Location.
- (h) Same—Description of building.
- (i) Pleading and practice.

(a) Matter of description as warranty or representation.

In determining the effect of false statements in the description of the property insured, it is first necessary to determine whether matters of description are to be regarded as warranties or as representations merely. It is obvious that our determination of this question is usually dependent on the special circumstances of each case. It is just as obvious that the general principles of distinction between warranties and representations already discussed are applicable. It is deemed sufficient at present to refer to a few of the leading cases where these principles have been specially applied to matters of description.

Where the policy was conditioned that it would be void if the property insured was not correctly described and if any false statements material to the risk were made, as in *Planters' Ins. Co. v. Myers*, 55 Miss. 479, 30 Am. Rep. 521, it was said that the matter of description must relate to something material to the risk in order to constitute a warranty. A similar rule was laid down in *Lindsey v. Union Mut.*

Fire Ins. Co., 3 R. I. 157, where the reference to the description was qualified "as far as regards the risk," and it was held that this was a warranty only that the description was correct so far as it was material to the risk. From this we are led to the principle that a description relating to the risk is a warranty, as asserted in *Alexander v. Germania Ins. Co.*, 66 N. Y. 464, 23 Am. Rep. 76, reversing 5 Thomp. & C. (N. Y.) 208. So, in *Richards v. Protection Ins. Co.*, 30 Me. 273, it was said that, if the description affects the rate of premium, it operates as a warranty.

The general principle that matter of description contained in or made part of the policy is a warranty is asserted in *Wood v. Hartford Fire Ins. Co.*, 13 Conn. 533, 35 Am. Dec. 92; *Fame Ins. Co. v. Thomas*, 10 Ill. App. 545; *Baker v. German Fire Ins. Co.*, 124 Ind. 490, 24 N. E. 1041; *United States Fire & Marine Ins. Co. v. Kimberly*, 34 Md. 224, 6 Am. Rep. 325; *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247; *Deweese v. Manhattan Ins. Co.*, 34 N. J. Law, 244; *Deweese v. Manhattan Ins. Co.*, 35 N. J. Law, 366; *Sarsfield v. Metropolitan Ins. Co.*, 61 Barb. (N. Y.) 479, 42 How. Prac. 97; *Fowler v. Aetna Fire Ins. Co.*, 6 Cow. (N. Y.) 673, 16 Am. Dec. 460; *Bryce v. Lorillard Fire Ins. Co.*, 46 How. Prac. (N. Y.) 498, affirming 35 N. Y. Super. Ct. 394; *Wall v. East River Ins. Co.*, 7 N. Y. 370, overruling *Same v. Howard Ins. Co.*, 14 Barb. (N. Y.) 383; *Smith v. Mechanics' & Traders' Fire Ins. Co.*, 32 N. Y. 399; *Le Roy v. Market Fire Ins. Co.*, 39 N. Y. 90; *Id.*, 45 N. Y. 80; *Bobbitt v. Liverpool & London & Globe Ins. Co.*, 66 N. C. 70, 8 Am. Rep. 494; *Lenox v. Greenwich Ins. Co.*, 9 Pa. Super. Ct. 171; *Keller v. Liverpool & London & Globe Ins. Co.*, 27 Tex. Civ. App. 102, 65 S. W. 695.

But the intent to make the description part of the policy must clearly appear, according to *Boyd v. Vanderbilt Ins. Co.*, 90 Tenn. 212, 16 S. W. 470, 25 Am. St. Rep. 676.

Where the descriptive matter is not inserted in or distinctly referred to in the policy (*Jefferson Ins. Co. v. Cotheal*, 7 Wend. [N. Y.] 72, 22 Am. Dec. 567), such description cannot be regarded as a warranty. This principle is also supported by *Delonguemare v. Tradesmen's Ins. Co.*, 2 N. Y. Super. Ct. 629. If the survey and description is made by the agent of the insurer, there is no warranty.

Roth v. City Ins. Co., 20 Fed. Cas. 1255; *Howard Fire Ins. Co. v. Bruner*, 23 Pa. 50; *Landers v. Watertown Fire Ins. Co.*, 19 Hun (N. Y.) 174.

If there is any uncertainty on the part of the insured as to the description, it is not a warranty.

Woods v. Atlantic Mut. Ins. Co., 50 Mo. 112; *German Ins. Co. v. Miller*, 39 Ill. App. 633.

Though the statute provides that matter of description shall be only a representation, as in the Kentucky act of February 4, 1874, the parties may by stipulation make such matter a warranty (*Farmers' & Drovers' Ins. Co. v. Curry*, 76 Ky. 312, 26 Am. Rep. 194). A description of a building in which goods insured are situated is not a warranty (*Howard Fire & Marine Ins. Co. v. Cornick*, 24 Ill. 555); the basis of the decision being, apparently, that the description does not refer to the property actually covered by the policy. Similarly it was said, in *Protection Ins. Co. v. Harmer*, 2 Ohio St. 452, 59 Am. Dec. 684, that where the reference to the survey is for a more particular description of the property, matter not in fact descriptive cannot be regarded as a warranty.

In *Clinton v. Hope Ins. Co.*, 51 Barb. (N. Y.) 647, where the reference was general, "as per survey on file at the office," and there were in fact three surveys on file, the court held that the survey could be regarded only as matter of identification and description, and not as a warranty. A similar principle governed the decision in *Newman v. Springfield Fire & Marine Ins. Co.*, 17 Minn. 123 (Gil. 98). In other cases it has been held that matter of description is not even a representation, but merely matter of identification.

Cumberland Valley Mut. Protection Co. v. Schell, 29 Pa. 31; *Wilkins v. Germania Fire Ins. Co.*, 57 Iowa, 529, 10 N. W. 916; *Everett v. Continental Ins. Co.*, 21 Minn. 76.

So, in *Vilas v. New York Central Ins. Co.*, 9 Hun (N. Y.) 121, a general reference to a survey made in fact for another company was regarded as competent only for purpose of identification.

The principle that matters of description are not warranties, but at best representations only, is supported in *Rogers v. Phenix Ins. Co.*, 121 Ind. 570, 23 N. E. 498; *Commonwealth's Ins. Co. v. Monninger*, 18 Ind. 352; *Phenix Ins. Co. v. Wilson*, 132 Ind. 449, 25 N. E. 592; *Niagara Fire Ins. Co. v. Johnson*, 4 Kan. App. 16, 45 Pac. 789; *Ætna Ins. Co. v. Grube*, 6 Minn. 82 (Gil. 32); *Everett v. Continental Ins. Co.*, 21 Minn. 76; *Pabst Brewing Co. v. Union Ins. Co.*, 63 Mo. App. 663; *Delonguemare v. Tradesmen's Ins. Co.*, 2 N. Y. Super. Ct. 629; *Wall v. Howard Ins. Co.*, 14 Barb. (N. Y.) 383, overruled in *Wall v. East River Ins. Co.*, 7 N. Y. 370; *Western & Atlantic Pipe Lines v. Home Ins. Co.*, 145 Pa. 343, 22 Atl. 665, 27 Am. St. Rep. 703; *Virginia Fire & Marine Ins. Co. v. Morgan*, 90 Va. 290, 18 S. E. 191.¹

¹ See Rev. St. Me. 1883, c. 49, § 20; Pub. St. N. H. 1901, c. 170, § 2.

Where matter of description is regarded as a representation, it can be so regarded only so far as it is material to the risk.

Reference may be made to *Boardman v. New Hampshire Mut. Fire Ins. Co.*, 20 N. H. 551; *Germania Fire Ins. Co. v. Deckard*, 3 Ind. App. 361, 28 N. E. 868; *Kentucky & Louisville Mut. Ins. Co. v. Southard*, 8 B. Mon. (Ky.) 637; *Watertown Fire Ins. Co. v. Simons*, 96 Pa. 520.

If the description affects the premium, or is an inducement to insure, it is material (*Allen v. Lafayette Ins. Co.*, 34 La. Ann. 763). But it was said in *Tesson v. Atlantic Mut. Ins. Co.*, 40 Mo. 33, 93 Am. Dec. 293, that, as applied to matters of description, the extent of the variation from the truth is an important factor, though in ordinary warranties the facts must be literally true.

(b) Description of building insured.

Where the building insured was described as a two-story building (*Watertown Fire Ins. Co. v. Simons*, 96 Pa. 520), such description, being a representation merely, was held not to avoid the policy, though false, unless it was material. In *Benedict v. Ocean Ins. Co.*, 1 Daly (N. Y.) 8, a description of a building having five stories above the sidewalk and a cellar as a five-story building was regarded as substantially correct. So a description of a building as a "three-story building" was regarded as sufficient (*Massell v. Protective Mut. Fire Ins. Co.*, 19 R. I. 565, 35 Atl. 209), where the building was in fact one and one-half stories, with a basement. A policy of insurance on a "two-story frame building" is not avoided by testimony that the insured property was a story and a half house, where there is no evidence that the half story did not make the building a "two-story house" either in common parlance or within the established usage of underwriters, and it does not appear that the alleged misdescription affected the character of the risk or influenced the insurer in determining its acceptance and fixing the rate (*Mallery v. Frye*, 21 App. D. C. 105). In *Wilkins v. Germania Fire Ins. Co.*, 57 Iowa, 529, 10 N. W. 916, where the building was described as a two-story building and had in fact a one-story addition, it was held that such a building would ordinarily be described as a two-story building, notwithstanding such one-story addition; that it was a matter of identification as to which strict accuracy was not required. A similar principle governed *Hartford Fire Ins. Co. v. Moore*, 13 Tex. Civ. App. 644, 36 S. W. 146, where the facts were substantially the same. Where the insured informed the agent that he could not particularly describe the building, and the application, signed in blank,

was filled in by the agent (*Clark v. Union Mutual Fire Ins. Co.*, 40 N. H. 333, 77 Am. Dec. 721), there was not such a concealment as to the condition of the building as would avoid the policy. Where, as in *Williams v. New England Fire Ins. Co.*, 31 Me. 219, the policy was on an unfinished building, and subsequent to its issuance, for the purpose of securing consent to take out additional insurance, a representation was made that the building was finished, the court held that such statement did not avoid the policy, though the building was not in fact entirely finished. And when the pleadings in an action on the policy admit that the structure insured was a building, it will be regarded as having acquired identity as a building, though not completed (*Bode v. Firemen's Ins. Co. of Newark*, 77 S. W. 116, 103 Mo. App. 289).

(c) Same—Location.

Where the property insured was described as located in the original plat of the town (*German Ins. Co. v. Miller*, 39 Ill. App. 633), and it appeared that it was in fact in an addition, the court held that as the description was sufficient to identify it, and the agent who took the policy saw the property and knew exactly where it was situated, undertaking to examine the record and correct the description, if necessary, such statement was not a warranty, the incorrectness of which would avoid the policy. It may be stated as a general rule that, if property is otherwise sufficiently identified, a misdescription as to location will not avoid the policy.

This rule is supported by *Breckinridge v. American Central Ins. Co.*, 87 Mo. 62; *Kansas Farmers' Fire Ins. Co. v. Saindon*, 52 Kan. 486, 35 Pac. 15, 39 Am. St. Rep. 356; *Western & Atlantic Pipe Lines v. Home Ins. Co.*, 145 Pa. 346, 22 Atl. 665, 27 Am. St. Rep. 703; *Yonkers New York Fire Ins. Co. v. Hoffman Fire Ins. Co.*, 29 N. Y. Super. Ct. 318.

The rule has been applied where the property was described as located on a certain section of land, when in fact it was on an adjoining section; and this, though the statements were made warranties.

Prieger v. Exchange Mut. Ins. Co., 6 Wis. 89; *Collins v. St. Paul Fire & Marine Ins. Co.*, 44 Minn. 440, 46 N. W. 906.

So, in *Dougherty v. German-American Ins. Co.*, 67 Mo. App. 526, where the application recited that the property insured was located on section 8, and as a matter of fact a portion of the land was in section 7, but the buildings insured were on section 8, the court said that the warranty is, not that the whole property was on section 8, but merely that the building insured was on that section.

(d) Same—Material and construction.

Though it may be true, as said in *Parrish v. Rosebud Mining & Milling Co.*, 140 Cal. 635, 74 Pac. 312, that a false description as to the material of which a building is constructed avoids the policy, the rule is subject to many qualifications. If the insured expresses himself as uncertain whether the description is correct (*Woods v. Atlantic Mut. Ins. Co.*, 50 Mo. 112), the statement as to the character of the building, being made merely to the best of applicant's knowledge, is not a warranty as to the material of which the building is constructed. Where the building was described as "frame filled in with brick" (*Fowler v. Ætna Fire Ins. Co.*, 7 Wend. [N. Y.] 270), it was said that the expression was ambiguous, and might mean, in view of the circumstances, either that the building was filled in with brick in front and rear, with a building on each side having a brick wall, or as referring to a building with sides filled in with brick. A statement that the buildings insured were "his brick shingle sugar house and purgeries" was held (*Meyer v. Queen Ins. Co.*, 41 La. Ann. 1000, 6 South. 899) not to be a statement that the purgeries were brick, but only the sugar house. Where there was a reference to the survey, as in *Sayles v. Northwestern Ins. Co.*, 21 Fed. Cas. 609, and a reference in the survey to a diagram on a separate sheet of paper, a statement in the diagram that the building was of brick and stone was not a warranty as to the material of which such building was constructed. Where the building was described as "hard-finished" (*Jackson v. St. Paul Fire & Marine Ins. Co.*, 33 Hun [N. Y.] 60), such a description did not contemplate merely a hard finish so far as the building was finished at all, but that the whole building was in fact hard-finished throughout.

In the early case of *Fowler v. Ætna Fire Ins. Co.*, 6 Cow. (N. Y.) 673, 16 Am. Dec. 460, it was held that the policy was defeated by the falsity of the statement that the building insured was a frame house filled in with brick, when as a matter of fact the building had hollow walls. In *Chase v. Hamilton Ins. Co.*, 22 Barb. (N. Y.) 527, the building was represented as a stone house, no mention being made of a wooden kitchen attached. It was held that the house was sufficiently described, unless the kitchen was regarded as a part of the house; there being nothing in the case to show how it was attached to the main building. Where the facts were warranted so far as material to the risk (*Cox v. Ætna Ins. Co.*, 29 Ind. 586), the substantial truth of a statement that the outside walls were of brick was regarded as sufficient. In *Gerhauser v. North British & Mercantile Ins. Co.*, 7 Nev. 174, the applicant, stating that the building was in good repair, disclosed the

fact that one wall had been replaced in part by timbers, but represented the building as a brick building. The court held that, as in common understanding this was a brick building, the fact that the bricks in one wall had been replaced by timbers in repairing it did not render the statement false. A similar principle was applied in *Mead v. Northwestern Ins. Co.*, 7 N. Y. 536.

In *Williams v. Bankers' & Merchants' Town Mut. Fire Ins. Co.*, 73 Mo. App. 607, and *Germania Fire Ins. Co. v. Deckard*, 3 Ind. App. 361, 28 N. E. 868, a description of the building as a frame building was said not to be false, so as to avoid the policy, because the building was built partly of logs. The theory of the latter case seems to be that, as there was no increase of the risk, an exact description was not necessary. Similarly, in *Norris v. Farmers' Mut. Fire Ins. Co.*, 65 Mo. App. 632, where the building was described as "shg." roof frame barn, the court said that, though the barn was covered with clapboards and the abbreviation ought to be interpreted to mean "shingle," yet the misdescription was so immaterial that it would not avoid the policy. In *Continental Ins. Co. v. Kasey*, 25 Grat. (Va.) 268, 18 Am. Rep. 681, where the building was described as a frame house, and the policy provided that matter of description was a warranty, the court held that such matter could be regarded only as a representation, and the fact that one end of the house was built of logs did not avoid the policy. In *McNamara v. Dakota Fire & Marine Ins. Co.*, 1 S. D. 342, 47 N. W. 288, a representation that the house was a frame building was not falsified by the fact that one wing of it was sodded up on three sides.

Where the question was, "Are walls on sides and between each tenement without openings?" (*Phoenix Ins. Co. v. Padgitt* [Tex. Civ. App.] 42 S. W. 800) it was held that the question must be construed as referring only to the walls between the tenements, and not the outside walls, so that an affirmative answer was not falsified by the existence of openings in the outside walls. In *Northrup v. Porter*, 44 N. Y. Supp. 814, 17 App. Div. 80, it was said that, where it is represented in the policy that the division walls between buildings extend to the roof between each building, a misdescription in that regard is material to the risk, so as to avoid the policy. In *Northrup v. Piza*, 43 App. Div. 284, 60 N. Y. Supp. 363, affirmed without opinion in 167 N. Y. 578, 60 N. E. 1117, it appeared that the policy as originally taken out, before the completion of the buildings, recited, "It is understood that the entire division walls extend to the roof between each of the above-described buildings." After completion of the buildings the insurer indorsed

on the policy, "On and after this date this policy to cover as below, and not as heretofore," followed by a description of the buildings; no mention being made of the division walls. It was contended that the indorsement had the effect of doing away with the warranty as to the walls, but the court held otherwise.

(c) Same—Age of building.

The effect of false statements as to the age of the building insured has been considered in several cases of comparatively recent date. The general principle that a misrepresentation as to the age of the building will not avoid the policy, unless material to the risk, is asserted in *Watertown Fire Ins. Co. v. Simons*, 96 Pa. 520. That a variance of twenty-four years between the age stated and the real age of the building will avoid the policy was held in *Lama v. Dwelling House Ins. Co.*, 51 Mo. App. 447, though it is to be noted that the character of the building was an important element, and the statements were regarded as warranties. A variance of eight years was not regarded as material in *Eddy v. Hawkeye Ins. Co.*, 70 Iowa, 472, 30 N. W. 808, 59 Am. Rep. 444, where the building had been kept in repair and was worth more than the amount for which it was insured.

In *Lamb v. Council Bluffs Ins. Co.*, 70 Iowa, 238, 30 N. W. 497, the insured, in answer to a question, stated that the building was built in 1883. There was evidence to show that there had been a building at another place, which was torn down, and the material, with some new material, used in the construction of the building insured. The statement in the application was literally correct. The insurer contended that according to the usage of insurers the words, "when built" referred only to a building constructed entirely of new material. The court held, however, that, as this distinction was not pointed out in the question, the answer of the insured was a sufficient answer to the question. Somewhat similar were the facts in *Manufacturers' & Merchants' Ins. Co. v. Zeitinger*, 168 Ill. 286, 48 N. E. 179, 61 Am. St. Rep. 105, where the applicant, in answer to a question, stated that the age of the building was 20 or 25 years. The evidence showed that the building was erected some 60 or 70 years before the policy was issued, but that about 25 years before a portion of the building was rebuilt. There was no evidence showing that there was any material difference between the value of the mill after it was partially rebuilt and what its value would have been had it been entirely rebuilt. Therefore, in the absence of moral fraud, the statement was regarded as sufficient.

An interesting series of cases involving this question has been before in the court in Indiana. In *Phenix Ins. Co. v. Pickel*, 119 Ind. 155, 21 N. E. 546, 12 Am. St. Rep. 393, it was stated in the application and policy that the building was 12 years old and in good condition. The answer of the insurance company alleged that in fact the building was 15 years old and in bad condition. The court apparently regarded this as a sufficient plea of breach of warranty which would avoid the policy. Such, too, was the holding in *Pickel v. Phenix Ins. Co.*, 119 Ind. 291, 21 N. E. 898, involving the same policy. In *Rogers v. Phenix Ins. Co.*, 121 Ind. 570, 23 N. E. 498, where the policy contained the same condition as that involved in the *Pickel* Case, the court took an entirely different view, and held that the statements as to the age of the building were not warranties, but representations merely, so that an immaterial variance in no way affecting the risk would not avoid the policy. The statement as to age was regarded as a statement of opinion and belief, rather than exact fact. A similar doctrine was announced in *Phenix Ins. Co. v. Wilson*, 132 Ind. 449, 25 N. E. 592. Nevertheless, in *Phenix Ins. Co. v. Pickel*, 3 Ind. App. 332, 29 N. E. 432, on appeal from the second trial of the case reported in 119 Ind. 291, 21 N. E. 898, the Appellate Court regarded the decision on the former appeal as the law of the case,² and that the statement as to the age of the building was a warranty, a breach of which would avoid the policy. It appeared, however, that the building had been rebuilt within the 12 years, though of the old materials. The court, basing its decision on the ground that the age of the building must be computed from the date of its erection, and not from the age of the material used in its construction, held that the warranty was not broken.

(2) Description of personal property.

Where a policy recited that it was "on stock in trade consisting of not hazardous merchandise" (*Richards v. Protection Ins. Co.*, 30 Me. 273), the court held that the policy was avoided if there were present in the store, at the time the policy was taken out, articles regarded as hazardous. In *Evans v. Columbia Fire Ins. Co.*, 81 N. Y. Supp. 933, 40 Misc. Rep. 316, where the policy covered a number of cotton presses located at various points throughout the United States, a representation that the total number of presses was about 150 and that no two were set up together was material, so as to avoid the policy, if false. The rule that a statement which is a representation merely need be only substan-

² Former decision as law of the case, see Cent. Dig. vol. 8, "Appeal and Error," cols. 2348, 2349, § 4360.

tially true was applied in *Delaware Ins. Co. v. Harris*, 26 Tex. Civ. App. 537, 64 S. W. 867, where machinery insured had been in use much longer than was represented. Where the policy contains many questions as to facts deemed by the company material to the risk (*Wytheville Insurance & Banking Co. v. Stultz*, 87 Va. 629, 13 S. E. 77), insured is bound to disclose only to the extent inquiry is made, and the failure to disclose that tobacco covered by the policy was damaged and unsalable when he obtained the policy will not avoid the contract. In *Coleman v. Retail Lumbermen's Ins. Ass'n*, 77 Minn. 31, 79 N. W. 588, it was held that a description of the property insured in the application, not made a part of the policy, does not limit a description stated in the policy. As there were inconsistent recitals in the policy involved in *Indiana Farmers' Live Stock Ins. Co. v. Byrnett*, 9 Ind. App. 443, 36 N. E. 779, it was held that the statements as to the condition of the horse insured were representations only.

(g) Same—Location.

As the description of the location of the personal property insured is usually regarded as matter of identification merely, a misdescription will not defeat the policy, unless the variance is material.

Phenix Ins. Co. v. Gebhart, 32 Neb. 144, 49 N. W. 333; *Everett v. Continental Ins. Co.*, 21 Minn. 76.

So, where it was intended to insure goods in plaintiff's house, which was situated on a large tract of land in a rural community and was the only house plaintiff owned in that county, a description of the house as located on the south side of the road, when it was in fact on the north side, will not render the policy void, and it may be reformed after loss (*Le Gendre v. Scottish Union & National Ins. Co.*, 95 App. Div. 562, 88 N. Y. Supp. 1012). On the other hand, in *Bryce v. Lorillard Fire Ins. Co.*, 46 How. Prac. (N. Y.) 498, affirming 35 N. Y. Super. Ct. 394, where a description of location was regarded as a warranty, it appeared that the merchandise insured was in a building known as "C. Patterson Stores." These stores were divided into compartments having no connection with each other and listed separately by the insurance surveyors. The court held, therefore, that the words descriptive of the location were material, and, if false, avoided the policy. So, in *Phenix Ins. Co. v. Allen*, 109 Ind. 273, 10 N. E. 85, location of personal property was regarded as material.

In *Eddy Street Iron Foundry v. Farmers' Mut. Fire Ins. Co.*, 5 R. I. 426, the original application recited that the property insured was con-

tained in the furnace room. In an application for renewal the property was described as in the rear of 82 and 84 Eddy street, and recited that there had been no change increasing the risk. This description included more than the furnace room. It was regarded as immaterial whether the property was actually in the furnace room, or in other rooms in the rear of the locality mentioned; that the effect of the description was to extend the risk to other property, and not to show a removal which changed the risk. **A general statement that the insurance is desired upon household goods while in the building does not involve a representation that the goods are then in the building,** according to *Omaha Fire Ins. Co. v. Crighton*, 50 Neb. 314, 69 N. W. 766. Where the furniture insured was described as located in a house of two stories and a garret, as in *Clarke v. Firemen's Ins. Co.*, 18 La. 431, and it was contended that there was a concealment as to the situation of part of the furniture, because it was stored in the garret, the court held that, as it was stated that the house had a garret and the furniture was described as in the house generally, there was no concealment.

(h) Same—Description of building.

In the early case of *Fowler v. Ætna Fire Ins. Co.*, 6 Cow. (N. Y.) 673, 16 Am. Dec. 460, where the property was described as contained in the two-story frame house filled in with brick, the fact that the house was really a wooden building with hollow walls was sufficient to avoid the policy, whether the error in description arose from mistake or design. So, in *Pickel v. Phenix Ins. Co.*, 119 Ind. 291, 21 N. E. 898, where the statements were regarded as warranties and the policy covered both building and personalty therein, it was said that a misdescription of the building avoided the policy as to the personalty. But it was said, in *Allen v. Lafayette Ins. Co.*, 34 La. Ann. 763, that a misdescription of the building containing insured property will not avoid the policy, unless it affects the premium or misleads the insurer. A similar principle seems to have been asserted in *Wall v. Howard Ins. Co.*, 14 Barb. (N. Y.) 383, though this case was subsequently overruled in *Wall v. East River Ins. Co.*, 7 N. Y. 370. Where the application recited that the description was correct so far as regards the risk (*Lindsey v. Union Mut. Fire Ins. Co.*, 3 R. I. 157), the warranty is only that the description is true so far as it is material to the risk. In *Virginia Fire & Marine Ins. Co. v. Morgan*, 90 Va. 290, 18 S. E. 191, it was held that a description of the building containing a stock of goods insured is merely descriptive and amounts to nothing more than a representation.

Where it was represented that the building was brick (*Landes v. Safety Mut. Fire Ins. Co.*, 190 Pa. 536, 42 Atl. 961), and it appeared that there was a frame addition, but that the fire did not originate in or extend to such addition, it was held that the existence of the frame addition was not necessarily so material as to require disclosure. In *Farmers' Ins. & Loan Co. v. Snyder*, 16 Wend. (N. Y.) 481, 30 Am. Dec. 118, a leading case, where the building containing the goods insured was described as one story high, garret over the whole, stone partition running lengthwise through the building to the roof, and it appeared that the partition was not built higher than the garret floor, the court held that, as it would be an unusual way of constructing a one-story building to run the partition up to the highest point of the roof, and, moreover, as the insured had stated in so many words that the garret extended over the whole building, the misdescription did not avoid the policy. Where the policy described the building containing the insured property as a five-story building (*Benedict v. Ocean Ins. Co.*, 31 N. Y. 389, affirming 1 Daly, 8), the fact that there were five stories above the ground and a cellar underneath did not constitute a misdescription. In *Whitehurst v. Fayetteville Mut. Ins. Co.*, 51 N. C. 352, the policy provided that a true description should be given of the property insured, and that such description should be part of the contract. In the description of the building the insured omitted to mention an old stove-pipe hole in the chimney, which had been carefully and safely closed by means of an iron plate and mortar. The court held that it was not unconditionally necessary that plaintiff should disclose the manner in which the opening had been closed, as the fact that the opening existed there was immaterial.

(1) Pleading and practice.

A complaint which describes the property insured as lot 25 in N.'s addition to a certain city is not bad because the policy describes the property as situated on lot 25 in N.'s Fifth addition, though the variance may be ground for an objection to the introduction of the policy in evidence (*Franklin Ins. Co. v. Feist*, 31 Ind. App. 390, 68 N. E. 188). To be available as a defense, a misdescription must be specially pleaded.

Hynds v. Schenectady County Mut. Ins. Co., 16 Barb. (N. Y.) 119;
Haskins v. Hamilton Mutual Ins. Co., 5 Gray (Mass.) 432; *Pino v. Merchants' Mut. Ins. Co.*, 19 La. Ann. 214, 92 Am. Dec. 529.

A plea that there was a material misrepresentation as to the description of the premises on which the personal property insured was

situated was regarded as insufficient, in that it did not set forth the representation complained of and show wherein it was untrue (*Girard Fire Ins. Co. v. Boulden* [Ala.] 11 South. 773). On the other hand, it was said, in *Jackson v. St. Paul Fire & Marine Ins. Co.*, 33 Hun (N. Y.) 60, that a general allegation that the policy is void for false representation and concealment is sufficient, if no more particular statement is demanded.

A provision in a policy that the description shall be a part of the contract and a warranty by the insured does not impose on the insured the burden of proving the truth of such description (*Morotock Ins. Co. v. Fostoria Novelty Glass Co.*, 94 Va. 361, 26 S. E. 850). In *Yoch v. Home Mut. Ins. Co.*, 111 Cal. 503, 44 Pac. 189, 34 L. R. A. 857, where the issue was whether the insured had represented that the building contained less than 15 rooms, it was held to be proper to exclude as leading a question asked the agent by the insurer as to whether the insured stated to him that the building contained less than 15 rooms. Sufficiency of the evidence to show a false statement in describing the building was considered in *Johnston v. Farmers' Fire Ins. Co.*, 106 Mich. 96, 64 N. W. 5. Where the evidence as to the description of the building was conflicting, as in *Wright v. Hartford Fire Ins. Co.*, 36 Wis. 522, the verdict of the jury was held to be conclusive.

That it is for the court to say what amounts to a misdescription of premises is asserted in *State Ins. Co. v. DuBois*, 7 Colo. App. 214, 44 Pac. 756. But in the same case it was also said that whether a misdescription is material to the risk is a question for the jury. This principle is also laid down in *Ætna Ins. Co. v. Grube*, 6 Minn. 82 (Gil. 32). Where the original insurer sought to avoid the policy on the ground of misdescription of the building insured (*Jackson v. St. Paul Fire & Marine Ins. Co.*, 99 N. Y. 124, 1 N. E. 539), the court held that the judgment against the original insurer in such action was conclusive in an action between the original insurer and a reinsurer, so that the reinsurer could not inquire into the merits of the contentions decided in the original action.

11. EFFECT OF MISREPRESENTATION, BREACH OF WARRANTY, OR CONCEALMENT AS TO USE AND OCCUPANCY OF PREMISES.

- (a) Effect of false statements in general.
- (b) Failure to disclose use and occupancy.
- (c) Effect of false statement or concealment as dependent on intent and materiality.
- (d) Truth or falsity of statements as to use and occupancy.
- (e) Same—Dwelling house.
- (f) Use and occupancy of building containing personal property insured.
- (g) Pleading and practice.

(a) Effect of false statements in general.

Stipulations relating to the use and occupancy of the property inserted in the face of the policy are regarded as warranties as to the use and occupancy at the time the contract is entered into. This principle is asserted in *Baker v. German Fire Ins. Co.*, 124 Ind. 490, 24 N. E. 1041. Being warranties, the falsity of such statements will avoid the policy, whether material to the risk or not.

These principles are also supported in *Fame Ins. Co. v. Thomas*, 10 Ill. App. 545, affirmed in 108 Ill. 91; *Stout v. City Fire Ins. Co. of New Haven*, 12 Iowa, 871, 79 Am. Dec. 539; *Baker v. German Fire Ins. Co.*, 124 Ind. 490, 24 N. E. 1041; *Evans v. Queen Ins. Co.*, 5 Ind. App. 198, 31 N. E. 843; *Aiple v. Boston Ins. Co. (Minn.)* 100 N. W. 8; *Deweese v. Manhattan Ins. Co.*, 35 N. J. Law, 366; *Martin v. State Ins. Co.*, 44 N. J. Law, 485, 43 Am. Rep. 397; *Jennings v. Chenango County Mut. Ins. Co.*, 2 Denio (N. Y.) 75; *Smith v. Mechanics' & Traders' Fire Ins. Co.*, 32 N. Y. 399; *Alexander v. Germania Fire Ins. Co.*, 66 N. Y. 464, 23 Am. Rep. 76; *State Mut. Fire Ins. Co. v. Arthur*, 30 Pa. 315; *Lennox v. Greenwich Ins. Co.*, 9 Pa. Super. Ct. 171; *Boyd v. Vanderbilt Ins. Co.*, 90 Tenn. 212, 16 S. W. 470, 25 Am. St. Rep. 676.

Though the statute provides that the statements and descriptions in the application or policy shall be representations, and not warranties,¹ the parties may, according to *Farmers' & Drovers' Ins. Co. v. Curry*, 13 Bush (Ky.) 312, 26 Am. Rep. 194, stipulate that statements regarding use and occupancy shall be regarded as warranties.

That statements as to use and occupancy are not always warranties, even when referred to in the policy, seems to be asserted in *Boardman v. New Hampshire Mut. Fire Ins. Co.*, 20 N. H. 551. The applicant

¹ See Act Ky. Feb. 4, 1874.

represented the building as occupied by a tenant in the third story, when in fact the third story was vacant. In view of the established principle that a warranty is in effect a stipulation that the fact is material, so as to avoid the policy if false, however immaterial it may be in other aspects, the court took the position that the insured could not be supposed to have intended to be bound by his statement as by a warranty, when the vacancy of the upper story was clearly an advantage to the insurer, and not an increase of the risk. Where the application is not made by the insured the statements cannot be regarded as warranties.

Blass v. Agricultural Ins. Co., 18 App. Div. 481, 46 N. Y. Supp. 392;
McNally v. Phoenix Ins. Co., 137 N. Y. 389, 88 N. E. 475.

Thus, if the application or representations as to use and occupancy are made by the agent of the insurer, a warranty avoiding the policy cannot be predicated thereon (*South Bend Toy Mfg. Co. v. Dakota Fire & Marine Ins. Co.*, 2 S. D. 17, 48 N. W. 310).

In *Garrison v. Farmers' Mut. Fire Ins. Co.*, 56 N. J. Law, 235, 28 Atl. 8, the policy had been renewed from year to year. When originally issued there was a misdescription as to the use of the property, but at the time of the last renewal the use of the property corresponded to the description in the original. It was held that, though the original policy might have been avoided by reason of the misdescription, the defect had been cured as to the renewal, and avoidance of such renewal could not be predicated on the original false description.

(b) Failure to disclose use and occupancy.

A failure to disclose a use of the premises other than that stated in the application is a concealment avoiding the policy.

Fame Ins. Co. v. Mann, 4 Ill. App. 485; *Thomas v. Fame Ins. Co.*, 108 Ill. 91, affirming *Fame Ins. Co. v. Thomas*, 10 Ill. App. 545.

In the *Thomas Case*, Justice Scott, in a dissenting opinion, took the position that, as a special inquiry calculated to elicit the facts was unanswered, concealment could not be predicated on such failure to answer. The principle thus invoked by Justice Scott is directly asserted in *Liberty Hall Ass'n v. Housatonic Mut. Fire Ins. Co.*, 7 Gray (Mass.) 261. Where the application or policy calls for a full disclosure of facts relating to the risk, a failure to disclose the facts relating to the use and occupancy of the property is a concealment, which will avoid the policy.

This is asserted in *Fame Ins. Co. v. Thomas*, 10 Ill. App. 545, affirmed in 108 Ill. 91; *Abbott v. Shawmut Fire Ins. Co.*, 3 Allen (Mass.)

213; *Barre Boot Co. v. Milford Mut. Fire Ins. Co.*, 7 Allen (Mass.) 42; *Loehner v. Home Mut. Ins. Co.*, 19 Mo. 628.

If, however, there is no inquiry, a failure to disclose the use and occupancy of the building will not avoid the policy (*People v. Liverpool & London & Globe Ins. Co.*, 2 Thomp. & C. [N. Y.] 268). Where the company is a mutual one, and the by-laws make it the duty of the surveyor to examine the premises and give a correct description thereof to the secretary (*Satterthwaite v. Mutual Benefit Ins. Ass'n*, 14 Pa. 393), avoidance for concealment of facts relating to the use of the property cannot be predicated on the failure of the insured to disclose. Failure to disclose the vacancy of the property will not avoid the policy, in the absence of any inquiry as to occupancy, according to *Short v. Home Ins. Co.*, 90 N. Y. 16, 43 Am. Rep. 138. This doctrine is apparently approved in *Slobodisky v. Phenix Ins. Co.*, 53 Neb. 816, 74 N. W. 270.

(e) Effect of false statement or concealment as dependent on intent and materiality.

The general doctrine that an unintentional false statement as to occupancy, not a warranty, will not avoid the policy, is asserted in *National Bank v. Union Insurance Co.*, 88 Cal. 497, 26 Pac. 509, 22 Am. St. Rep. 324; and a similar principle was probably the basis of the decision in *Petty v. Mutual Fire Ins. Co.*, 111 Iowa, 358, 82 N. W. 767. An unintentional concealment will not avoid the policy, especially where the insured has no knowledge of the exact use and occupancy of the building.

Reference may be made to *National Bank of D. O. Mills & Co. v. Union Ins. Co.*, 88 Cal. 497, 26 Pac. 509; *National Fire Ins. Co. v. United States Building & Loan Ass'n's Assignee*, 21 Ky. Law Rep. 1207, 54 S. W. 714; *Hall v. People's Mut. Ins. Co.*, 6 Gray (Mass.) 185; *Boggs v. America Ins. Co.*, 30 Mo. 63.

That the knowledge of the insured is an important element seems also to be conceded in *Loehner v. Home Mutual Ins. Co.*, 17 Mo. 247, and *Weigle v. Cascade Fire & Marine Ins. Co.*, 12 Wash. 449, 41 Pac. 53.

When the statement as to the use and occupancy of the premises is a warranty, it will be assumed to be material under the general rule

The rule is applied in *Loehner v. Home Mutual Ins. Co.*, 17 Mo. 247; *Dougherty v. Greenwich Ins. Co. of City of New York*, 42 Atl. 485, 64 N. J. Law, 716; *Thomas v. Fame Ins. Co.*, 108 Ill. 91, affirming 10 Ill. App. 545; *Martin v. State Ins. Co.*, 44 N. J. Law, 485, 43 Am. Rep. 897.

If special inquiries are made as to the use and occupancy, the facts must be regarded as material, whether warranties or not.

Wilson v. Conway Fire Ins. Co., 4 R. I. 141; *Fame Ins. Co. v. Thomas*, 10 Ill. App. 545, affirmed in 108 Ill. 91; *Mullin v. Vermont Mut. Fire Ins. Co.*, 54 Vt. 223.

But, where the insurer did not inquire of the insured what the building contained besides the insured property (*Campbell v. American Fire Ins. Co.*, 73 Wis. 100, 40 N. W. 661), he cannot claim that it contained other property, increasing the risk, unless he can show that the insured concealed the fact fraudulently.

If the use or occupancy of the building is such as will make the risk more hazardous, a false statement or concealment in regard thereto will, of course, avoid the policy. The theory of the cases is that by the false statement or failure to disclose the insurer was induced to issue the policy, when if the truth were known the risk would have been declined, or accepted only at a higher premium. Thus, in *Goddard v. Monitor Mut. Fire Ins. Co.*, 108 Mass. 56, 11 Am. Rep. 307, where the property was described as a machine shop, when in fact it was an organ manufactory, it was held that, as organ manufactories are more liable to destruction by fire than machine shops, the representation was material, and it made no difference that it was made accidentally, or even that the insured did not know the representation was made. The insurers were willing to insure a machine shop and supposed they were doing so. They did not insure an organ factory, which was a different and more hazardous risk. Where the building was insured as a country store (*Deweese v. Manhattan Ins. Co.*, 35 N. J. Law, 366), and it appeared that part of the building was occupied as a private stable, this being designated as an extrahazardous use, the policy was avoided.

The principle is also illustrated in *Franklin Fire Ins. Co. v. Martin*, 40 N. J. Law, 568, 29 Am. Rep. 271, *Sarsfield v. Metropolitan Ins. Co.*, 61 Barb. (N. Y.) 479, 42 How. Prac. 97, and *Lappin v. Charter Oak Fire & Marine Ins. Co.*, 58 Barb. (N. Y.) 325.

Even if the undisclosed use is within the same class of hazards as the use disclosed, it will not affect the question. Thus, in *Lee v. Howard Fire Ins. Co.*, 3 Gray (Mass.) 583, where the fact that the building, in addition to certain uses disclosed, was also used as a gristmill was concealed, the disclosed and undisclosed uses both being classed as special hazards, the court said that it did not affect the result that the additional unauthorized use was for a purpose comprehended within

the same class of hazards as that which was specified in the policy. The manifest purpose was to prevent any use of the premises for an occupation or business included in any of the classes of risks, whether hazardous, extrahazardous, or special. It was not intended to limit the insured in the use of his property to the same class of risks as those specified in the policy, and to allow him to change the mode of its occupation or appropriate the premises to additional uses of the same grade of hazard at his pleasure. The objection was to prevent the accumulation of hazardous occupations in the same premises. Each distinct use of the building might, in the opinion of the insurers, increase the risk, whether the additional use was within the same kind of hazard, or belonged to a higher or a lower class.

A different view seems to have been taken in the well-known case of *Delonguemare v. Tradesmen's Ins. Co.*, 2 N. Y. Super. Ct. 629, where the ordinary rates of premium ranged from 22 to 75 cents per \$100, with an additional charge of 25 cents per \$100 for risks deemed extrahazardous, and a provision that special hazards would be charged as special rates. The rate charged was not only the highest rate for extrahazardous risks, but also an additional sum, which covered special risks. The court held, therefore, that, as the policy covered special hazards, it could not be assumed that the use undisclosed would have influenced the insurer to increase the premium or decline the risk. So, in *American Cent. Ins. Co. v. Nunn* (Tex. Civ. App.) 79 S. W. 88, the fact that insured did not disclose that gambling rooms were connected with his saloon was held not to be a fatal concealment, in the absence of anything to show that such a connection was regarded as increasing the risk to the knowledge of the insured; no inquiry having been made. In *Boardman v. New Hampshire Mutual Fire Ins. Co.*, 20 N. H. 551, where the fact undisclosed was advantageous to the insurer, the court held that avoidance could not be predicated thereon. In *Camden Consolidated Oil Co. v. Ohio Ins. Co.*, 4 Fed. Cas. 1126, it was held that if the property was properly described the policy would be binding, though the company was mistaken as to the extent of the danger of fire to which the property was subject. That a false statement as to occupancy will not avoid, if the different use is not material, is asserted in *New England Fire & Marine Ins. Co. v. Wetmore*, 32 Ill. 221.

(d) Truth or falsity of statements as to use and occupancy.

In the leading case of *Jennings v. Chenango County Mut. Ins. Co.*, 2 Denio (N. Y.) 75, where the statements were regarded as express warranties, the building was represented as occupied as a gristmill.

There was a small turning lathe and some carpenter's tools, with a work bench, in the mill. The court said that, if these tools were used for purposes other than the mere repairs necessary in the mill, such use would show a breach of the warranty as to the occupation of the premises; and as in fact there were in this case mechanical operations carried on by means of the turning lathe and tools, other than merely repairing the mill, the warranty was broken. In *Wilson v. Hampden Fire Ins. Co.*, 4 R. I. 159, the insured stated, in effect, that there was but one proprietor of the premises and that the works were operated by a tenant. He was then asked whether the works were immediately superintended by one of the proprietors and answered in the affirmative. In fact, they were superintended by the tenant, who owned a portion of the machinery. The court held that, as the insured had practically stated there was but one proprietor, he may well have understood the question whether the works were operated by one of the proprietors to have reference to the tenant, as well as the real proprietor. Consequently, his answer, being to an ambiguous question, cannot be said to be false. In *Peoria Marine & Fire Ins. Co. v. Perkins*, 16 Mich. 380, the statement was that the building containing the property insured was used for stores. The preliminary proofs of loss showed that half the building was used as one store, the other half as another store, and that the second floor and garret were used as sleeping rooms. The court held that the statement in the preliminary proofs would be satisfied if the tenants themselves slept occasionally in the rooms over the stores. Consequently, in the absence of proof that such was not the fact, it could not be said that the statement was falsified. Where no representation as to use was made, as in *Petty v. Mutual Fire Ins. Co.*, 111 Iowa, 358, 82 N. W. 767, but the agent was in the building and could not help seeing that the business conducted there was liquor selling, it was held that it could not be contended that there was a misrepresentation as to the occupancy, because the saloon was not conducted strictly in compliance with law. Failure to disclose that the building is occupied as a disorderly house does not avoid the policy, when there is no fraud or positive representation.

National Fire Ins. Co. v. United States Building & Loan Ass'n's Assignee, 21 Ky. Law Rep. 1207, 54 S. W. 714; *Hall v. People's Mut. Fire Ins. Co.*, 6 Gray (Mass.) 185.

On the other hand if the insured has knowledge of the fact, he must disclose it, according to *Weigle v. Cascade Fire & Marine Ins. Co.*, 12 Wash. 449, 41 Pac. 53.

A statement that the first floor of a block is "occupied as stores" is not regarded (*Carter v. Humboldt Fire Ins. Co.*, 17 Iowa, 456) as a statement that all the rooms are actually occupied as stores, and therefore the fact that some of the rooms were vacant does not render the statement false. The expression must be construed as meaning that the rooms are not and will not be used for any other kind of business. In *Insurance Co. v. O'Connell*, 34 Ill. App. 357, the policy described the building as a barn occupied by B. as a "tenant." The testimony showed that B. had not rented the barn, but it had been left in his charge, and he had the key thereto. The court held that, as he had the key and was rightfully invested with the care and possession of the building, it was immaterial that he did not live on the same lot, or even in the same town; that it was not necessary that there should be a formal hiring or leasing of the property. Where it was stated that the store was occupied by the insured (*Fire Association v. Colgin* [Tex. Civ. App.] 33 S. W. 1004), the representation was not falsified by the fact that a milliner occupied a part of the store, especially as the facts showed that she belonged to the establishment.

The same question was involved in *Scottish Union Ins. Co. v. Colgin* (Tex. Civ. App.) 33 S. W. 1005, and *Hartford Fire Ins. Co. v. Same*, *Id.*

Where the description was that the building was "occupied as a boarding house" (*Martin v. State Ins. Co.*, 44 N. J. Law, 485, 43 Am. Rep. 397), the court held that the statement was not falsified by the fact that there was a bar and billiard room in the building. The distinctive characteristic of the house was that of a boarding house, rather than that of a hotel or inn, since it did not afford entertainment to transients, and the presence of a bar and billiard room were not inconsistent with such character. Though their existence rendered the description incomplete, it did not necessarily make it false. In *Menk v. Home Mutual Ins. Co.*, 76 Cal. 50, 14 Pac. 837, 18 Pac. 117, 9 Am. St. Rep. 158, the application declared that the first story of the building was occupied as a brewery, the second story as a lodging house, and "a family residence in the rear." The application further stated that the second story was occupied by a tenant as a lodging house. The company claimed that the first statement was a warranty that the applicant resided with his family in the second story; but the court took the position that there was no representation that the applicant personally resided there.

A description of the use and occupancy of a building includes the ordinary uses incident thereto. This is the principle underlying *Col-*

lins v. Charlestown Mut. Fire Ins. Co., 10 Gray (Mass.) 155, where the building was described as used for the "manufacture of lead pipe only." It appeared that the attic of the building was used for the manufacture of reels on which the lead pipe was coiled. It was said that, if this manufacture of reels was a necessary incident of the business, it would not avoid the policy, though the mere fact that it was more convenient to make reels on the premises would not be sufficient to authorize such use. Similarly, in *Keeney v. Home Ins. Co.*, 71 N. Y. 396, 27 Am. Rep. 60, where the business was described as the manufacture of bath tubs, it was contended that the policy was avoided for the reason that the insured carried on the business of planing and sawing lumber on the insured premises. In fact, the business of planing and sawing lumber was carried on by the insured on adjacent premises, from which the shavings were conducted by a tube to the boiler room on the insured premises. The court held that this did not show that the business of planing and sawing lumber was carried on in the insured premises. Where the policy insured plaintiffs' stock as rope makers, and described the building containing such stock as "occupied as a storehouse," as in the leading case of *Wall v. East River Ins. Co.*, 7 N. Y. 370, the fact that a part of the building was used for hackling hemp and spinning it into rope yarn avoided the policy, though the building was partly occupied as a storehouse.

Where the policy, issued in July, described the building as used for the storage of ice, it was held (*Dolliver v. St. Joseph Fire & Marine Ins. Co.*, 131 Mass. 39) that the representation was not a warranty that ice was actually stored in the building when the policy was written. It was merely descriptive of the business ordinarily carried on in such building. Similarly, in *Louck v. Orient Ins. Co.*, 176 Pa. 638, 35 Atl. 247, 33 L. R. A. 712, it was held that a statement that a manufactory is occupied is not a warranty that it is in operation.

(c) Same—Dwelling house.

In accord with the principle asserted in the *Dolliver Case*, cited in the last subdivision, is the doctrine that a description of the insured premises as a dwelling house is not a warranty of actual occupancy as such, but merely that the building shall be used for that purpose exclusively. It is merely a warranty or representation that the house was built for the purpose of a dwelling.

This is asserted in *Slobodsky v. Phenix Ins. Co.*, 53 Neb. 816, 74 N. W. 270; *Browning v. Home Ins. Co. of Columbus, Ohio*, 6 Daly (N. Y.) 522; *Hill v. Hibernia Ins. Co.*, 10 Hun (N. Y.) 26; *Browning v. Home Ins. Co.*, 71 N. Y. 509, 27 Am. Rep. 86; *Woodruff v. Im-*

perial Fire Ins. Co., 83 N. Y. 133; *Lennox v. Greenwich Ins. Co.*, 2 Pa. Super. Ct. 431, 39 Wkly. Notes Cas. 188; *Cumberland Valley Mutual Protection Co. v. Douglas*, 58 Pa. 419, 98 Am. Dec. 298.

On the other hand, it was held, in *Hamburg-Bremen Fire Ins. Co. v. Lewis*, 4 App. D. C. 66, that the acceptance of a policy insuring a building occupied as a dwelling is a warranty that the building is so occupied at the time. Where the statement is that the building is "occupied as a dwelling," this must be construed as a warranty of actual occupancy.

Alexander v. Germania Ins. Co., 66 N. Y. 464, 23 Am. Rep. 76, reversing 2 Hun, 655, 5 Thomp. & C. 208; *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283, affirming 6 Hun, 353. This is also the rule governing *Boyd v. Vanderbilt Ins. Co.*, 90 Tenn. 212, 16 S. W. 470, 25 Am. St. Rep. 676, and *Alple v. Boston Ins. Co.* (Minn.) 100 N. W. 8.

A similar principle controlled *Pottsville Mut. Fire Ins. Co. v. Fromm*, 100 Pa. 347, where the insured stated that he dwelt in the house, though in fact it was not finished and was never occupied.

The use of premises as a grocery store is inconsistent and incompatible with their use as a dwelling (*Dougherty v. Greenwich Ins. Co.*, 64 N. J. Law, 716, 42 Atl. 485). So, also, is the use of the building for basket making (*Merwin v. Star Fire Ins. Co.*, 7 Hun [N. Y.] 659, affirmed without opinion in 72 N. Y. 603), and use as a billiard saloon (*Sarsfield v. Metropolitan Ins. Co.*, 61 Barb. [N. Y.] 479, 42 How. Prac. 97). On the other hand, where the policy described the building as a dwelling, the court held (*Niagara Fire Ins. Co. v. Johnson*, 4 Kan. App. 16, 45 Pac. 789), that such statement was merely descriptive, and not a warranty that the building was so used at the time, so as to avoid the policy if it appeared that it was used for school purposes. According to *Planters' Ins. Co. v. Sorrels*, 1 Baxt. (Tenn.) 352, 25 Am. Rep. 780, it does not avoid a policy on a house insured as a dwelling that the building was at the time occupied as a boarding house.

Where a building, formerly used as a factory and insured as such, was subsequently occupied throughout as a dwelling house, it is not a misrepresentation, in the application for insurance thereon at dwelling house rates, to state that the building is a dwelling house (*Mitchell v. Niagara Fire Ins. Co.*, 91 Hun, 287, 36 N. Y. Supp. 204). In *Kentucky & Louisville Mut. Ins. Co. v. Southard*, 8 B. Mon. (Ky.) 637, the building was described as a dwelling house of eight rooms. One room was used as a kitchen, and it was contended that the policy was avoided, as the entire house was not used as a dwelling. The court said, however, that the terms "dwelling house" and "kitchen" were not of such precise

and definite meaning that a room in a dwelling could not be used as a kitchen. But a hotel does not become a dwelling house by the occupancy of a caretaker pending negotiations to sell (*Bennett v. Commercial Assur. Co.*, 162 Mass. 29, 37 N. E. 672).

(f) Use and occupancy of building containing personal property insured.

In *Howard Fire & Marine Ins. Co. v. Cornick*, 24 Ill. 455, the policy covered only personal property contained in a certain building. The building was not insured, but the question was presented whether a false representation as to the use of the building rendered the policy void. The court took the position that a representation as to something independent of the property insured could not affect the validity of the contract. The conditions of the policy as to occupancy manifestly related only to insurance on buildings. The condition relating to the insurance of goods required only a description of the building containing them, and did not require any statements as to the occupancy of such buildings. It was said, therefore, that any representation as to the occupancy of the building was so far independent of the property insured that a false statement could not be regarded as avoiding the policy. Nevertheless there is no doubt that the rule discussed in the preceding subdivisions applies with equal force when the subject of an insurance is personal property and the representations or concealments refer to the use and occupancy of the buildings in which such property is contained.

Reference may be made to the following cases involving policies on personal property: *Prudhomme v. Salamander Ins. Co.*, 27 La. Ann. 695; *Boggs v. America Ins. Co.*, 30 Mo. 63; *Dougherty v. Greenwich Ins. Co. of City of New York*, 64 N. J. Law, 716, 42 Atl. 485; *Wall v. East River Ins. Co.*, 7 N. Y. 370, overruling *Same v. Howard Ins. Co.*, 14 Barb. 383; *Same v. East River Ins. Co.*, 10 N. Y. Super. Ct. 264; *Satterthwaite v. Mutual Benefit Ins. Ass'n*, 14 Pa. 393; *Liverpool, London & Globe Ins. Co. v. Colgin* (Tex. Civ. App.) 84 S. W. 291; *Mullin v. Vermont Mut. Fire Ins. Co.*, 54 Vt. 223.

(g) Pleading and practice.

The general principle that the falsity of a statement as to the use of the building insured must be pleaded in order to be available was asserted in *Mayor, etc., of New York v. Brooklyn Fire Ins. Co.*, 3 Abb. Dec. (N. Y.) 251. Nor does it affect the question that the facts relating to such use and occupancy are brought out on the cross-examination of plaintiff's witnesses, according to *Mulry v. Mohawk Valley Ins. Co.*, 5 Gray (Mass.) 541, 66 Am. Dec. 380. It was said in

Girard Fire Ins. Co. v. Boulden (Ala.) 11 South. 773, that a plea of false representations as to use of the property must set out the representations and allege wherein they are untrue. It is necessary, however, only to allege the substantial facts, and not the minute details, which the evidence might possibly show. In *Dwelling House Ins. Co. v. Brewster*, 43 Neb. 528, 61 N. W. 746, the answer pleaded a breach of warranty as to the use of the building as a dwelling house. The reply alleged estoppel on the part of the defendant by reason of knowledge of the character of the building, and concluded with a general denial of each and every allegation in the answer. It was held that this was in effect an admission of the breach as to the use of the building.

Where the building was described as a general salesroom (*Warshawky v. Anchor Mut. Fire Ins. Co.*, 98 Iowa, 221, 67 N. W. 237), and there was some evidence tending to show that the insured lived in a part of the building, it was proper to exclude testimony as to declarations made by the insured as to the use he was making of the building as a place in which to live. But the court held that testimony as to whether such use of the premises increased the risk should have been admitted. Where the legality of the business conducted in the premises is not in issue (*Petty v. Mutual Fire Ins. Co.*, 82 N. W. 767, 111 Iowa, 358), it is error to allow a witness to testify that an unlawful business increased the risk. Proofs of loss are not conclusive as to the occupancy of the premises (*Parmelee v. Hoffman Fire Ins. Co.*, 54 N. Y. 193). In the absence of evidence that the use undisclosed is material, the court will not presume it to be so (*Delonguemare v. Tradesmen's Ins. Co.*, 2 N. Y. Super. Ct. 629).

Whether there is a breach of warranty as to the occupancy of the property is a question for the jury (*Parmelee v. Hoffman Ins. Co.*, 54 N. Y. 193). The materiality of the facts relating to the use and occupancy of property is for the jury.

Reference may be made to *Hardman v. Firemen's Ins. Co.* (C. C.) 20 Fed. 594; *Warshawky v. Anchor Mut. Fire Ins. Co.*, 98 Iowa, 221, 67 N. W. 237; *Lyon v. Commercial Ins. Co.*, 2 Rob. (La.) 266; *Loehner v. Home Mut. Ins. Co.*, 19 Mo. 628; *Franklin Fire Ins. Co. v. Martin*, 40 N. J. Law, 568, 29 Am. Rep. 271.

Where the issue is whether there was a misrepresentation as to occupancy, the verdict of the jury will not be disturbed (*Blass v. Agricultural Ins. Co.*, 18 App. Div. 481, 46 N. Y. Supp. 392). So, where there is a conflict of evidence, and the jury decides that there was no increase of the risk, the verdict will not be disturbed on appeal (*Hardman v. Firemen's Ins. Co.* [C. C.] 20 Fed. 594).

12. EFFECT OF MISREPRESENTATION, BREACH OF WARRANTY, OR CONCEALMENT AS TO VICINITY OF OTHER BUILDINGS AND USE OF ADJACENT PROPERTY.

- (a) Statements as warranties or representations.
- (b) Effect of false statements or concealments.
- (c) Same—Materiality.
- (d) Same—Knowledge and intent of applicant.
- (e) Truth or falsity of statements.
- (f) Same—Doctrine of *Gates v. Madison County Mut. Ins. Co.*
- (g) Same—Knowledge of insured.
- (h) Same—Character and distance of exposure.
- (i) Same—Construction of questions and answers.
- (j) Insurance on personal property.
- (k) Questions of practice.

(a) Statements as warranties or representations.

For the purpose of determining to what extent the insured property is exposed to danger from fire, it is regarded important that the surroundings of the property should be disclosed, and that the insurer should be advised as to the existence of other buildings or like structures near the insured property and the use that is made of such adjoining premises. The insured is therefore usually asked for information on this point, and required to disclose whether there are other buildings within certain prescribed distances, and in some instances the character of such buildings. His answers to these questions are, of course, regarded as warranties or as representations according to the circumstances, under the rules heretofore discussed as determining the distinction between warranties and representations.

In a leading case involving this question (*Burritt v. Saratoga County Mut. Fire Ins. Co.*, 5 Hill [N. Y.] 188, 40 Am. Dec. 345) the court held that, as the application was referred to as forming a part of the policy, statements as to the distance of other buildings from the one insured were warranties, which must be literally true or the policy avoided. A similar doctrine was asserted in *Jennings v. Chenango County Mut. Ins. Co.*, 2 Denio (N. Y.) 75, also regarded as a leading case on this phase of the question.

Statements as to the vicinity of other buildings are regarded as warranties in *Tebbetts v. Hamilton Mut. Ins. Co.*, 1 Allen (Mass.) 305, 79 Am. Dec. 740; *Hardy v. Union Mut. Fire Ins. Co.*, 4 Allen (Mass.) 217; *Trench v. Chenango County Mut. Ins. Co.*, 7 Hill (N. Y.) 122; *Sexton v. Montgomery County Mut. Ins. Co.*, 9 Barb. (N.

Y.) 191; *Baldwin v. Citizens' Ins. Co.*, 60 Hun, 389, 15 N. Y. Supp. 587; *Chaffee v. Cattaraugus County Mut. Ins. Co.*, 18 N. Y. 876; *Brown v. Chatteraugus County Mut. Ins. Co.*, Id. 885; *Mamluk v. Franklin*, 65 N. Y. 556; *Burleigh v. Gebhard Fire Ins. Co.*, 90 N. Y. 220; *Chrisman v. State Ins. Co.*, 16 Or. 283, 18 Pac. 466; *Pottsville Mut. Fire Ins. Co. v. Horan*, 89 Pa. 438.

Where the policy contained a clause requiring the lumber insured to be separated from the mill by a clear space of 200 feet, as in *Keller v. Liverpool & London & Globe Ins. Co.*, 27 Tex. Civ. App. 102, 65 S. W. 695, the condition was regarded as in the nature of a warranty.

On the other hand, in the well-known case of *Dennison v. Thomaston Mut. Ins. Co.*, 20 Me. 125, 37 Am. Dec. 42, the statements as to the vicinity of other buildings were considered as representations only.

Such is also the doctrine of *Roth v. City Ins. Co.*, 20 Fed. Cas. 1255; *Commonwealth Ins. Co. v. Monninger*, 18 Ind. 352; *Richmondville Union Seminary v. Hamilton Mut. Ins. Co.*, 14 Gray (Mass.) 459; *Ring v. Phoenix Assur. Co.*, 145 Mass. 426, 14 N. E. 525; *Stebbins v. Globe Ins. Co.*, 2 N. Y. Super. Ct. 675; *Clinton v. Hope Ins. Co.*, 45 N. Y. 454; *Vilas v. New York Central Ins. Co.*, 72 N. Y. 590, 28 Am. Rep. 186, affirming 9 Hun, 121.

(b) Effect of false statements or concealments.

The general principle that a breach of warranty avoids the policy, irrespective of the materiality of the fact, applies to express warranties relating to the vicinity of other buildings to the property insured.

Reference may be made to *Jennings v. Chenango County Mut. Ins. Co.*, 2 Denio (N. Y.) 75; *Trench v. Chenango County Mut. Ins. Co.*, 7 Hill (N. Y.) 122; *Chrisman v. State Ins. Co.*, 16 Or. 283, 18 Pac. 466; *Keller v. Liverpool & London & Globe Ins. Co.*, 27 Tex. Civ. App. 102, 65 S. W. 695; *Brown v. Chatteraugus County Mut. Ins. Co.*, 18 N. Y. 885.

Similarly, it follows from general principles that, if the statement is not a warranty, but a representation, in order to avoid the policy, it must be shown that the fact is material.

It is sufficient to refer to *Ring v. Phoenix Assur. Co.*, 145 Mass. 426, 14 N. E. 525; *Roth v. City Ins. Co.*, 20 Fed. Cas. 1255.

So it was said, in *Huntley v. Perry*, 38 Barb. (N. Y.) 569, that a misrepresentation will not render the policy absolutely void, but only voidable at the election of the insurer.

In a leading case (*Burritt v. Saratoga County Mut. Fire Ins. Co.*, 5 Hill [N. Y.] 188, 40 Am. Dec. 345) the broad principle was laid down that, irrespective of the question whether a partial statement of the exposures could be regarded as a breach of warranty or a misrepresentation, the duty rests on the insured, in response to an inquiry, to make a full disclosure of all buildings within the distance prescribed in the question, and the failure to disclose amounts to a concealment, which avoids the policy.

The rule thus announced was subsequently approved in *Wilson v. Herkimer County Mut. Ins. Co.*, 6 N. Y. 53, and in *Gates v. Madison County Mut. Ins. Co.*, 8 Barb. (N. Y.) 73; but the latter case was reversed by the Court of Appeals in *Gates v. Madison County Mut. Ins. Co.*, 2 N. Y. 43.

In the *Gates Case* the inquiry was as to the "distance of other buildings, if less than 10 rods." In response to this, the application stated the nearest buildings in each direction, but did not mention all buildings within the prescribed distance. As the insurers accepted the answer as it was given, the court held that it would be presumed that they intended by the question to ask for the very information they obtained, and concealment could not be predicated on the failure to disclose more fully. These principles were asserted by the Court of Appeals in a subsequent appeal in the same case, reported in 5 N. Y. 469, 55 Am. Dec. 360, and it was also said that, in the absence of inquiry, it was not the duty of the insured to state that he intended to erect a barn on the premises.

In the absence of special inquiry, a failure to disclose all the exposures will not avoid the policy, if the nearest are disclosed.

Hall v. People's Mut. Fire Ins. Co., 6 Gray (Mass.) 185; *Clark v. Union Mut. Insurance Co.*, 40 N. H. 333, 77 Am. Dec. 721.

So, where there was no application (*Commonwealth v. Hide & Leather Ins. Co.*, 112 Mass. 136, 17 Am. Rep. 72), the court said that a failure to disclose the use of a dummy engine near the property insured would not avoid the policy. If the policy is issued in spite of the fact that the question as to other exposures is left unanswered, concealment cannot be predicated thereon (*Armenia Ins. Co. v. Paul*, 91 Pa. 520, 36 Am. Rep. 676). It appeared in this case that the buildings were situated within nine feet of a railroad track. The proximity of the track was not communicated; the application disclosing merely that the building was situated on the line of the railroad near the depot.

The court held that this was a sufficient warning to the company that the location was one of danger.

(c) Same—Materiality.

The principle that matters inquired for must be regarded as material is applied to statements as to the vicinity of other buildings.

Tebbetts v. Hamilton Mut. Ins. Co., 1 Allen (Mass.) 305, 79 Am. Dec. 740; *Hardy v. Union Fire Ins. Co.*, 4 Allen (Mass.) 217.

Where the stipulation is that the statements are true, so far as material to the risk, the effect of an incorrect or insufficient disclosure as to other exposures is, of course, dependent on the materiality of the facts undisclosed (*Mulville v. Adams* [C. C.] 19 Fed. 887).

Where there is no representation or warranty as to the existence of other buildings within the prescribed distance, the effect of a failure to disclose a certain building is dependent on the materiality to the risk.

This principle is stated in *Dennison v. Thomaston Mutual Ins. Co.*, 20 Me. 125, 37 Am. Dec. 42; *Richmondville Union Seminary v. Hamilton Mut. Ins. Co.*, 14 Gray (Mass.) 459; *Bostwick v. Bass*, 99 Mass. 469; *Moore v. Atlantic Mut. Ins. Co.*, 56 Mo. 343; *Masters v. Madison County Mut. Ins. Co.*, 11 Barb. (N. Y.) 624; *Chase v. Hamilton Mut. Ins. Co.*, 22 Barb. (N. Y.) 527.

The general principle that the effect of a failure to disclose adjoining exposures depends on materiality to the risk is asserted, also, in *Davis v. Aetna Mut. Fire Ins. Co.*, 67 N. H. 335, 39 Atl. 902; *Id.*, 68 N. H. 315, 44 Atl. 521, where the Massachusetts statute¹ declaring that no false statement shall avoid the policy, unless made with actual intent to deceive, or unless the matter represented increased the risk of loss, governed the policy; but it was pointed out that an increase of risk means the actual physical risk of fire, and does not refer to ultimate money loss to the insurer. It was said, in *Tesson v. Atlantic Mut. Ins. Co.*, 40 Mo. 33, 93 Am. Dec. 293, that the extent of variation from the true state of the facts is an important factor.

In the case of *Burritt v. Saratoga County Mut. Fire Ins. Co.*, 5 Hill (N. Y.) 188, 40 Am. Dec. 345, stress seems to be laid on the fact that the building undisclosed was a more hazardous risk than the one insured. This affords a foundation for the principle, asserted in *Burleigh v. Gebhard Fire Ins. Co.*, 90 N. Y. 220, that, to render an incorrect or insufficient disclosure as to the vicinity or other build-

¹ Pub. St. c. 119, § 181; Rev. Laws 1902, c. 118, § 21.

ings material, the existence of such buildings must constitute an exposure to danger and increase the risk of fire.

The rule apparently governed *Cole v. Germania Fire Ins. Co.*, 99 N. Y. 36, 1 N. E. 38, and it was also applied in *Baldwin v. Citizens' Ins. Co.*, 60 Hun, 389, 15 N. Y. Supp. 587, though the statements were regarded as warranties. A similar principle seems to have governed in *Mulville v. Adams* (C. O.) 19 Fed. 887, and *Pottsville Mutual Fire Ins. Co. v. Horan*, 89 Pa. 433.

In the *Horan* Case it was contended that the building not mentioned was used as a carpenter shop, and the court concedes that if such was the fact there was clearly a breach of warranty, thus making the use to which the undisclosed building was put an important element.

This is also the fact in *Richmondville Union Seminary v. Hamilton Mut. Ins. Co.*, 14 Gray (Mass.) 459. In *Masters v. Madison Mut. Ins. Co.*, 11 Barb. (N. Y.) 624, where the policy covered a mill, the fact that the mill was destroyed by fire during a dry season without injuring other buildings in the vicinity, the existence of which was not disclosed, was regarded by the court as simply evidence that the risk of the mill was not increased by the existence of such other buildings.

(d) Same—Knowledge and intent of applicant.

If answers are qualified that they are true so far as known to the applicant, the warranty is not of the absolute truth of the statement, and to avoid the policy it must appear that he knew that there were buildings within the prescribed distance other than those disclosed by him.

This is the rule laid down in *Wilkins v. Germania Fire Ins. Co.*, 57 Iowa, 529, 10 N. W. 916; *Mulville v. Adams* (C. O.) 19 Fed. 887; *Noone v. Transatlantic Ins. Co.*, 88 Cal. 152, 26 Pac. 103.

Where the statement as to other exposures is regarded as a representation (*Wright v. Hartford Fire Ins. Co.*, 36 Wis. 522), the intent of the insured is regarded as an important factor. In the well-known case of *Dennison v. Thomaston Mut. Ins. Co.*, 20 Me. 125, 37 Am. Dec. 42, it was said that, to avoid the policy, where the misrepresentation or failure to disclose was inadvertent, the existence of the undisclosed or falsely described exposure must not only be material to the risk, but the materiality must be known to the insured. In *Ring v. Phoenix Assur. Co.*, 145 Mass. 426, 14 N. E. 525, a statement that there were no other houses within 100 feet was shown to be false, and it was held that, if the existence of other buildings increased the risk, the fact that the misrepresentation was not made with

intent to deceive did not change its effect, in view of Pub. St. c. 119, § 181, providing that a misrepresentation shall not avoid the policy, unless made with intent to deceive or unless it increased the risk. In *Burritt v. Saratoga County Mut. Fire Ins. Co.*, 5 Hill (N. Y.) 188, 40 Am. Dec. 345, it was held that, when inquiry is made as to other exposures, a failure to disclose will avoid the policy, irrespective of intent.

(e) Truth or falsity of statements.

In the early case of *Burritt v. Saratoga County Mut. Fire Ins. Co.*, 5 Hill (N. Y.) 188, 40 Am. Dec. 345, a condition annexed to the policy provided that an application should show the relative situation of the property insured to other buildings and the distance from each, if less than ten rods. The insured described five buildings as standing within the prescribed distance, but several other buildings, also within that distance, were not mentioned. The court held that, though the insured did not in terms say there were no other buildings than those he mentioned, he must have intended that his answer should be received and understood as affirming that fact. His answer must be construed as a warranty that there were no other buildings within the prescribed distance. Moreover, irrespective of the character of the statement as a warranty or a representation, a direct inquiry was made calling upon the insured to make a full statement concerning the distance of other buildings. In response to such an inquiry he omitted to mention several that stood within the prescribed distance, one of which, at least, was a far more hazardous risk than the building insured. This failure to disclose was undoubtedly a concealment which avoided the policy. In *Jennings v. Chenango County Mut. Ins. Co.*, 2 Denio (N. Y.) 75, where, in answer to a question calling for a disclosure as to the vicinity of other buildings and the distance from each, if less than ten rods, the insured stated that the mill was bounded by space on all sides, though in fact there was a barn about six rods from the mill, the court held that this was a clear breach of warranty avoiding the policy. The doctrine of these cases was also approved in *Wilson v. Herkimer County Mut. Ins. Co.*, 6 N. Y. 53.

(f) Same—Doctrine of *Gates v. Madison County Mut. Ins. Co.*

The question was again considered in *Gates v. Madison County Ins. Co.*, 2 N. Y. 43, and was discussed in all its phases. The application, which was made part of the policy, required a disclosure of the distance of other buildings within ten rods. The insured described certain buildings as the nearest buildings on each side. As there were other

buildings within ten rods, the insurer pleaded breach of warranty and concealment. The court said, however, that the statement of the insured related in terms only to the nearest buildings, and did not import that those buildings were the only ones within the circuit of ten rods. Viewing the statement by itself, and not as an answer to any special inquiry, it would plainly import that the buildings mentioned were the nearest on the several sides, and no other meaning could be assigned to it. It was contended that, as the statement was an answer to an inquiry calling for information as to contiguous buildings and intended to elicit full information, the insurer had a right to consider and treat it as a full answer to the inquiry. It is to be noted, however, that the inquiry was not for all buildings within ten rods, but for the distance of the insured premises from other buildings, if less than ten rods. The important point was to ascertain what space was between the buildings to be insured and those nearest thereto, if any there were at a less distance than ten rods; that being the largest range of vacant space that was deemed of any importance. It is the distance of the nearest buildings in different directions that is the important subject of inquiry. The answer of the insured must be regarded as an apt response to the question, and as making a full disclosure of the information asked for. The use of the term "nearest" in the answer implied that there were or might be other buildings more remote, but within the distance prescribed. If the insurers accepted the answer as given, and issued the policy thereon, they must be regarded as having accepted it as sufficient. The court calls attention to the fact that the insurers must have so understood the question and answer, as it was not until after the decision of the *Burritt* Case that the present ground of defense was taken. The court also distinguishes this case from the *Jennings* Case, as in the latter there was an actual concealment. The principles thus laid down were reaffirmed on a subsequent appeal, reported in 5 N. Y. 469, 55 Am. Dec. 360.

That a statement of the nearest buildings, without professing to do more, is not a warranty that there are no other buildings within the prescribed limits, is also asserted in *Masters v. Madison County Mut. Fire Ins. Co.*, 11 Barb. (N. Y.) 624. On the other hand, where the application contained the additional clause, "All exposures within 10 rods are mentioned," the principles laid down in the *Gates* Case were properly regarded as inapplicable.

Chaffee v. Cattaraugus County Mut. Ins. Co., 18 N. Y. 376; *Kennedy v. St. Lawrence County Mut. Ins. Co.*, 10 Barb. (N. Y.) 285; *Brown v. Chattaraugus Mut. Ins. Co.*, 18 N. Y. 385.

In the Brown Case, however, a second policy was involved, in which it was said that the insured building was in the rear of a dwelling and a store, "both of which are contiguous to other buildings." This the court regarded as a sufficient disclosure under the terms of the policy.

(g) Same—Knowledge of insured.

An important and interesting case is *Dennison v. Thomaston Mut. Ins. Co.*, 20 Me. 125, 37 Am. Dec. 42. It was contended that, in answer to the question as to the distance of other buildings from the premises insured, there was a misrepresentation, in that the insured answered that there were on the east side of the property small one-story woodsheds, which would not endanger the buildings insured if they should burn. It appeared that small sheds projected out from the rear of the brick block insured, leaving a passageway 14 feet wide between them and certain two-story wooden buildings facing on the other street. The fire which consumed the insured property originated in these two-story wooden buildings. The court regarded the misrepresentation complained of as merely a matter of opinion, which, if honestly maintained and honestly communicated, would not avoid the policy, however erroneous it might be. The decision is based on the theory that a false statement, made inadvertently, will not avoid the policy, unless it is material, and unless the insured should have known that it was material. The mere fact that the fire originated in the adjacent buildings and was actually communicated to the insured property does not show conclusively that the existence of the buildings was a fact material to the risk. It is essential to determine whether the insured was bound to have known that a fire originating in such buildings would have endangered his property. If, as a man of ordinary capacity, he should have had such an apprehension, he should have named those buildings in reply to the interrogatory; but there is no evidence that other individuals would have anticipated such an event, and it cannot reasonably be expected that the insured should have anticipated it. He cannot be considered as culpable for not knowing it, and a fact which he could not be expected to know he could not be bound to communicate.

(h) Same—Character and distance of exposure.

The character of the undisclosed structure was regarded as a controlling factor in *Burleigh v. Gebhard Fire Ins. Co.*, 90 N. Y. 220, where personal property insured was described as contained in a frame storehouse detached at least 100 feet. There was, however, a small build-

ing about 75 feet distant from the storehouse, described as a frame building 10 by 12 feet and 7 feet high, occupied sometimes as an office, and so called. As the statement as to the situation of the building appeared on the face of the policy, it was regarded as a warranty. The court says that a fair import of the words is that the storehouse, considered by itself, is a detached building, apart from other buildings at least 100 feet; but this statement may mean detached 100 feet from any other building, whatever its size or character, or it may mean detached 100 feet from any building of such character as to constitute an exposure and increase the risk. This, it seems to the court, is a sensible and just construction. Otherwise, the existence of any building, however small or insignificant, such as an icehouse or open shed, within the prescribed distance, would operate as a breach of warranty. **The test must be whether the building within the distance named is or is not an exposure which increases the risk.** In view of these principles, the court holds that the warranty was not broken, as the evidence showed that the building standing 75 feet from the subject of the insurance was not an exposure which affected the risk.

In *White v. Mutual Fire Assur. Co.*, 8 Gray (Mass.) 566, the policy covered plaintiff's dwelling house and woodhouse, and it was stated that the house and woodhouse were connected, and that there were no other buildings within four rods. It appeared that the building designated as a woodhouse was divided into two rooms by a board partition, which did not extend to the roof. One of these rooms was designated as a carriage house. The court held that the term "woodhouse" covered and included the room used as a carriage house, and such room could not be considered a building, so as to render the statement false that there was no other building within four rods. It also appeared that within four rods there was a small structure, about three feet high and six feet in length, called by some witnesses a hoghouse and by some a henhouse. The court held that whether this was a building, within the terms of the application, depended upon the size and structure, and that, in view of the evidence, it could not be considered a building within the meaning of the statement. In *Day v. Conway Ins. Co.*, 52 Me. 60, the policy covered a paper mill. In describing the building a bleachhouse, built separate from the mill, but connected therewith by a shed-roof building, was not included, nor were they mentioned in answer to the inquiry as to other buildings within a specified distance. The court held that, if the bleachhouse and shed were a part of the mill, the description of the building was materially incorrect. If they were not part of the mill, there was a false statement in

failing to mention them as being within the prescribed distance, and the policy was void. The erection of a dyehouse at a distance of six or seven feet from the building insured was regarded, in *Cole v. Germania Fire Ins. Co.*, 99 N. Y. 38, 1 N. E. 38, an increase of risk, which should have been disclosed on renewal. In determining the distance between the insured property and a mill, under a clause requiring a clear space of one hundred feet, the insurer may, according to *Merchants' Ins. Co. v. New Mexico Lumber Co.*, 10 Colo. App. 223, 51 Pac. 174, measure from a shed attached to the mill.

(1) Same—Construction of questions and answers.

In *Susquehanna v. Perrine*, 7 Watts & S. (Pa.) 348, the application for membership made it conditional that the relative situation of the property to be insured as to other buildings, and the distance from each, if less than ten rods, should be stated. It was contended that, as several buildings were insured, the condition in the policy did not require a disclosure of the distance between the buildings covered, but only the distance between those and adjoining buildings. The court held, however, that such a construction was too literal, and as the object was to have a disclosure of every material cause of danger, whether internal or external, the distance between the buildings covered must also be disclosed. In *Allen v. Charlestown Mut. Fire Ins. Co.*, 5 Gray (Mass.) 384, the statement as to the relative situation of the insured building to other buildings was that there was a dwelling house and cabinet shop "with fifty feet." The court held that this really meant "within fifty feet," and was a sufficient statement, though the cabinet shop was, in fact, within two feet. Where the insurance is on a building described as "standing detached" (*Hill v. Hibernia Ins. Co.*, 10 Hun [N. Y.] 26), the words, not being ambiguous, cannot be limited by the alleged custom among insurance companies to construe the phrase as implying a distance of at least 25 feet. An application required the insured to describe other buildings and all other exposures to fire, and their distance from the risk and from each other, within 150 feet. A condition of the policy provided that the application should specify the situation of the building containing the goods insured with respect to the contiguous buildings, and their construction and materials. The answer disclosed several buildings within a certain distance, the nearest being given as 30 feet, but did not describe the construction or materials of which they were built. Under this state of facts it was held, in *Peoria Marine & Fire Ins. Co. v. Perkins*, 16 Mich. 380, that the issuance of a policy on such application showed a partic-

ular construction of the conditions, and afforded a basis for the inference that the buildings mentioned in the answer were not "contiguous" in any sense, requiring a statement of their construction and materials. Moreover, as the answer did not assume to describe all buildings within 150 feet, the acceptance of the application by the company affords ground for the inference that they deemed the answer sufficient.

(J) Insurance on personal property.

In the early case of *Trench v. Chenango County Mut. Ins. Co.*, 7 Hill (N. Y.) 122, the policy covered a mill and stock therein. Annexed to the policy was a condition reciting that all applications for insurance should disclose the place where the property is situated, its dimensions, materials of which it is composed, number of chimneys, etc., and its relative situation as to other buildings and distance from each, if less than ten rods. The condition was regarded as constituting a warranty that the insured had truly described all buildings within less than ten rods from the mill. Consequently, if there was a violation of the warranty so far as regards the mill and machinery, if the machinery could be regarded as part of the realty, it avoided the policy as to such mill and machinery. As to the personal property, however, the court took the position that the condition relied on by the company referred exclusively to applications for insurance on buildings; that the requirements of the condition were intelligible only when understood in reference to buildings, but could not be applied to personal property. Consequently there was no breach of the policy as to the personal property. This doctrine was subsequently approved in *Burrill v. Chenango Mut. Ins. Co.*, 1 Edm. Sel. Cas. (N. Y.) 233; the decision being based on the *Trench* Case. In *Sexton v. Montgomery County Mut. Ins. Co.*, 9 Barb. (N. Y.) 191, the property insured was a stock of goods described as being in a certain building, and representations were made as to the number of buildings within ten rods of the building in which the insured property was situated. Several buildings within that distance were not mentioned. The court questioned the rule laid down in the *Trench* Case, and regarded it as doubtful whether it was applicable where personal property only is insured, and the statement respecting other buildings within ten rods can refer only to buildings within that distance of the one in which the personal property was kept. The policy covered only personalty in *Kennedy v. St. Lawrence County Mut. Ins. Co.*, 10 Barb. (N. Y.) 285, but the court held that, in view of an answer alleging misrepresentation as to buildings within ten rods and

a reply denying that there were buildings other than those mentioned within the prescribed distance, the plaintiffs admitted by implication that they were required to set forth all buildings within ten rods, and on this ground distinguishes the case from the Trench Case.

The question whether the conditions as to the existence of other exposures applied to the insurance of personal property was discussed at length in *Wilson v. Herkimer County Mut. Ins. Co.*, 6 N. Y. 53. Assuming that the by-laws of the company involved in the Trench Case were the same as the by-laws of the present insurer, the court called attention to the fact that these by-laws, since they provided for the insurance of personal property at the same rates as the building in which such property is contained, regarded the building as the important feature in all insurance; and the insured having, in contemplation of an insurance on his personal property, recognized the materiality of the inquiry as to the situation of the building containing such property with reference to others within ten rods, his answer thereto, if false, avoided the policy though the property covered was personalty only. That the conditions as to the existence of other exposures applies in the insurance of personal property with the same effect as in the insurance of buildings appears to have been settled by this case.

The rules as to disclosure of other buildings in the vicinity have been applied to insurance on personal property in *Haley v. Dorchester Mut. Fire Ins. Co.*, 12 Gray (Mass.) 545; *Bostwick v. Bass*, 99 Mass. 469; *Peoria Marine & Fire Ins. Co. v. Perkins*, 16 Mich. 380; *Mamlok v. Franklin*, 65 N. Y. 556; *Burleigh v. Gebhard Fire Ins. Co.*, 90 N. Y. 220.

(k) Questions of practice.

The burden of proof to show the falsity of a representation as to the relative distance of other buildings and the fraudulent intent of the insured in making such false statement is on the insurer (*Wilkins v. Germania Fire Ins. Co.*, 57 Iowa, 529, 10 N. W. 916). Evidence as to the understanding among insurance companies of the meaning of the words "standing detached" was properly rejected (*Hill v. Hibernia Ins. Co.*, 10 Hun [N. Y.] 26), as there is no ambiguity in such expression. In *Davis v. Ætna Fire Ins. Co.*, 68 N. H. 315, 44 Atl. 521, which was governed by the provisions of Pub. St. Mass. c. 119, § 181, declaring that misrepresentations shall not avoid the policy unless they increase the risk, there was offered in evidence a statute of Massachusetts making railroad companies liable for fire set by their engines. The court, on the ground that the increase of risk referred to means

actual physical risk of fire, and not ultimate money loss to the company, held that the introduction of the statute was misleading, as having a tendency to confuse the jury and cause them to think that the question to be determined was, not whether the proximity of the railroad increased the risk of fire, but whether it increased the risk of money loss. In *Richmondville Union Seminary v. Hamilton Mut. Ins. Co.*, 14 Gray (Mass.) 459, it appeared that, in response to the question as to the situation of the property in relation to other buildings, the insured referred to a diagram of certain date. This diagram could only be identified by the date of a letter to which it was attached and the signature of an agent thereto. The court held that under these circumstances the insured had a right to insist that the latter should also be put in evidence, not for the purpose of proving the facts stated therein, but as containing representations by him.

Where the issue was whether the policy, in stating the distance of the insured property from other buildings, gave the distance as "six" or "oix" (*Lapeer County Farmers' Mut. Fire Ins. Ass'n v. Doyle*, 30 Mich. 159), it was for the court to say whether the written word was "oix" or "six." Whether there has been a concealment of the facts relating to the vicinity of other buildings is for the jury (*Sexton v. Montgomery Mut. Ins. Co.*, 9 Barb. [N. Y.] 191). In accordance with the general rule it may also be stated that the materiality of the relation of the risk to other exposures is for the jury.

This is asserted in *Jennings v. Chenango County Mutual Ins. Co.*, 2 Denio (N. Y.) 75; *Sexton v. Montgomery County Mut. Ins. Co.*, 9 Barb. (N. Y.) 191; *Gates v. Madison County Mut. Ins. Co.*, 2 N. Y. 43; *Davis v. Aetna Mut. Fire Ins. Co.*, 67 N. H. 335, 39 Atl. 902.

In *Haley v. Dorchester Mut. Fire Ins. Co.*, 12 Gray (Mass.) 545, the insured, being requested to state whether there was a livery barn or steam engine in the vicinity of the building insured, mentioned the steam engine, but did not disclose the existence of the livery barn. The court instructed the jury that they were to inquire whether there was a livery stable in the vicinity at the time the application was made, and were also to determine the meaning of the question and of the word "vicinity," having reference to the situation of the building in which the property insured was situated, the situation of other buildings, and the locality as ascertained. The company insisted that this instruction gave the jury liberty to find that the existence of a livery barn on the

opposite side of the street or in an adjoining building need not have been disclosed; but the court held that this contention was not tenable and that the instruction was sufficiently favorable to the insurer.

13. EFFECT OF MISREPRESENTATION OR BREACH OF WARRANTY AS TO AMOUNT AND VALUE OF INSURED PROPERTY.

- (a) Statements of value as warranties or representations.
- (b) Same—Qualified warranties.
- (c) Same—Value as matter of opinion.
- (d) Effect of overvaluation.
- (e) Same—Materiality—Open or valued policies.
- (f) Same—Intent of insured.
- (g) Same—Statutory provisions limiting effect of false statements.
- (h) Same—Valuation compared with amount of insurance.
- (i) Same—Amount or value of property not covered by policy.
- (j) Failure to disclose value.
- (k) What constitutes an overvaluation.
- (l) Questions of practice—Pleading.
- (m) Same—Evidence.
- (n) Same—Trial and review.
- (o) Conclusion.

(a) Statements of value as warranties or representations.

The character of statements as to the value of the property insured, as warranties or representations, is, of course, determined by the general rules on which the distinction rests. These rules have been applied in some cases to the effect that statements of value are to be regarded as express warranties, governed by the principles generally applying to statements of that character.

Reference may be made to *Cowan v. Phenix Ins. Co.*, 78 Cal. 181, 20 Pac. 408; *Bennett v. Agricultural Ins. Co.*, 50 Conn. 420; *American Ins. Co. v. Gilbert*, 27 Mich. 429; *Shelden v. Michigan Millers' Mut. Fire Ins. Co.*, 124 Mich. 303, 82 N. W. 1068; *Holloway v. Dwelling House Ins. Co.*, 48 Mo. App. 1; *Maddox v. Dwelling House Ins. Co.*, 56 Mo. App. 343; *Bobbitt v. Liverpool & London & Globe Ins. Co.*, 66 N. C. 70, 8 Am. Rep. 494; *Nassauer v. Susquehanna Mut. Fire Ins. Co.*, 109 Pa. 507.

But it must clearly appear that the parties intended to make the statement a warranty, or it will not be so considered.

Morotock Ins. Co. v. Fostoria Novelty Glass Co., 94 Va. 361, 26 S. E. 850; *Liverpool & London & Globe Ins. Co. v. Stern* (Tex. Civ. App.) 29 S. W. 678.

Thus, where the policy referred to the application only by the words "on the following property as described in application and survey" (*Owens v. Holland Purchase Ins. Co.*, 56 N. Y. 565), it was said that, as the reference was for description only, there was no warranty as to the value of the property. Moreover, the policy provided that, while the application should be made out by the agent, the company would not in all cases be bound by the agent's valuation, thus indicating an intent that statements of value would not be regarded as absolute warranties. In accordance with this principle, it may be stated as a rule that if the recitals are inconsistent—if the statements of value are referred to as warranties and also as representations—they must be construed as representations only.

This rule is applied in *Merchants' & Mechanics' Ins. Co. v. Schroeder*, 18 Ill. App. 216; *Commonwealth's Ins. Co. v. Monninger*, 18 Ind. 852; *Indiana Farmers' Live Stock Ins. Co. v. Rundell*, 7 Ind. App. 426, 24 N. E. 588; *Schmidt v. City & Village Fire Ins. Co.*, 55 Mich. 432, 21 N. W. 875; *Ætna Ins. Co. v. Simmons*, 49 Neb. 811, 69 N. W. 125.¹

Neither can a warranty be based on an unresponsive answer as to value, according to *Meyers v. Lebanon Mut. Ins. Co.*, 156 Pa. 420, 27 Atl. 39.

(b) Same—Qualified warranties.

In accordance with the general rule that a warranty cannot be predicated on a qualified reference to the statements of the insured is the principle laid down in *Lee v. Howard Fire Ins. Co.*, 11 Cush. (Mass.) 324, where it was said that if the application, which was referred to in the policy as a warranty, recites that it is a full and true statement of the facts "so far as the same are known to applicant and material to the risk," the statements of value are not warranties. In view of such a qualification, the warranty is only that the statement is made in the honest belief that it is true so far as it is material to the risk.

This principle is also asserted in *National Bank v. Insurance Co.*, 95 U. S. 673, 24 L. Ed. 563; *Miller v. Alliance Ins. Co. (C. C.)* 7 Fed. 649; *Fisher v. Crescent Ins. Co. (C. C.)* 33 Fed. 549; *Lindsey v. Union Mut. Fire Ins. Co.*, 3 R. I. 157; *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575, 44 Am. Rep. 177.

¹ See Maine Rev. St. 1883, c. 49, § 20; N. H. Pub. St. 1901, c. 170, § 2 (Gen. St. c. 157, § 2).

(c) **Same—Value as matter of opinion.**

It is worthy of note, moreover, that in *National Bank v. Insurance Co.*, 95 U. S. 673; 24 L. Ed. 563, the insured was required to give only the "estimated value" of the property, and the court said that, as his statement was merely a matter of opinion, it could not be regarded as a warranty. Similarly, in *Phenix Ins. Co. v. Pickel*, 119 Ind. 155, 21 N. E. 546, 12 Am. St. Rep. 393, and *Pickel v. Phenix Ins. Co.*, 119 Ind. 291, 21 N. E. 898, though it was conceded that the statements of value might be warranties, the warranty was only that the value stated was the honest belief or opinion of the insured. These principles were again asserted in *Rogers v. Phenix Ins. Co.*, 121 Ind. 570, 23 N. E. 498, and *Phenix Ins. Co. v. Wilson*, 132 Ind. 449, 25 N. E. 592. From the cases just discussed, we may deduce the principle that estimates of value are not ordinarily statements of fact, but only of opinion, which cannot be regarded as warranties.

Such is the rule laid down in *Merchants' & Mechanics' Ins. Co. v. Schroeder*, 18 Ill. App. 216; *Owens v. Holland Purchase Ins. Co.*, 1 Thomp. & C. (N. Y.) 285; *Dacey v. Agricultural Ins. Co.*, 21 Hun (N. Y.) 83; *Smith v. Home Ins. Co.*, 47 Hun (N. Y.) 30; *Baker v. State Ins. Co.*, 31 Or. 41, 48 Pac. 699, 65 Am. St. Rep. 807.

The principle that a warranty cannot be predicated on estimates of amount and value has been repudiated in some cases. In *Bennett v. Agricultural Ins. Co.*, 51 Conn. 504, the insured stated that the farm on which the insured property was situated contained 60 acres, and that the value of the farm and buildings was \$1,700; the statements being expressly made warranties. In fact, there were only 50 acres of land, and the estimates of value by witnesses ranged from \$1,000 to \$1,400. It was contended that, as the statements of the insured were merely matters of opinion, strict accuracy was not necessary. The court regarded this contention as untenable, on the ground that, as the parties had expressly stipulated that the statements should be warranties, it must be presumed that the insured weighed his words more carefully, and made statements of fact, rather than of mere opinion. The questions as to the number of acres manifestly called upon the insured to give facts, and not his opinion. Nor is there anything in the subject-matter itself which raises a presumption that opinion merely was called for. The number of acres contained in a farm of this size could not be shown by the opinion of the witnesses. The facts were capable of mathematical demonstration. This reasoning was followed in *Mad-dox v. Dwelling House Ins. Co.*, 56 Mo. App. 343, where the facts were

similar; and the principle also governed *School Dist. No. 4 v. State Ins. Co.*, 61 Mo. App. 597.

(d) Effect of overvaluation.

In a few cases a broad rule has been laid down that an overvaluation of the property insured will avoid the policy.

Reference may be made to *Bennett v. Agricultural Ins. Co.*, 51 Conn. 504; *School Dist. No. 4 v. State Ins. Co.*, 61 Mo. App. 597; *Holloway v. Dwelling House Ins. Co.*, 48 Mo. App. 1; *Nassauer v. Susquehanna Mut. Fire Ins. Co.*, 109 Pa. 507; *American Ins. Co. v. Gilbert*, 27 Mich. 429; *Dunham v. Citizens' Ins. Co.*, 34 Wash. 205, 75 Pac. 804.

It is to be noted that in these cases the statement of value was construed as an express warranty, as to which there could arise no question of materiality or intent. As will appear in the following discussion, this rule has been qualified in a large majority of the cases. Thus, in *Cumberland Valley Mut. Protection Co. v. Schell*, 29 Pa. 31, it was said that the insured could not be held responsible for an overvaluation made by the insurer's agent. The rule, too, has been qualified in some cases where the statement of value was regarded as a warranty.

Where the rules of a mutual company limit any one risk to an amount not exceeding three-fourths of the value, so that the company must fix the valuation, a valuation proposed by the insured and acceded to by the insurer, by fixing the amount of the policy on that basis, is a valuation by mutual agreement, upon which, in the absence of fraud, avoidance for misrepresentation cannot be predicated.

This seems to be the rule laid down in *Fuller v. Boston Mut. Fire Ins. Co.*, 4 Metc. (Mass.) 206; *Borden v. Hingham Mut. Fire Ins. Co.*, 18 Pick. (Mass.) 523, 29 Am. Dec. 614; *Phillips v. Merrimack Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 350; *Harrington v. Fitchburg Mut. Fire Ins. Co.*, 124 Mass. 128.

(e) Same—Materiality—Open or valued policies.

In *Bobbitt v. Liverpool & London & Globe Ins. Co.*, 66 N. C. 70, 8 Am. Rep. 494, and *Briggs v. Fireman's Fund Ins. Co.*, 65 Mich. 52, 31 N. W. 616, the broad principle that statements of value are material was asserted. It is noted, however, that in both cases the statement was regarded as a warranty. The principle was based, probably, on the theory, stated in *Hersey v. Merrimac County Ins. Co.*, 27 N. H. 149, that an overvaluation is designed to induce the company to insure, and to cause a larger risk to be taken than would be assumed if a just

valuation had been given. In the leading case of *Carpenter v. American Ins. Co.*, 5 Fed. Cas. 105, where the property was overvalued for the purpose of securing insurance to an amount in excess of what the insurers at first regarded as sufficient, the court held that there could be no other result than that the policy was utterly void. But, as said in *Keeler v. Niagara Fire Ins. Co.*, 16 Wis. 523, 84 Am. Dec. 714, it cannot be laid down as an absolute rule that any particular difference between the real and represented value is material. It was conceded, however, in the *Hersey Case*, that, as the policy provided that the company should not be liable for more than a proper proportion of the value of the property at the time of loss, it was not designed to invite an overvaluation.

In accordance with this is the principle laid down in *Morotock Ins. Co. v. Fostoria Novelty Glass Co.*, 94 Va. 361, 26 S. E. 850, to the effect that, if the insurer's liability shall not exceed the actual cash value at time of loss, the valuation in the application is not material.

The principle is also stated in *Indiana Farmers' Live Stock Ins. Co. v. Bogeman*, 9 Ind. App. 399, 36 N. E. 927, and *Bonham v. Iowa Cent. Ins. Co.*, 26 Iowa, 328, though a different view was taken in *Briggs v. Fireman's Fund Ins. Co.*, 65 Mich. 52, 31 N. W. 616.

This is equivalent to the doctrine controlling *Lee v. Howard Fire Ins. Co.*, 11 Cush. (Mass.) 324, where it was said that in an open policy the statement of the exact value of the property could not be material, since in any event the insurer was to be liable only for a proportion of the value at the time of loss. Especially was this true in this case, in view of a condition in the policy that an overvaluation in a valued policy should render the policy void; the policy in suit being an open one.

The rule that valuation is immaterial when the policy is an open one is asserted in *Insurance Co. of North America v. Osborn*, 26 Ind. App. 88, 59 N. E. 181; *Behrens v. Germania Fire Ins. Co.*, 64 Iowa, 19, 19 N. W. 838; *Indiana Farmers' Live Stock Ins. Co. v. Bogeman*, 9 Ind. App. 399, 36 N. E. 927; *Cox v. Aetna Ins. Co.*, 29 Ind. 586; *Aurora Fire Ins. Co. v. Johnson*, 46 Ind. 315; *Liverpool & London & Globe Ins. Co. v. Stern* (Tex. Civ. App.) 29 S. W. 678.

The converse of the foregoing principle obviously must be true; that is, where the policy is a valued one, an overvaluation is material.

The rule is supported by *Aurora Ins. Co. v. Johnson*, 46 Ind. 315; *Germania Ins. Co. v. Johnson*, 46 Ind. 331; *Indiana Farmers' Live Stock Ins. Co. v. Bogeman*, 9 Ind. App. 399, 36 N. E. 927; *Rosser v. Georgia Home Ins. Co.*, 101 Ga. 716, 29 S. E. 286; *Wood v. Firemen's Fire Ins. Co.*, 126 Mass. 316.

Even though by statute the amount of a valued policy is a liquidated demand, overvaluation was regarded as material in *Sullivan v. Hartford Fire Ins. Co.* (Tex. Civ. App.) 34 S. W. 999, though a different view was taken in *Williams v. Bankers' & Merchants' Town Mut. Fire Ins. Co.*, 73 Mo. App. 607, where it was said that the provisions of Rev. St. 1889, § 5897, declaring that the insurer shall not be permitted to deny the value fixed by the policy, cannot be evaded by incorporating a warranty as to value in the application for the policy. The Delaware act of March 29, 1889, provides that every policy on real property shall have indorsed on its face an agreed valuation of the the insured property, and that, if the owner shall effect any subsequent insurance upon any larger value than so agreed, all insurance shall become void. It was held, in *Thurber v. Royal Ins. Co.*, 1 Marv. (Del.) 251, 40 Atl. 1111, that, where the agreed valuation on real property indorsed on the policy in a subsequent policy of insurance was stated at a larger amount than that in a prior one on the same property, the insurance became void. It is to be noted, however, that the statute by its terms applies only to real property.³

(2) Same—Intent of insured.

In accordance with the general rule that an intentional misrepresentation will avoid the policy, it may be stated as a fundamental principle that an intentional overvaluation is fatal to the policy.

Reference may be made to *Field v. Insurance Company of North America*, 9 Fed. Cas. 16; *Hartford Fire Ins. Co. v. Magee*, 47 Ill. App. 367; *Lycoming Fire Ins. Co. v. Rubin*, 79 Ill. 402; *Howes v. Union Ins. Co.*, 16 La. Ann. 235; *Miller v. Germania Fire Ins. Co.*, 34 Leg. Int. (Pa.) 339.⁴

As said in *Hersey v. Merrimac County Mut. Fire Ins. Co.*, 27 N. H. 149, it does not affect the question that the policy limits the liability of the company to a proportion of the actual value at the time of loss.

³ For valued policy laws see: Arkansas: Sand. & H. Dig. § 4140 (Act March 15, 1889). Delaware: Laws 1889, c. 695; Laws 1893, c. 696. Louisiana: Acts 1894, p. 187, No. 148 (Wolf's Rev. Laws, p. 467). Maine: Rev. St. 1883, c. 49, § 19 (Rev. St. 1871, c. 49, § 18). Minnesota: Laws 1895, c. 175, § 25, p. 401. Mississippi: Code 1892, § 2330. Missouri: Rev. St. 1889, § 5897. Nebraska: Comp. St. 1901, § 3451 (Laws 1889, c. 48, § 1). Ohio: Bates' Ann.

St. (4th Ed.) § 3643. Oklahoma: Rev. St. 1903, § 3199 (Act Dec. 25, 1890). Oregon: Ann. St. §§ 3720, 3721. Texas: Sayles' Ann. Civ. St. 1897, art. 3089 (Acts 1879, c. 73, p. 83). Washington: Ballinger's Ann. Codes & St. § 2833. West Virginia: Warth's Code 1899, p. 280, c. 34, § 18a (Acts 1899, c. 33). Wisconsin: Rev. St. 1898, § 1943.

⁴ See Rev. Codes N. D. 1899, §§ 4607, 4593; Sanders' Civ. Code Mont. § 3553; Rev. St. Okl. 1903, § 3199.

Under general principles, if the statement is a warranty, the intent of the insured in valuing his property is not material.

The rule is applied in *Shelden v. Michigan Millers' Mut. Fire Ins. Co.*, 124 Mich. 307, 82 N. W. 1068; *Holloway v. Dwelling House Ins. Co.*, 48 Mo. App. 1; *Maddox v. Dwelling House Ins. Co.*, 56 Mo. App. 343.

This rule has been relaxed in some cases, to the effect that, even if warranties, the statements of value must be fraudulently false in order to avoid the policy.

Helbing v. Svea Ins. Co., 54 Cal. 156, 85 Am. Rep. 72; *Wheaton v. North British & Merc. Ins. Co.*, 76 Cal. 415, 18 Pac. 758, 9 Am. St. Rep. 216; *Sun Fire Office v. Wich*, 6 Colo. App. 103, 39 Pac. 587.

Attention has already been called to the principle that, as statements of value are usually statements of opinion, they cannot be regarded as warranties. This principle affords a basis for the doctrine that as value is always to a considerable extent a matter of opinion and judgment, as to which men may honestly differ, absolute accuracy of judgment is not required. If the property is fairly and honestly valued according to the best judgment of the insured, an overvaluation will not avoid the policy.

This doctrine is supported by *Field v. Insurance Co. of North America*, 9 Fed. Cas. 16; *Fisher v. Crescent Ins. Co. (C. C.)* 33 Fed. 549; *Franklin Fire Ins. Co. v. Vaughan*, 92 U. S. 516, 23 L. Ed. 740; *National Bank v. Insurance Co.*, 95 U. S. 673, 24 L. Ed. 563; *Merchants' & Mechanics' Ins. Co. v. Schroeder*, 18 Ill. App. 216; *Phenix Ins. Co. v. Pickel*, 119 Ind. 155, 21 N. E. 546, 12 Am. St. Rep. 393; *Pickel v. Phenix Ins. Co.*, 119 Ind. 291, 21 N. E. 898; *Rogers v. Phenix Ins. Co.*, 121 Ind. 570, 23 N. E. 498; *Phenix Ins. Co. v. Wilson*, 132 Ind. 449, 25 N. E. 592; *Bowlus v. Insurance Co.*, 133 Ind. 106, 32 N. E. 319, 20 L. R. A. 400; *Bonham v. Iowa Cent. Ins. Co.*, 25 Iowa, 328; *Behrens v. Germania Fire Ins. Co.*, 64 Iowa, 19, 19 N. W. 838; *Continental Insurance Co. v. Ware*, 3 Ky. Law Rep. 621; *Dwelling House Ins. Co. v. Freeman*, 10 Ky. Law Rep. 496; *Agricultural Ins. Co. v. Yates*, 10 Ky. Law Rep. 984; *Dwelling House Ins. Co. v. Freeman*, 12 Ky. Law Rep. 894; *German Ins. Co. v. Read*, 13 S. W. 1080, 12 Ky. Law Rep. 371; *Kenton Ins. Co. v. Wigginton*, 89 Ky. 330, 12 S. W. 608, 7 L. R. A. 81; *Teutonia Ins. Co. v. Howell*, 21 Ky. Law Rep. 1245, 54 S. W. 852; *Williams v. Phoenix Fire Ins. Co.*, 61 Me. 67; *Lee v. Howard Fire Ins. Co.*, 11 Cush. (Mass.) 324; *Harrington v. Fitchburg Mut. Fire Ins. Co.*, 124 Mass. 126; *Planters' Ins. Co. v. Myers*, 55 Miss. 479, 30 Am. Rep. 521; *Ætna Ins. Co. v. Simmons*, 49 Neb. 811, 69 N. W. 125; *Owens v. Holland Purchase Ins. Co.*, 1 Thomp. & C. (N. Y.) 285;

DuPree v. Virginia Home Ins. Co., 92 N. C. 417; *Baker v. State Ins. Co.*, 31 Or. 41, 48 Pac. 690, 65 Am. St. Rep. 807; *Miller v. Germania Fire Ins. Co.*, 34 Leg. Int. (Pa.) 339; *Melvin v. Insurance Co. of North America*, 2 Luz. Leg. Reg. (Pa.) 219; *Liverpool & London & Globe Ins. Co. v. Stern* (Tex. Civ. App.) 29 S. W. 678; *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575, 44 Am. Rep. 177; *Morotock Ins. Co. v. Fostoria Novelty Glass Co.*, 94 Va. 361, 26 S. E. 850.

The contrary doctrine seems to have received approval in *Bobbitt v. Liverpool & London & Globe Ins. Co.*, 66 N. C. 70, 8 Am. Rep. 494, and *Home Ins. Co. v. Eakin*, 2 Willson, Civ. Cas. Ct. App. (Tex.) § 665.

Though the policy contains the express provision that an overvaluation shall avoid it, the overvaluation must be intentional.

Miller v. Alliance Ins. Co. of Boston (C. C.) 7 Fed. 649; *Citizens' Fire & Marine Ins. Co. v. Short*, 62 Ind. 316; *Susquehanna Mut. Fire Ins. Co. v. Staats*, 102 Pa. 529.

This rule was qualified in *Boutelle v. Westchester Fire Ins. Co.*, 51 Vt. 4, 31 Am. Rep. 666, where the court said that under such a provision a substantial overvaluation (that is, an overvaluation such as could not ordinarily arise from a difference of opinion) would be sufficient to avoid the policy, whether intentional or not.

(g) Same—Statutory provisions limiting effect of false statements.

In *Mobile Fire Dept. Ins. Co. v. Miller*, 58 Ga. 420, it was held that, in determining the effect of a false statement of value, the statutes declaring that misrepresentations must be material and fraudulent will govern.⁴ The same principle was asserted in *Rosser v. Georgia Home Ins. Co.*, 101 Ga. 716, 29 S. E. 286. The Kentucky statute⁵ was applied with like effect in *Kenton Ins. Co. v. Wigginton*, 89 Ky. 330, 12 S. W. 668, 7 L. R. A. 81. In *Thayer v. Providence Ins. Co.*, 70 Me. 531, the court, in applying Rev. St. 1883, c. 49, § 20, declaring that false statements shall not avoid the policy unless they increase the risk, said that the phrase "increase the risk" means to increase the hazard of loss and has nothing to do with inducing the insurer to enter into the contract. The Ohio statute,⁶ providing that the agents of the insurer shall examine the building insured and fix the insurable value, was applied in *Queen Ins. Co. v. Leslie*, 47 Ohio St. 409, 24 N. E. 1072, 9 L. R. A. 45.

⁴ See Code Ga. §§ 2802, 2804, 2806 (Code 1895, §§ 2097, 2099, 2101).

⁵ Act Feb. 4, 1874.

⁶ Bates' Ann. St. § 3643.

(h) Same—Valuation compared with amount of insurance.

Attention has already been called to *Carpenter v. American Ins. Co.*, 5 Fed. Cas. 105, where the overvaluation was made to secure increased insurance. The principle discussed in that case leads us to the converse proposition, which we may state as follows: Where the issue is whether there has been an overvaluation, the stated value may be compared with the amount of insurance for the purpose of determining the materiality of the variation and possibly the intent of the insured. Thus, in *Insurance Co. of North America v. McDowell*, 50 Ill. 120, 99 Am. Dec. 497, where it was urged that the policy was void because the property was overvalued at the time of the application, the court said that it was difficult to perceive how a statement as to value can be material, if the risk is taken at less than the value, or if the value at the time of loss exceeds the amount of the insurance. The court practically lays down the rule that overvaluation will not avoid the policy if the loss equals or exceeds the amount of the policy. While this may be too broad a statement, the rule just stated has received support in other cases.

Reference may be made to *Phoenix Ins. Co. v. McKernan*, 20 Ky. Law Rep. 337, 46 S. W. 10; *Thayer v. Providence Ins. Co.*, 70 Me. 531; *Hubbard v. North British & Mercantile Ins. Co.*, 57 Mo. App. 1; *Dupree v. Virginia Home Ins. Co.*, 92 N. C. 417.

(i) Same—Amount or value of property not covered by policy.

Where a house and barn were insured and correctly valued, and the applicant was also asked as to the value of the land and buildings, as in *Dacey v. Agricultural Ins. Co.*, 21 Hun (N. Y.) 83, the fact that the land was overvalued does not avoid the policy, being a mere expression of opinion as to the value of property not covered by the policy. Similarly, in the well-considered case of *Ætna Ins. Co. v. Simmons*, 49 Neb. 811, 69 N. W. 125, where the policy covered buildings and personal property situated on land owned by the insured, it was said that false statements as to the amount paid for the land and as to the terms of sale, since they did not relate to the property insured, are immaterial to the risk and do not avoid the policy. The question was raised in *Phoenix Mut. Fire Ins. Co. v. Bowersox*, 6 Ohio Cir. Ct. R. 1, 3 O. C. D. 321, but not decided, because of the insufficiency of the pleadings.

On the other hand, in *Bennett v. Agricultural Ins. Co.*, 51 Conn. 504, the Supreme Court of Connecticut took the position that a statement that the farm on which the insured property was situated contained 60 acres and that the property was worth \$1,700, whereas in fact there

was less than 50 acres and the value was not to exceed \$1,400, would avoid the policy. The decision was based on the principle that, as the statements in the application were made express warranties, the effect of the false warranty could not be evaded by regarding the statements as expressions of opinion, especially as the size of the farm was capable of exact computation. Mr. Ostrander, while approving the result of this case, criticises the reasoning, in that it takes into account only the naked legal rights incident to express warranties. According to his view it is the relation of the size of the farm to the moral hazard that should be made the basis of the decision.⁷ His reasoning is that it is important for the insurer to know whether the buildings or other property are adapted to the convenient and profitable use of the farm. While the abstract principle on which Mr. Ostrander bases his criticism is more satisfactory than the technical view taken by the Connecticut court, it is a little remarkable that he failed to see that under his reasoning the decision in the Bennett Case was indefensible; the variance between the statement and the fact being insufficient to affect the moral hazard.

(j) Failure to disclose value.

Where an inquiry as to the value of property has not been answered, but the policy is issued notwithstanding such omission, the insurer cannot assert avoidance for failure to disclose a material fact.

Williams v. New England Mut. Fire Ins. Co., 31 Me. 219; *Bardwell v. Conway Ins. Co.*, 122 Mass. 90.

But if the by-laws of a mutual company limit the amount of insurance to three-fourths of the cash value of the property, and the application declares that no circumstance affecting the risk has been withheld (*Van Buren v. St. Joseph County Village Fire Ins. Co.*, 28 Mich. 398), a failure to state the value of the property will avoid the contract.

(k) What constitutes an overvaluation.

A slight overestimate of the value, which may reasonably be accounted for from differences of opinion, will not avoid the policy.

Field v. Insurance Co. of North America, 9 Fed. Cas. 16. The doctrine is also supported in *Protection Ins. Co. v. Hall*, 15 B. Mon. (Ky.) 411, *Hubbard v. North British & Mercantile Ins. Co.*, 57 Mo. App. 1, and *Catron v. Tennessee Ins. Co.*, 6 Humph. (Tenn.) 176.

⁷ See Ostrander on Fire Insurance, § 140.

In *American Ins. Co. v. Gilbert*, 27 Mich. 429, where the valuation was regarded as a warranty, the court went so far as to hold that a merely slight variation between the stated and the real value would not be fatal. Similarly, in *Bonham v. Iowa Cent. Ins. Co.*, 25 Iowa, 328, the court seems to approve the principle that, even if the statement of value is an express affirmative warranty, there must be a material overvaluation to avoid the policy. It was said, in *Sun Fire Office v. Wich*, 6 Colo. App. 103, 39 Pac. 587, that only a fair and reasonably accurate valuation is required, even if the statement is a warranty.

It may then be stated as the well-settled rule that, to avoid the policy on the ground of false statements as to the value of the property insured, the overvaluation must be substantial or excessive.

The principle is asserted in *Whittle v. Farmville Ins. Co.*, 29 Fed. Cas. 1126; *Merchants' & Mechanics' Ins. Co. v. Schroeder*, 18 Ill. App. 216; *Citizens' Fire & Marine Ins. Co. v. Short*, 62 Ind. 316; *Phenix Ins. Co. v. Pickel*, 119 Ind. 155, 21 N. E. 546, 12 Am. St. Rep. 393; *Continental Ins. Co. of New York v. Ware*, 3 Ky. Law Rep. 621; *Smith v. Home Ins. Co.*, 47 Hun (N. Y.) 30; *Dupree v. Virginia Home Ins. Co.*, 92 N. C. 417; *Susquehanna Mut. Fire Ins. Co. v. Staats*, 102 Pa. 529; *Eakin v. Home Ins. Co.*, 1 White & W. Civ. Cas. Ct. App. § 368; *Boutelle v. Westchester Fire Ins. Co.*, 51 Vt. 4, 31 Am. Rep. 666; *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575, 44 Am. Rep. 177.

While some latitude may be allowed for a difference of opinion, even if the statements are warranties, yet, as is said in *Briggs v. Fireman's Fund Ins. Co.*, 65 Mich. 52, 31 N. W. 616, after making such allowance, there is still an overvaluation, the policy is avoided. This leads us to the fundamental principle that a gross or substantial overvaluation will be fatal to the policy.

It is sufficient to refer to *Fireman's Fund Ins. Co. v. McGreevy*, 118 Fed. 415, 55 C. C. A. 543; *Lycoming Ins. Co. v. Rubin*, 79 Ill. 402; *Bowlus v. Phenix Ins. Co.*, 133 Ind. 106, 32 N. E. 319, 20 L. R. A. 400; *Shelden v. Michigan Millers' Mut. Fire Ins. Co.*, 82 N. W. 1068, 124 Mich. 303; *Catron v. Tennessee Ins. Co.*, 6 Humph. (Tenn.) 176; *Boutelle v. Westchester Fire Ins. Co.*, 51 Vt. 4, 31 Am. Rep. 666.

In the *Shelden Case* it was said that, where the statement is a warranty and the overvaluation excessive, the motive of the insured is immaterial. But, according to *Citizens' Fire & Marine Ins. Co. v. Short*, 62 Ind. 316, not even a gross overvaluation will avoid the policy, unless it is willful and fraudulent, as it is not unusual for the owner to enter-

tain honestly more enlarged views of the value of his property than if he had no proprietary interest therein.

Such would also seem to be the rule governing *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575, 44 Am. Rep. 177, and *Williams v. Phoenix Fire Ins. Co.*, 61 Me. 67.

Where the policy covered machinery in a mill (*Mutual Mill Ins. Co. v. Gordon*, 20 Ill. App. 559), and the question as to the value was, "What is present cash value of the property exclusive of the land?" the court held that the question might well have been construed by the applicant as referring to the whole mill property, and not merely the machinery in the mill. So that an answer stating the value of the whole mill was not a false one, so as to avoid the policy. In *Lee v. Howard Fire Ins. Co.*, 11 Cush. (Mass.) 324, a statement that the value of the stock insured was from \$2,000 to \$3,000 was construed as a statement that the insured would, during the life of the policy, keep a stock ranging from \$2,000 to \$3,000. Similarly, in *Myers v. Council Bluffs Ins. Co.*, 72 Iowa, 176, 33 N. W. 453, it was contended that the property had been overvalued, in that the value was fixed at \$4,000, whereas in fact it was worth only \$1,700. The question asked was as to the cash value of the stock. The applicant answered \$4,000, but qualified the statement later by the assertion that the stock would range from \$4,000 to \$5,000. The court construed this statement not as an absolute warranty that the value of the stock at the time the application was made was \$4,000, but merely that there was an intent to increase his stock to approximately that amount. Where the answer was that the building cost \$13,000 (*Meyers v. Lebanon Mut. Fire Ins. Co.*, 156 Pa. 420, 27 Atl. 39), a false statement avoiding the policy cannot be predicated on the fact that at the time the insurance was taken out the value of the building was only \$6,000. On the other hand, where the applicant stated to the agent, in answer to a question, not included in the written application, as to the value of the property, that he had paid \$1,500 on the contract price of the building, when in fact he knew he had paid less than \$700, it was regarded as a misrepresentation fatal to recovery, though the statement was not communicated to the home office of the insurer prior to the issuance of the policy (*Dunham v. Citizens' Ins. Co.*, 75 Pac. 804, 34 Wash. 205). Where the insured stated the value of the property as "about" \$17,000, and on the trial testified that at the time of the fire the value was not less than \$8,000 (*Merchants' & Mechanics' Ins. Co. v. Schroeder*, 18 Ill. App. 216), the court held that, in view of the qualifying words, there was no such overvaluation shown as would avoid the policy.

An interesting case involving the question of valuation is *Carpenter v. American Ins. Co.*, 5 Fed. Cas. 105. The original proposal for insurance referred the company to a description in another office, in which the property, valued at \$19,000, was insured for \$15,000. The defendant company, on the ground that the sum already insured was as much as was proper to be taken on such a valuation, declined the proposal. In order to induce defendants to take the risk, the insured subsequently stated that since the original insurance was taken additions had been made to the factory to a value of \$10,000. This representation was utterly untrue, and it was held, therefore, that, as it was made to induce the issuance of the present policy, it was a fatal misrepresentation. In *Smith v. Home Ins. Co.*, 47 Hun (N. Y.) 30, where the policy was valued at \$1,400, and it appeared that the actual cash value was \$1,000, it was said that, as value is largely a matter of opinion, the discrepancy was not great enough to avoid the policy. In *Schmidt v. City & Village Fire Ins. Co.*, 55 Mich. 432, 21 N. W. 875, the property was valued at \$550, on which a policy for \$400 was issued. The jury found that as a matter of fact the property was worth \$366 at the time of the fire. The court held that there was not such a discrepancy, in view of the amount of insurance, as would avoid the policy. Where the representation was that the property was worth \$1,500 (*Wheaton v. North British & Mercantile Ins. Co.*, 76 Cal. 415, 18 Pac. 758, 9 Am. St. Rep. 216), a discrepancy of \$200 was regarded as not excessive. Where several different classes of articles are covered by the policy, and the total valuation is correct (*Mosley v. Vermont Mut. Fire Ins. Co.*, 55 Vt. 142), the policy cannot be avoided, because of overvaluation, on the ground that the amount of goods of a certain class was misstated, and the value erroneously apportioned between the classes. This doctrine seems, also, to have been applied in *Eddy Street Foundry v. Farmers' Mut. Fire Ins. Co.*, 5 R. I. 426.

(1) Questions of practice—Pleading.

The Missouri statute (Rev. St. 1899, § 7969), providing that in suits on fire insurance policies the defendant shall not be permitted to deny that the property was worth the full amount of insurance, etc., renders unnecessary an allegation as to the value of the property (*Bode v. Firemen's Ins. Co.*, 77 S. W. 116, 103 Mo. App. 289). It has, indeed, been laid down as a general principle that it is not necessary that the insured should allege and prove the truth of his statements of value, whether the same are warranties or representations.

Redman v. Aetna Ins. Co., 49 Wis. 431, 4 N. W. 591; *Cowan v. Phenix Ins. Co.*, 78 Cal. 181, 20 Pac. 408.

On the contrary, as said in *Ætna Ins. Co. v. Simmons*, 49 Neb. 811, 69 N. W. 125, it is incumbent on the insurer to plead and prove that the answers as to value were made as written in the application, that they were false in a particular material to the risk, and that the company relied and acted upon such answers.

The South Carolina Act of February 28, 1896, provides that the insurer shall be estopped, after the expiration of 60 days, to deny the truth of the statement in the application, except for fraud. It was held, in *Home Ins. Co. v. Virginia-Carolina Chemical Co.* (C. C.) 109 Fed. 681, that this did not preclude the insurer from contesting the value placed on the property, where it appeared that such value exceeded the true value by more than 100 per cent. and the statement was made with fraudulent intent. A plea that the application contained a warranty that the building cost a certain sum, whereas in fact it did not cost more than a small fraction of such sum, does not raise a question of overvaluation (*Virginia Fire & Marine Ins. Co. v. Saunders*, 84 Va. 215, 4 S. E. 584). Where the insurer alleged that plaintiff falsely and fraudulently represented the value of his goods, that defendant, relying upon such representations, entered into the contract, and that such representations were false and fraudulent and made with intent to defraud (*Travis v. Peabody Ins. Co.*, 28 W. Va. 583), the court held that the plea was insufficient, as it did not allege that the plaintiff, either in the policy or in any writing referred to or made part thereof, made such representations as were set forth, and that, as no such written representations were made, evidence in regard thereto tended to contradict, alter, or modify a written contract, and was therefore inadmissible. In view of the provisions of Rev. St. 1899, § 7979, declaring that the value of the property insured as stated in the policy shall be conclusive, it was held, in *Ritchey v. Home Ins. Co.*, 104 Mo. App. 146, 78 S. W. 341, that an answer alleging an overvaluation, but failing to aver that, but for the alleged false statement, the policy would not have been issued, is insufficient to raise an issue as to the fraudulent overvaluation.

(m) Same—Evidence.

The mere fact that there has been an overvaluation on the property insured does not raise a presumption of fraud on the part of the applicant.

This is asserted in *Citizens' Fire & Mar. Ins. Co. v. Short*, 62 Ind. 316; *Morotock Ins. Co. v. Fostoria Novelty Glass Co.*, 94 Va. 361, 26 S. E. 850; *Wheaton v. North British & Mercantile Co.*, 76 Cal. 415, 18 Pac. 758, 9 Am. St. Rep. 216; *Williams v. Phoenix Fire Ins. Co.*, 61 Me. 67.

The rule may be different in case of a valued policy (*Rosser v. Georgia Home Ins. Co.*, 101 Ga. 716, 29 S. E. 286).

In accord with the general rule, it has been stated that the burden of proof is on the defendant to show an overvaluation, avoiding the policy.

Reference may be made to *Field v. Insurance Co. of North America*, 9 Fed. Cas. 16; *Eakin v. Home Ins. Co.*, 1 White & W. Civ. Cas. Ct. App. §§ 368, 369; *Sullivan v. Hartford Fire Ins. Co.* (Tex. Civ. App.) 34 S. W. 999; *Fire Association v. Jones* (Tex. Civ. App.) 40 S. W. 44; *Morotock Ins. Co. v. Fostoria Novelty Glass Co.*, 94 Va. 361, 26 S. E. 850. The contrary doctrine is asserted in *Bobbitt v. Liverpool & London & Globe Ins. Co.*, 66 N. C. 70, 8 Am. Rep. 494.

Where the policy was issued on a written application (*Bardwell v. Conway Ins. Co.*, 122 Mass. 90), evidence as to an oral statement of value is inadmissible. The price for which the property was sold to another person in another state, 18 months before, is regarded as inadmissible on the issue of value (*Gere v. Council Bluffs Ins. Co.*, 67 Iowa, 272, 23 N. W. 137, 25 N. W. 159). Offers to purchase, which were refused, are inadmissible to show value (*Wood v. Firemen's Fire Ins. Co.*, 126 Mass. 316), though it was said that, if made before the policy issued, such offers were admissible to show good faith on the part of the insured. So declarations of the plaintiff as to the actual cost of the property insured are admissible as bearing on the honesty and good faith of his claim (*Merchants' Nat. Ins. Co. v. Pearce*, 84 Ill. App. 255). An offer to sell was regarded as admissible in *Hersey v. Merrimac County Fire Ins. Co.*, 27 N. H. 149. In *Fowler v. Aetna Fire Ins. Co.*, 6 Cow. (N. Y.) 673, 16 Am. Dec. 460, it was said that evidence of the good character of the insured was not admissible on an issue of overvaluation. In *Gere v. Council Bluffs Ins. Co.*, 67 Iowa, 272, 23 N. W. 137, 25 N. W. 159, where the policy covered a horse, the plaintiff introduced as witnesses two farmers, for the purpose of proving the value of the horse. The defendant objected, on the ground that it did not appear that they were competent to testify. The court held, however, that the witnesses, having shown that they were engaged in farming and stock raising, that they were acquainted with the horse, and knew its value, were competent witnesses. Statements of value in the proofs of loss are not conclusive as to the falsity of the statements in the application (*Watertown Fire Ins. Co. v. Simons*, 96 Pa. 520). The sufficiency of the evidence as to value was also considered in *Maryland Home Fire Ins. Co. v. Kimmell*, 89 Md. 437, 43 Atl. 764.

(a) Same—Trial and review.

Whether there has been a fraudulent misrepresentation as to value is a question for the jury, according to *Ætna Ins. Co. v. Strickle*, 3 Ky. Law Rep. 535, and *Mobile Fire Dept. Ins. Co. v. Miller*, 58 Ga. 420, though, as said in *Hubbard v. North British & Mercantile Ins. Co.*, 57 Mo. App. 1, an overvaluation may be so slight as to warrant the court in refusing to submit the question to the jury, and in other cases may be so excessive as to authorize the court to direct a nonsuit, it is nevertheless the general rule that whether an overvaluation is material or substantial is a question for the jury.

It is deemed sufficient to refer to *Wich v. Equitable Fire & Marine Ins. Co.*, 2 Colo. App. 484, 81 Pac. 389; *Ætna Ins. Co. v. Grube*, 6 Minn. 82 (Gil. 32); *Ætna Ins. Co. v. Simmons*, 49 Neb. 811, 69 N. W. 125; *Lindsey v. Union Mut. Fire Ins. Co.*, 3 R. I. 157; *Keeler v. Niagara Fire Ins. Co.*, 16 Wis. 523, 84 Am. Dec. 714.

In *Phoenix Mut. Fire Ins. Co. v. Bowersox*, 6 Ohio Cir. Ct. R. 1, 3 O. C. D. 321, the answer averred that the insured greatly overvalued the property, by reason whereof the policy under its terms was void. The answer did not, however, aver that the land on which the property stood was overvalued, or that, if it had been, the company would have been prejudiced thereby. The court held, therefore, that an instruction in that regard was properly refused, since no question justifying it was raised in the pleadings. In *Citizens' Fire & Mar. Ins. Co. v. Short*, 62 Ind. 316, the defendant asked for written instructions. It was objected on appeal that the judge, in giving his instructions, read extracts from an opinion published in a legal journal and also from a text-book on Insurance. The court said, however, that, if the record did not show that such extracts were not transcribed in the instructions, the objection was untenable. Nor could the reading of such extracts be objected to as misleading the jury, when it appears that, if it was misleading at all, it was in the defendant's favor. Where there is a discrepancy in the valuation, a finding for the plaintiff is a finding that the overvaluation was not fraudulent (*Williams v. Phoenix Fire Ins. Co.*, 61 Me. 67). On the issue as to fraudulent overvaluation, a verdict on conflicting evidence will not be disturbed on appeal (*Wytheville Ins. Co. v. Stultz*, 87 Va. 629, 13 S. E. 77).

(c) Conclusion.

Though in some instances statements of value have been regarded as warranties, the weight of authority is that such statements cannot be considered as strict warranties, but rather as matters of

opinion. Therefore an overvaluation, unless excessive to such a degree as to involve an increase of the moral hazard and show a fraudulent intent, will not avoid the policy. But the mere fact of overvaluation does not raise a presumption of fraud, except, perhaps, in a valued policy. The stated value may be compared with the amount of the insurance, for the purpose of determining the materiality of the variance between the real and the stated value.

**14. EFFECT OF CONCEALMENT, MISREPRESENTATION, OR
BREACH OF WARRANTY OR CONDITION AS TO
TITLE TO OR INTEREST IN PROPERTY
INSURED.**

- (a) Statements as to title and interest as representations or warranties.
- (b) Stipulations in the nature of conditions precedent.
- (c) Same—Condition as to sole and unconditional ownership.
- (d) Necessity of disclosure of title or interest.
- (e) Same—Under provisions of policy.
- (f) Effect of false statements, concealment, or breach of condition in general.
- (g) Effect of false statements or concealment as dependent on materiality.
- (h) Effect of false statements as dependent on knowledge and intent of the insured.
- (i) Statutory provisions limiting the effect of misrepresentations.

(a) Statements as to title and interest as representations or warranties.

In view of the general principle that a person procuring insurance on property must have an insurable interest in the property to be covered, and for the additional reason that on the extent of such interest depends, in a large degree, the moral hazard of the risk assumed by the underwriter, the insured is generally called upon to state the nature of his title to or interest in the property to be covered by the policy. In considering the effect to be given to his statements, it is, of course, important to determine, first, whether such statements are to be interpreted as warranties, which must be strictly true, or as representations, which need be only substantially true.

The character of statements as to interest or title is dependent on and determined by the general rules on which the distinction between representations and warranties is based. In accordance with these rules it may be stated as an elementary principle that, where the application is referred to as part of the policy and a warranty on the

part of the insured, statements as to title and interest are warranties.

Reference may be made to *Capital City Ins. Co. v. Caldwell*, 95 Ala. 77, 10 South. 355; *Germier v. Springfield Marine & Fire & Marine Ins. Co.*, 109 La. 341, 33 South. 361; *Abbott v. Shawmut Fire Ins. Co.*, 3 Allen (Mass.) 213; *Froehly v. North St. Louis Mut. Fire Ins. Co.*, 32 Mo. App. 302; *Holloway v. Dwelling House Ins. Co.*, 48 Mo. App. 1; *Shoup v. Dwelling House Ins. Co.*, 51 Mo. App. 286; *Pierce v. Empire Ins. Co.*, 62 Barb. (N. Y.) 636; *Birmingham v. Empire Ins. Co.*, 42 Barb. (N. Y.) 457; *Phillips v. Knox County Mut. Ins. Co.*, 20 Ohio, 174.

In *Pierce v. Empire Ins. Co.*, 62 Barb. (N. Y.) 636, cited above, the court uses a peculiar argument to show that the statements as to title are warranties. It is said that representations relate exclusively to matters which would have a tendency to induce the insurer to enter into or refuse the contract, or would affect the premium. Ownership cannot be the subject of representation, as it is of vital importance, in order to avoid gambling contracts. A statement of ownership, therefore, must be a warranty, since from its very nature it cannot be a representation. In *Treadway v. Hamilton Mut. Ins. Co.*, 29 Conn. 68, stress was laid on the fact that the by-laws of the company declared the application to be a warranty.

In accord with the general principles as to the sufficiency of the reference to make statements warranties, it was held, in *Vilas v. New York Cent. Ins. Co.*, 9 Hun (N. Y.) 121, that, where the only reference to the application is a description of the property "as per application No. —," this is not sufficient to make statements as to title a warranty. So it was said, in *Rohrbach v. Germania Fire Ins. Co.*, 62 N. Y. 47, 20 Am. Rep. 451, that, where the statement in a policy is that plaintiff is insured "on his two buildings," the phrase is matter of description only, and not a warranty of ownership, or even a material representation. In *Wainer v. Milford Fire Ins. Co.*, 153 Mass. 335, 26 N. E. 877, 11 L. R. A. 598, it was said that where the policy does not incorporate an answer as to title, and does not contain any requirement as to disclosing title, a statement as to title or interest cannot be considered a warranty in view of St. 1887, c. 214, § 59, providing that an application shall not be considered a warranty or part of the contract, except in so far as it is incorporated in full.¹

¹ For other statutory provisions relating to statements as to title, see Me. 1883, c. 49, § 20; Pub. St. N. H. 1901, c. 170, § 2 (Gen. St. c. 157, § 2). Gen. St. Conn. 1902, § 3499; Rev. St.

Newman v. Springfield Fire & Marine Ins. Co., 17 Minn. 123 (Gil. 98), seems to support the doctrine that a warranty as to title cannot be based on an oral application. In *Cleavenger v. Franklin Fire Ins. Co.*, 47 W. Va. 595, 35 S. E. 998, it was held that where one makes an application designating the company from which he desires a policy, but the application is so changed as to make it an application to another and different company, which issues the policy, representations as to title contained in such application cannot be regarded as warranties. Statements of a third person as to title cannot be regarded as a warranty by the insured, according to *Kansel v. Minnesota Farmers' Mut. Fire Ass'n*, 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776. Notwithstanding the general principle that, in the case of warranties, the materiality of the facts stated is of no consequence, it seems to be intimated, in *Imperial Fire Ins. Co. v. Murray*, 73 Pa. 13, that to be a warranty the statement as to title must be material to the risk.

(b) Stipulations in the nature of conditions precedent.

The general question whether a failure to comply with a condition in the policy requiring a disclosure, if certain facts do or do not exist, is a warranty in regard thereto, has been discussed in a former brief.² The principles there deduced have been applied in the case of conditions relating to the title or interest of the insured. Such conditions are valid and do not contravene any rule of public policy.

Dumes v. N. W. National Ins. Co., 12 App. D. C. 245, 40 L. R. A. 358;
Crescent Ins. Co. v. Camp, 64 Tex. 521.

In some instances the condition in the policy is that if the title or interest of the insured is not absolute, or is other than full and exclusive ownership, it must be disclosed. It has been held, in *Mers v. Franklin Ins. Co.*, 68 Mo. 127, a leading case, that the acceptance of the policy without any representation as to title amounts to a warranty that the title is such as is specified in the condition.

This rule has also been approved in *Clark v. German Mut. Fire Ins. Co.*, 7 Mo. App. 77, and *Adema v. Lafayette Fire Ins. Co.*, 36 La. Ann. 680.

In the case of mutual companies, where the articles of incorporation or by-laws provide that the company may make insurance only when the title is unincumbered fee simple, and if insured has a less estate the policy shall be void, unless the title is expressed therein, a failure to

² See ante, p. 1150.

disclose title amounts to a warranty that it is such as is required by the charter.

Such is the doctrine announced in *Illinois Mut. Fire Ins. Co. v. Marseilles Mfg. Co.*, 1 Gilman (Ill.) 236, and *Treadway v. Hamilton Mut. Ins. Co.*, 29 Conn. 68.

(c) **Same—Condition as to sole and unconditional ownership.**

The most usual phase of this question is that presented where the policy contains the stipulation that, if the interest of the insured is other than sole and unconditional ownership, it must be expressed in the policy; otherwise, the policy shall be void. Such a stipulation is generally regarded as a condition precedent.

Reference may be made to *Phoenix Ins. Co. v. Public Parks Amusement Co.*, 68 Ark. 187, 87 S. W. 959; *Brown v. Commercial Fire Ins. Co.*, 86 Ala. 189, 5 South. 500; *Henning v. Western Assur. Co.*, 77 Iowa, 319, 42 N. W. 808; *Rosenstock v. Mississippi Home Ins. Co.*, 82 Miss. 674, 35 South. 309; *Ordway v. Chace*, 57 N. J. Eq. 478, 42 Atl. 149; *Matthie v. Globe Fire Ins. Co.*, 74 N. Y. Supp. 177, 68 App. Div. 239; *Weed v. London & Lancashire Fire Ins. Co.*, 116 N. Y. 106, 22 N. E. 229; *Queen Ins. Co. v. Leonard*, 9 Ohio Cir. Ct. R. 46, 6 O. C. D. 49, 2 Ohio Dec. 122.

In some of the cases just cited, the rule is modified by the statement that the clause is a condition precedent in the nature of a warranty.

Though questioned in some cases, it seems to be a well established rule that if the policy contains the condition that, if the interest of the insured is other than sole and unconditional ownership, it must be expressed in the policy, such condition, if unqualified by a disclosure, amounts to a warranty that the interest of the insured is sole and unconditional.

This rule is asserted in *Western Assurance Co. v. Altheimer*, 58 Ark. 565, 25 S. W. 1067; *Adema v. Lafayette Fire Ins. Co.*, 86 La. Ann. 660; *Kells v. N. W. Live Stock Ins. Co.*, 64 Minn. 390, 67 N. W. 215, 71 N. W. 5, 58 Am. St. Rep. 541; *Franklin v. Atlantic Fire Ins. Co.*, 42 Mo. 456; *Mount Leonard Milling Co. v. Liverpool & London & Globe Ins. Co.*, 25 Mo. App. 259; *Hubbard v. North British & Mercantile Ins. Co.*, 57 Mo. App. 1; *Rohrbach v. Germania Fire Ins. Co.*, 62 N. Y. 47, 20 Am. Rep. 451; *Wood v. American Fire Ins. Co.*, 78 Hun, 109, 29 N. Y. Supp. 250; *Crescent Ins. Co. v. Camp*, 64 Tex. 521; *Manhattan Fire Ins. Co. v. Weill*, 28 Grat. 389, 26 Am. Rep. 364.

The clause is not a warranty as to the particular kind of title, according to *East Texas Fire Ins. Co. v. Crawford* (Tex. Sup.) 16 S. W. 1069; but it is not satisfied by a mere insurable interest. As said in *Ordway*

v. Chace, 57 N. J. Eq. 478, 42 Atl. 149, the insured's interest must be that of sole and unconditional owner.

While the condition was not directly held to be a warranty or condition precedent, the acceptance of a policy containing such a clause has in some cases been regarded as equivalent to a representation that the title of the insured was sole and unconditional.

Duda v. Home Ins. Co., 20 Pa. Super. Ct. 244; Orient Ins. Co. v. Williamson, 98 Ga. 464, 25 S. E. 560; Reithmueller v. Fire Ass'n, 20 Mo. App. 246.

A contrary rule was, however, laid down in Manchester Fire Assur. v. Abrams, 89 Fed. 932, 32 C. C. A. 426, where it was held that the mere acceptance of a policy containing the clause did not amount to a representation as to the interest in the property. This holding was based on the ground that the insurer must be presumed to have knowledge of the condition of insured's title, if it accepts the premium and issues the policy, without requiring a statement as to interest. A similar view of the effect of the condition was taken in Miotke v. Milwaukee Mechanics' Ins. Co., 113 Mich. 166, 71 N. W. 463.

The cases cited above, whether they regard the clause as a warranty or a condition, or as a mere representation, all hold in effect that the clause relates to the interest of the insured at the time of the consummation of the contract.

Such, too, was the rule laid down in Collins v. London Assur. Co., 165 Pa. 298, 30 Atl. 924, and Rosenstock v. Mississippi Home Ins. Co., 82 Miss. 674, 35 South. 309.

In Michigan it has been held that the clause is in effect a condition subsequent, to apply only to changes taking place after the execution of the policy, and not to the interest of the insured at the time the policy was issued.

Hoose v. Prescott Ins. Co., 84 Mich. 309, 49 N. W. 587, 11 L. R. A. 340; Hall v. Niagara Fire Ins. Co., 93 Mich. 184, 53 N. W. 727, 18 L. R. A. 185, 32 Am. St. Rep. 497; Ahlberg v. German Fire Ins. Co., 94 Mich. 259, 53 N. W. 1102.

As there were no written statements or representations as to interest in these cases, the rule governing them is perhaps based on the doctrine of the Abrams Case, that an insurer must be presumed to have knowledge of the exact nature of all the interest of the insured, if the policy is issued without requiring specific disclosures.

Under the Massachusetts statute (St. 1864, c. 196), requiring that the conditions of the insurance shall be stated in the body of the policy, a

provision that the policy shall be void if, at the time of the fire, the premises are occupied, in whole or in part, for any purposes classified in the annexed printed conditions as more hazardous than that described in the application, unless permission be given, does not incorporate within the policy a provision on the back thereof requiring a statement of the nature of the insured's interest. *Mullaney v. National Fire & Marine Ins. Co.*, 118 Mass. 393.

(d) Necessity of disclosure of title or interest.

In the early case of *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90, affirming 12 Wend. 507, the court seems to have taken the position that the specific nature of the title or interest need not be disclosed, unless directly inquired for; the basis of the decision being apparently that, as the insurer had power by making inquiry to protect itself as to all facts material to the risk, the absence of inquiry indicated that it did not consider the state of the title material. A similar view of the necessity of disclosing the interest of the insured was taken by the court in *Morrison's Adm'r v. Tennessee Marine & Fire Ins. Co.*, 18 Mo. 262, 59 Am. Dec. 299. In a more recent case (*Hanover Fire Ins. Co. v. Bohn*, 48 Neb. 743, 67 N. W. 774, 58 Am. St. Rep. 719) the court approves the general principle that the exact status of the title need not be disclosed, in the absence of direct inquiry. The view of the court seems to be that where an insurance company issues its policy, and accepts and retains the premium, without requiring an application and without making inquiry, and the insured has in fact an insurable interest, the company will be presumed to have insured such interest.

From the principles approved in these cases there may be deduced the general rule that, in the absence of conditions in the policy requiring a disclosure, the insured is not bound to state the exact nature of his title or interest, if no specific inquiry is made.

The general rule is approved in *Howard Fire Insurance Co. v. Chase*, 5 Wall. 509, 18 L. Ed. 524; *Hooper v. Robinson*, 98 U. S. 523, 25 L. Ed. 219; *Geib v. Enterprise Co.*, 10 Fed. Cas. 156; *Lockwood v. Middlesex Mut. Assur. Co.*, 47 Conn. 555; *Essex Sav. Bank v. Meriden Fire Ins. Co.*, 57 Conn. 335, 17 Atl. 930, 18 Atl. 324, 4 L. R. A. 759; *Western Assur. Co. v. Mason*, 5 Ill. App. 142; *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53, 4 Am. Rep. 582; *Norwich Fire Ins. Co. v. Boomer*, 52 Ill. 442, 4 Am. Rep. 618; *Dohn v. Farmers' Joint Stock Ins. Co.*, 5 Lans. (N. Y.) 275; *St. Paul Fire & Marine Ins. Co. v. Kelly*, 43 Kan. 741, 23 Pac. 1046; *German Ins. Co. of Freeport v. Davis*, 6 Kan. App. 268, 51 Pac. 60; *Hartford Fire Ins. Co. v. Haas*, 8 Ky. Law Rep. 610; *Firemen's Fund Ins. Co. v. Meschendorf*, 14 Ky. Law Rep. 757; *Sprigg v. American Central Ins. Co.*, 101 Ky. 185,

40 S. W. 575; *McClelland v. Greenwich Ins. Co.*, 107 La. 124, 31 South. 691; *Buck v. Phoenix Ins. Co.*, 76 Me. 586; *Gilman v. Dwelling House Ins. Co.*, 81 Me. 488, 17 Atl. 544; *Mutual Fire Ins. Co. v. Deale*, 18 Md. 26, 79 Am. Dec. 673; *Strong v. Manufacturers' Ins. Co.*, 10 Pick. (Mass.) 40, 20 Am. Dec. 507; *Fletcher v. Commonwealth Ins. Co.*, 18 Pick. (Mass.) 419; *Smith v. Bowditch Mut. Fire Ins. Co.*, 6 Cush. (Mass.) 448; *Williams v. Roger Williams Ins. Co.*, 107 Mass. 377, 9 Am. Rep. 41; *Washington Mills Emery Mfg. Co. v. Weymouth & Braintree Fire Ins. Co.*, 135 Mass. 508; *Hill v. Lafayette Ins. Co.*, 2 Mich. 476; *Oastner v. Farmers' Mut. Ins. Co.*, 46 Mich. 15, 8 N. W. 554; *Sibley v. Prescott Ins. Co.*, 57 Mich. 14, 23 N. W. 473; *Guest v. New Hampshire Fire Ins. Co.*, 66 Mich. 98, 33 N. W. 31; *Liverpool, London & Globe Ins. Co. v. McGuire*, 52 Miss. 227; *Franklin v. Atlantic Fire Ins. Co.*, 42 Mo. 456; *Boulware v. Farmers' & Laborers' Co-operative Ins. Co.*, 77 Mo. App. 639; *German Ins. Co. v. Hyman*, 34 Neb. 704, 52 N. W. 401; *Slobodisky v. Phenix Ins. Co.*, 53 Neb. 816, 74 N. W. 270; *Sussex County Mutual Ins. Co. v. Woodruff*, 26 N. J. Law, 541; *Carson v. Jersey City Ins. Co.*, 43 N. J. Law, 300, 39 Am. Rep. 584; *Trade Ins. Co. v. Barraciff*, 45 N. J. Law, 543, 46 Am. Rep. 792; *Niblo v. North American Fire Ins. Co.*, 8 N. Y. Super. Ct. 551; *White v. Hudson River Ins. Co.*, 7 How. Prac. (N. Y.) 341; *Kernochan v. New York Bowery Fire Ins. Co.*, 12 N. Y. Super. Ct. 1; *Helps v. Gebhard Fire Ins. Co.*, 22 N. Y. Super. Ct. 404; *Buffalo Elevating Co. v. Prussian National Ins. Co.*, 64 App. Div. 182, 71 N. Y. Supp. 918; *McCulloch v. Norwood*, 58 N. Y. 562; *Cross v. National Fire Ins. Co.*, 132 N. Y. 183, 30 N. E. 390; *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452, 59 Am. Dec. 684; *Koshland v. Hartford Fire Ins. Co.*, 31 Or. 402, 49 Pac. 866; *American Cent. Ins. Co. v. Heath*, 29 Tex. Civ. App. 445, 69 S. W. 235; *Dooly v. Hanover Fire Ins. Co.*, 47 Pac. 507, 16 Wash. 155, 58 Am. St. Rep. 26; *Mascott v. National Fire Ins. Co.*, 69 Vt. 116, 37 Atl. 255; *Wytheville Ins. & Banking Co. v. Stultz*, 87 Va. 629, 18 S. E. 77; *Union Assur. Soc. v. Nolla*, 101 Va. 613, 44 S. E. 896, 99 Am. St. Rep. 923.*

The theory on which the rule is based is probably, as stated in *Sisk v. Citizens' Ins. Co.*, 16 Ind. App. 565, 45 N. E. 804, that, unless a statement of interest is required, the insured need make none, if he has an insurable interest. The same theory is expressed in different words in *Farmers' Mut. Fire & Lightning Ins. Co. v. Lecroy*, 91 Ill. App. 41, where the court said that, if the insured will suffer loss by the burning of property, it is sufficient, and he may be insured, without particularly defining his interest.

The charters of mutual companies usually provide that the company shall make insurance only where the insured has an unincumbered fee-

* See Rev. Civ. Code S. D. 1903, § 1822; Sanders' Civ. Code Mont. § 3427.

simple title, and give the company a lien on the property for assessments. In view of these provisions, and especially the provision granting the lien, it is a well-recognized rule that where the insurance is in a mutual company, the right to a full disclosure exists, irrespective of whether inquiry is made or not.

Reference may be made to *Illinois Mut. Fire Co. v. Marseilles Mfg. Co.*, 1 Gilman (Ill.) 236; *Mutual Fire Ins. Co. v. Deale*, 18 Md. 26, 79 Am. Dec. 673; *Smith v. Bowditch Mut. Fire Ins. Co.*, 6 Cush. (Mass.) 448; *Wilbur v. Bowditch Mutual Fire Ins. Co.*, 10 Cush. (Mass.) 446; *Brown v. People's Mut. Ins. Co.*, 11 Cush. (Mass.) 280; *Bowditch Mut. Fire Ins. Co. v. Winslow*, 8 Gray (Mass.) 415; *Froehly v. North St. Louis Mut. Fire Ins. Co.*, 32 Mo. App. 302; *Marshall v. Columbian Mut. Fire Ins. Co.*, 27 N. H. 157; *Phillips v. Knox County Mut. Ins. Co.*, 20 Ohio, 174; *Mutual Assur. Co. v. Mahon*, 5 Call (Va.) 517.

(e) Same—Under provisions of policy.

Though it was stated broadly in *Catron v. Tennessee Ins. Co.*, 6 Humph. (Tenn.) 176, and *Turner v. Stetts*, 28 Ala. 420, that the nature of the title or interest must be disclosed, the rule stated in subdivision (d) must be regarded as unimpeached, in the absence of qualifying stipulations in the policy. Where the policy contains special stipulations and conditions, the decisions are by no means uniform. In a series of well-considered cases, the rule has been conceived to be that, if the policy provides that it shall be void if the ownership is not absolute in fee simple, or sole and unconditional, or if the interest is not truly stated, a disclosure of the true state of the title is absolutely necessary.

This doctrine is asserted in *Syndicate Ins. Co. of Minneapolis v. Bohn*, 27 L. R. A. 614, 65 Fed. 165, 12 C. C. A. 531; *McCormick v. Orient Ins. Co.*, 86 Cal. 260, 24 Pac. 1003; *Waller v. Northern Assur. Co.* (C. C.) 10 Fed. 232; *Scottish Union & National Ins. Co. v. Petty*, 21 Fla. 399; *Mechanics' & Traders' Ins. Co. v. Real Estate & Bldg. Ass'n*, 98 Ga. 262, 25 S. E. 457; *Orient Ins. Co. v. Williamson*, 25 S. E. 560, 98 Ga. 464; *Illinois Mutual Fire Ins. Co. v. Marseilles Mfg. Co.*, 1 Gilman (Ill.) 236; *Germania Fire Ins. Co. v. Hick*, 23 Ill. App. 881; *Illinois Mut. Ins. Co. v. Mette*, 27 Ill. App. 330; *Sisk v. Citizens' Ins. Co.*, 16 Ind. App. 565, 45 N. E. 804; *Day v. Charter Oak Fire & Marine Ins. Co.*, 51 Me. 91; *Citizens' Fire Ins. Security & Land Co. v. Doll*, 35 Md. 89, 6 Am. Rep. 360; *Farmville Ins. & Banking Co. v. Butler*, 55 Md. 233; *Westchester Fire Ins. Co. v. Weaver*, 70 Md. 540, 17 Atl. 401, 5 L. R. A. 478; *Franklin v. Atlantic Fire Ins. Co.*, 42 Mo. 456; *Mers v. Franklin Ins. Co.*, 68 Mo. 127; *Gahagan v. Union Mut. Ins. Co.*, 43 N. H. 176; *Pierce v. Empire Ins. Co.*, 62 Barb. (N. Y.) 636; *Lasher v. Northwestern*

Nat. Ins. Co., 18 Hun (N. Y.) 99, 57 How. Prac. 222, reversing 55 How. Prac. 324; Mott v. Citizens' Ins. Co., 69 Hun, 501, 28 N. Y. Supp. 400; Genesee Falls Permanent Sav. & Loan Ass'n v. U. S. Fire Ins. Co., 44 N. Y. Supp. 979, 16 App. Div. 587; Rohrbach v. Germania Fire Ins. Co., 62 N. Y. 47, 20 Am. Rep. 451; Reynolds v. State Mut. Ins. Co., 2 Grant, Cas. (Pa.) 326; Dittenbaugh v. Union Fire Ins. Co., 150 Pa. 270, 24 Atl. 745, 30 Am. St. Rep. 805; Dittenbaugh v. New Hampshire Fire Ins. Co., 24 Atl. 746, 150 Pa. 274; Duda v. Home Ins. Co., 20 Pa. Super. Ct. 244; Elliott v. Teutonia Ins. Co., 20 Pa. Super. Ct. 859; Harding v. Norwich Union Ins. Co., 10 S. D. 64, 71 N. W. 755; Morotock Ins. Co. v. Rodefer, 92 Va. 747, 24 S. E. 393, 53 Am. St. Rep. 846; Tyree v. Virginia Fire & Marine Ins. Co. (W. Va.) 46 S. E. 703, 66 L. R. A. 657.

The rule seems to have been applied in *Home Ins. Co. v. Allen*, 19 S. W. 743, 93 Ky. 270, 13 Ky. Law Rep. 95, where the failure of an assignee of a policy to disclose the state of the title at the time of the assignment was involved.

It is to be noted, however, that in nearly all of the cases cited above the policy contained the special clause requiring the interest of the insured to be truly stated, and it is this that, in all probability, distinguishes these cases from those which hold that a clause in a policy requiring insured's interest to be sole and unconditional ownership is satisfied by a general disclosure, and does not, generally, make it necessary for him to disclose the particular nature of his title or interest, in the absence of specific inquiries in regard thereto.

This is the doctrine governing *Lycoming Fire Insurance Co. v. Haven*, 95 U. S. 242, 24 L. Ed. 473; *Rumsey v. Phoenix Ins. Co. (C. C.)* 1 Fed. 396; *Perry v. Fanuell Hall Ins. Co. (C. C.)* 11 Fed. 432; *Washington Mills Emery Mfg. Co. v. Commercial Fire Ins. Co. (C. C.)* 13 Fed. 646; *Friezen v. Allemania Fire Ins. Co. (C. C.)* 30 Fed. 352; *Manchester Fire Assur. Co. v. Abrams*, 89 Fed. 933, 32 C. C. A. 426; *Geiss v. Franklin Ins. Co.*, 123 Ind. 172, 24 N. E. 99, 18 Am. St. Rep. 324; *Clay Fire & Marine Stock Ins. Co. v. Beck*, 43 Md. 358; *Hall v. Niagara Fire Ins. Co.*, 98 Mich. 184, 58 N. W. 727, 18 L. R. A. 135, 32 Am. St. Rep. 497; *Hoose v. Prescott Ins. Co. of Boston*, 84 Mich. 309, 47 N. W. 587, 11 L. R. A. 340; *Slobodsky v. Phenix Ins. Co.*, 53 Neb. 816, 74 N. W. 270; *German Ins. & Sav. Institution v. Kline*, 44 Neb. 395, 62 N. W. 857; *Phenix Ins. Co. v. Fuller*, 53 Neb. 811, 74 N. W. 269, 40 L. R. A. 408, 68 Am. St. Rep. 637; *Milwaukee Mechanics' Fire Ins. Co. v. Fuller*, 53 Neb. 815, 74 N. W. 273; *Omaha Fire Ins. Co. v. Thompson*, 50 Neb. 580, 70 N. W. 80; *Dohn v. Farmers' Joint Stock Ins. Co.*, 5 Lans. (N. Y.) 279; *American Artistic Gold Stamping Co. v. Glens Falls Ins. Co.*, 1 Misc. Rep. 114, 20 N. Y. Supp. 646; *Wood v. American Fire Ins. Co. of Philadelphia*, 78 Hun, 109, 29 N. Y. Supp. 250; *Huff v. Jewett*, 44 N. Y. Supp. 811, 20 Misc. Rep. 85;

Millville Mut. Fire Ins. Co. v. Wilgus, 88 Pa. 107; Imperial Fire Ins. Co. v. Dunham, 117 Pa. 460, 12 Atl. 668, 2 Am. St. Rep. 686; Collins v. London Assurance Co., 165 Pa. 298, 30 Atl. 924; Steinmeyer v. Steinmeyer, 64 S. C. 413, 42 S. E. 184, 59 L. R. A. 319, 92 Am. St. Rep. 809; Manhattan Ins. Co. v. Barker, 7 Heisk. (Tenn.) 503; Franklin Fire Ins. Co. v. Crockett, 7 Lea (Tenn.) 725; Light v. Greenwich Ins. Co., 105 Tenn. 480, 58 S. W. 851; Liverpool & London & Globe Ins. Co. v. Ricker, 10 Tex. Civ. App. 264, 31 S. W. 248; Rankin v. Andes Ins. Co., 47 Vt. 144; Wolpert v. Northern Assur. Co., 44 W. Va. 734, 29 S. E. 1024; Johannes v. Standard Fire Office, 70 Wis. 196, 35 N. W. 298, 5 Am. St. Rep. 159; McClelland v. Greenwich Ins. Co., 107 La. 124, 31 South. 691.

In *De Wolf v. Capital City Ins. Co.*, 16 Hun (N. Y.) 116, where the policy insured *V. & Co.*, "as interest may appear," the court held that the phrase operated as a waiver of the right to disclosure under the clause as to sole and unconditional ownership.

This doctrine was reasserted by the Court of Appeals in *Dakin v. Liverpool & London & Globe Ins. Co.*, 77 N. Y. 600, and it seems to have been approved, also, in *Lycoming Fire Ins. Co. v. Jackson*, 83 Ill. 302, 25 Am. Rep. 383.

(f) Effect of false statements, concealment, or breach of condition in general.

In several cases the broad rule has been laid down that false statements as to the title or interest of the person insured avoid the policy.

Reference may be made to *Mohr & Mohr Distilling Co. v. Ohio Ins. Co.* (C. C.) 13 Fed. 74; *Spare v. Home Mut. Ins. Co.* (C. C.) 19 Fed. 14; *Planters' Mut. Ins. Co. v. Loyd*, 67 Ark. 584, 56 S. W. 44, 77 Am. St. Rep. 136; *Alberts v. Insurance Co. of North America*, 117 Ga. 854, 45 S. E. 282; *Security Ins. Co. v. Bronger*, 6 Bush (Ky.) 146; *Lovejoy v. Augusta Mut. Fire Ins. Co.*, 45 Me. 472; *Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co.*, 31 Mich. 346; *Liverpool & London & Globe Ins. Co. v. Cochran*, 77 Miss. 348, 26 South. 932, 78 Am. St. Rep. 524; *Shoup v. Dwelling House Ins. Co.*, 51 Mo. App. 286; *Stephens v. German Ins. Co.*, 61 Mo. App. 194; *American Ins. Co. v. Barnett*, 73 Mo. 364, 39 Am. Rep. 517; *Ehrsam Mach. Co. v. Phenix Ins. Co.*, 43 Neb. 554, 61 N. W. 722; *Sun Ins. Co. v. Greenville Bldg. & Loan Ass'n*, 58 N. J. Law, 367, 33 Atl. 962; *Pierce v. Empire Ins. Co.*, 62 Barb. (N. Y.) 636; *Birmingham v. Empire Ins. Co.*, 42 Barb. (N. Y.) 457; *Schuster v. Dutchess County Mut. Ins. Co.*, 102 N. Y. 260, 6 N. E. 406; *Gettelman v. Commercial Union Assur. Co.*, 97 Wis. 287, 72 N. W. 627; *Tyree v. Virginia Fire & Marine Ins. Co.* (W. Va.) 46 S. E. 706, 66 L. R. A. 657.

In some of these cases the statements are regarded as express warranties. This broad rule has, however, been qualified in a majority of the cases, as will appear later in the discussion, by considerations of materiality and the intent of the insured.

In accordance with general principles it has been held that misrepresentation as to title cannot be predicated, where no application or representation is made by the insured.

Such is the principle governing *German Ins. & Sav. Inst. v. Kline*, 44 Neb. 395, 62 N. W. 857; *Slobodsky v. Phenix Ins. Co.*, 53 Neb. 816, 74 N. W. 270; *Trade Ins. Co. v. Barraciff*, 45 N. J. Law, 543, 46 Am. Rep. 792; *Burrows v. McCalley*, 17 Wash. 269, 49 Pac. 508; *Cleavenger v. Franklin Fire Ins. Co. of Wheeling*, 47 W. Va. 595, 35 S. E. 998; *Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 24 S. E. 893, 53 Am. St. Rep. 846; *Union Assur. Soc. v. Nalls*, 101 Va. 613, 44 S. E. 896, 90 Am. St. Rep. 923.

Nor can a claim of false representation be based on nondisclosure, where no inquiry is made, according to *Phelps v. Gebhard Fire Ins. Co.*, 22 N. Y. Super. Ct. 404.

As a necessary deduction from the foregoing principle, it has been asserted in *Lycoming Fire Ins. Co. v. Jackson*, 83 Ill. 302, 25 Am. Rep. 386, and *Fidelity Mut. Fire Ins. Co. v. Lowe* (Neb.) 93 N. W. 749, that misrepresentation avoiding the policy cannot be based on statements as to title made by the agent of the insurer.⁴ If the answers of the insured are inconsistent, a claim of avoidance for misrepresentation cannot be based thereon, according to *Lamb v. Council Bluffs Ins. Co.*, 70 Iowa, 238, 30 N. W. 497, so long as the statements are sufficiently definite to put the insured on inquiry. Statements as to title need be true only as of the time when they are made, according to *Lycoming Ins. Co. v. Mitchell*, 48 Pa. 367.

Where the policy is conditioned that it shall be void if the subject of insurance is a building on ground not owned in fee simple, or if the interest of the insured is other than sole and unconditional ownership, a breach of such conditions avoids the policy.

Reference may be made to *Brown v. Commercial Fire Ins. Co.*, 86 Ala. 189, 5 South. 500; *Phoenix Ins. Co. v. Public Parks Amusement Co.*, 63 Ark. 187, 37 S. W. 959; *Henning v. Western Assur. Co.*, 77 Iowa, 819, 42 N. W. 308; *Overton v. American Cent. Ins. Co.*, 79 Mo. App. 1; *Ordway v. Chase*, 57 N. J. Eq. 478, 42 Atl. 149; *Matthie v. Globe Fire Ins. Co.*, 74 N. Y. Supp. 177, 68 App. Div. 239; *Brooks v. Erie Fire Ins. Co.*, 78 N. Y. Supp. 748, 76 App. Div. 275; *Weed v. London & Lancashire Fire Ins. Co.*, 116 N. Y. 106,

⁴ See, also, Rev. St. Me. 1883, c. 49, § 12.

1338 AVOIDANCE OF CONTRACT—INSURANCE OF PROPERTY.

22 N. E. 229; *Home Ins. Co. v. Smith* (Tex. Civ. App.) 29 S. W. 264, 32 S. W. 240; *Simonds v. Firemen's Fund Ins. Co.* (Tex. Civ. App.) 35 S. W. 300.

In *Franklin Fire Ins. Co. v. Coates*, 14 Md. 285, the policy provided that if any person should insure property, and cause the same to be described in the policy otherwise than as it really was, the insurance should be of no force. The court held that this clause related to a misdescription of the property insured, and had no relation to the character of the title or interest.

In view of the principle that disclosure is not necessary, in the absence of inquiry, discussed in subdivision (b), it is a necessary deduction that, as said in *German Ins. & Sav. Inst. v. Kline*, 44 Neb. 395, 62 N. W. 857, concealment avoiding the policy cannot be predicated on a failure to disclose the title, when no inquiry has been made. Though the general statement is made, in *Catron v. Tennessee Ins. Co.*, 6 Humph. (Tenn.) 176, and in *Security Ins. Co. v. Bronger*, 6 Bush (Ky.) 146, that a failure to disclose is a concealment avoiding the policy, we are, in view of the established rules heretofore discussed, justified in assuming that concealment avoiding the policy can be predicated on a failure to disclose title or interest only when the policy by special stipulation requires disclosure, as in *Grigsby v. German Ins. Co.*, 40 Mo. App. 276, and *Adema v. Lafayette Fire Ins. Co.*, 36 La. Ann. 660, or where disclosure is required by the provisions of the charter of a mutual company, as in *Illinois Mut. Fire Ins. Co. v. Marseilles Mfg. Co.*, 1 Gilman (Ill.) 236.

A false statement as to title, or failure to disclose the true title, will not affect the rights of the mortgagee.

Burrows v. McCalley, 17 Wash. 269, 49 Pac. 508; *Phoenix Assur. Co. v. Hinds*, 67 Kan. 595, 73 Pac. 893; *Smith v. Union Ins. Co.* (R. I.) 55 Atl. 715; *North British & Mercantile Ins. Co. v. Bohn*, 49 Neb. 572, 68 N. W. 942.

(g) Effect of false statements or concealment as dependent on materiality.

It is obvious that, in those cases where statements as to title or interest are regarded as warranties, the materiality of the fact cannot be considered in determining the effect of a false statement.

This is supported by *Adema v. Lafayette Fire Ins. Co.*, 36 La. Ann. 660; *Germier v. Springfield Fire & Marine Ins. Co.*, 109 La. 841, 83 South. 361; *Holloway v. Dwelling House Ins. Co.*, 48 Mo. App. 1; *Bohrbach v. Germania Fire Ins. Co.*, 62 N. Y. 47, 20 Am. Rep. 451.

But, if the statements as to title or interest are regarded as representations merely, the materiality of the fact is an important factor in determining the effects of a false statement.

Reference may be made to *Columbia Ins. Co. v. Lawrence*, 10 Pet. 507, 9 L. Ed. 512; *Kentucky Mut. Ins. Co. v. Harrison*, 7 Ky. Law Rep. 43; *Kenton Ins. Co. v. Wigginton*, 89 Ky. 330, 12 S. W. 668, 7 L. R. A. 81; *Adema v. Lafayette Fire Ins. Co.*, 36 La. Ann. 660; *Pinkham v. Morang*, 40 Me. 587; *Leathers v. Farmers' Mut. Fire Ins. Co.*, 24 N. H. 259; *Tyler v. Aetna Fire Ins. Co.*, 12 Wend. (N. Y.) 507, affirmed in 16 Wend. 385, 30 Am. Dec. 90.

Where concealment is predicated on a failure to disclose the title or interest of the insured, the materiality of the fact undisclosed must be considered in determining the effect of such failure.

This is asserted in *Phoenix Ins. Co. v. Hamilton*, 14 Wall. 504, 20 L. Ed. 729; *Franklin Fire Ins. Co. v. Coates*, 14 Md. 285; *Clement v. British America Ins. Co.*, 141 Mass. 298, 5 N. E. 847; *Kernochan v. New York Bowery Fire Ins. Co.*, 12 N. Y. Super. Ct. 1; *Irving v. Excelsior Fire Ins. Co.*, 14 N. Y. Super. Ct. 507.

It is said, in *Adema v. Lafayette Fire Ins. Co.*, 36 La. Ann. 660, that, if the policy contains a stipulation calling for full disclosure of title or interest, a failure to disclose will avoid the policy, whether it is really material or not.

It has been said in a few cases that statements as to the title or interest of the insured are not necessarily material.

Tyler v. Aetna Fire Ins. Co., 12 Wend. (N. Y.) 507, affirmed in 16 Wend. 385, 30 Am. Dec. 90; *Phoenix Ins. Co. v. Hinds*, 67 Kan. 595, 73 Pac. 893; *Morrison's Adm'r v. Tennessee Marine & Fire Ins. Co.*, 18 Mo. 262, 59 Am. Dec. 299; *Franklin v. Atlantic Fire Ins. Co.*, 42 Mo. 456.

But the weight of authority supports the principle that the condition of the title or interest is a fact material to the risk, which must be truly and fully stated.

Reference may be made to *Planters' Mut. Ins. Co. v. Loyd*, 67 Ark. 584, 56 S. W. 44, 77 Am. St. Rep. 136; *Eminence Mut. Ins. Co. v. Jesse*, 1 Metc. (Ky.) 523; *Wilbur v. Bowditch Mut. Ins. Co.*, 10 Oush. (Mass.) 446; *Monaghan v. Agricultural Fire Ins. Co.*, 53 Mich. 238, 18 N. W. 797; *Aetna Ins. Co. v. Resh*, 40 Mich. 241; *Van Kirk v. Citizens' Ins. Co.*, 79 Wis. 627, 48 N. W. 798.

In *Kernochan v. New York Bowery Fire Ins. Co.*, 12 N. Y. Super. Ct. 1, and *Adema v. Lafayette Fire Ins. Co.*, 36 La. Ann. 660, the question whether statements as to title or interest are material was

regarded as dependent on whether the character of the interest was such as to vary the right of premium. In *Tyler v. Ætna Fire Ins. Co.*, 12 Wend. (N. Y.) 507, affirmed in 16 Wend. 385, 30 Am. Dec. 90, and *Morrison's Adm'r v. Tennessee Marine & Fire Ins. Co.*, 18 Mo. 262, 59 Am. Dec. 299, it was said that generally the character of the interest cannot have that effect, and, as the insurer has the opportunity to protect himself by inquiry, the condition of the title may fairly be regarded as immaterial, in the absence of inquiry. From this doctrine it may be inferred that, where inquiry is made, the condition of the title must be regarded as material ipso facto.

Pelican Ins. Co. v. Smith, 92 Ala. 428, 9 South. 327; *Id.*, 107 Ala. 313, 18 South. 105; *Jenkins v. Quincy Mut. Fire Ins. Co.*, 7 Gray (Mass.) 370.

In the leading case of *Columbia Ins. Co. v. Lawrence*, 2 Pet. 25, 7 L. Ed. 335, and *Id.*, 10 Pet. 507, 9 L. Ed. 512, statements as to title are regarded as material, on the ground that they might, and probably would, influence the mind of the underwriter in accepting or declining the risk; the theory being that on the interest of the insured depends the extent to which he would probably protect his property from loss. In other words, it is in their relation to the moral hazard that the materiality of statements as to title or interest rests.

This principle is also approved in *Phoenix Ins. Co. v. Hamilton*, 14 Wall. 504, 20 L. Ed. 729; *Capital City Ins. Co. v. Caldwell*, 95 Ala. 77, 10 South. 355; *Day v. Charter Oak Fire & Marine Ins. Co.*, 51 Me. 91; *Catron v. Tennessee Ins. Co.*, 6 Humph. (Tenn.) 176.

In the case of mutual companies the condition of the title and the extent of the interest of the insured are regarded as material, in view of the lien given such companies for assessments. This principle was indorsed in *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90, affirming 12 Wend. (N. Y.) 507, and is well established by cases in which mutual companies were involved.

It is deemed sufficient to refer to *Brown v. Williams*, 28 Me. 253; *Pinkham v. Morang*, 40 Me. 587; *Lovejoy v. Augusta Mut. Fire Ins. Co.*, 45 Me. 472; *Merrill v. Farmers' & Mechanics' Mut. Fire Ins. Co.*, 48 Me. 285; *Mutual Fire Ins. Co. v. Deale*, 18 Md. 26, 79 Am. Dec. 673; *Wilbur v. Bowditch Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 446; *Brown v. People's Mut. Ins. Co.*, 11 Cush. (Mass.) 280; *Jenkins v. Quincy Mut. Fire Ins. Co.*, 7 Gray (Mass.) 370; *Leathers v. Farmers' Mut. Fire Ins. Co.*, 24 N. H. 259; *Marshall v. Columbian Mut. Fire Ins. Co.*, 27 N. H. 157; *Phillips Beckel & Co. v. Knox County Mut. Ins. Co.*, 20 Ohio, 174.

(h) Effect of false statements as dependent on knowledge and intent of the insured.

In *Catron v. Tennessee Ins. Co.*, 6 Humph. (Tenn.) 176, the general doctrine was asserted that a concealment of title avoids the policy whether fraudulent or innocent. It is to be noted, however, that in this case the condition of the title was regarded as necessarily material. On the recognized ground that the fact is material, it has been held that false statements or concealment as to the title or interest will avoid the policy, irrespective of the knowledge or intent of the insured.

Fletcher v. Com. Ins. Co., 18 Pick. (Mass.) 419; *Wilbur v. Bowditch Mut. Ins. Co.*, 10 Oush. (Mass.) 446; *Mutual Assurance Co. v. Mahon*, 5 Call (Va.) 517.

But it was said, in *Schuster v. Dutchess County Ins. Co.*, 102 N. Y. 260, 6 N. E. 406, that the doctrine that material representations as to title will avoid the policy, whether fraudulent or not, has no application where a severance is allowed between different items of insurance.

In view of the general doctrine of warranties, it necessarily follows that, where the statements as to title or interest are made warranties, the breach thereof will avoid the policy, whether the result of design or mistake.

Reference to the following cases is deemed sufficient: *Adema v. Lafayette Fire Ins. Co.*, 36 La. Ann. 660; *Froehly v. North St. Louis Mut. Fire Ins. Co.*, 32 Mo. App. 302; *Holloway v. Dwelling-House Ins. Co.*, 48 Mo. App. 1; *Rohrbach v. Germania Fire Ins. Co.*, 62 N. Y. 47, 20 Am. Rep. 451.

So it has been held that, where there is a condition requiring the true state of the title to be disclosed, a failure to set forth the title will avoid the policy, whether such failure resulted from design or mistake.

Adema v. Lafayette Fire Ins. Co., 36 La. Ann. 660; *Fireman's Fund Ins. Co. v. Barker*, 6 Colo. App. 541, 41 Pac. 513.

But the contrary view seems to have been taken in *Dooly v. Hanover Fire Ins. Co.*, 16 Wash. 155, 47 Pac. 507, 58 Am. St. Rep. 26; *Phoenix Ins. Co. v. Hinds*, 67 Kan. 595, 73 Pac. 893; *Hartford Ins. Co. v. Haas*, 87 Ky. 531, 9 S. W. 720, 2 L. R. A. 64.

The rule that misrepresentations as to title or interest will avoid the policy, whether due to design or mistake, has been repudiated in many well-considered cases. The grounds of objection are well stated in *Morrison's Adm'r v. Tennessee Marine & Fire Ins. Co.*,

18 Mo. 262, 59 Am. Dec. 299, where the court says that as it is in the power of the insurer to protect itself by making inquiry as to all matters which it deems material to the risk, and the insured is ignorant, not only of the importance of stating his interest, but also of the exact nature of his title, it would be extremely unjust to hold him responsible, except for fraud. As a result of this reasoning we may deduce the principle that the effect of a misrepresentation as to title or interest, or of a failure to disclose the exact nature of such interest, in the absence of inquiry, is dependent on the knowledge and intent of the insured.

This principle is approved in *Stout v. Fire Ins. Co.*, 12 Iowa, 371, 79 Am. Dec. 539; *Kentucky Mut. Ins. Co. v. Harrison*, 7 Ky. Law Rep. 43; *Curry v. Commonwealth Ins. Co.*, 10 Pick. (Mass.) 535, 20 Am. Dec. 547; *Fletcher v. Commonwealth Ins. Co.*, 18 Pick. (Mass.) 419; *Allen v. Charleston Mut. Fire Ins. Co.*, 5 Gray (Mass.) 384; *Washington Mills Emery Mfg. Co. v. Weymouth & Braintree Fire Ins. Co.*, 185 Mass. 503; *Castner v. Farmers' Mut. Fire Ins. Co.*, 46 Mich. 15, 8 N. W. 554; *Newman v. Springfield Fire & Mar. Ins. Co.*, 17 Minn. 123 (Gil. 98); *Boulware v. Farmers' & Laborers' Co-operative Ins. Co.*, 77 Mo. App. 639; *Sussex County Mut. Ins. Co. v. Woodruff*, 28 N. J. Law, 541; *Farmers' Mut. Fire & Lightning Ins. Co. v. Ward*, 24 Ohio Cir. Ct. R. 156; *Columbia Ins. Co. v. Cooper*, 50 Pa. 331; *Imperial Fire Ins. Co. v. Murray*, 73 Pa. 18; *Monroe County Mut. Fire Ins. Co. v. Robinson*, 5 Wkly. Notes Cas. (Pa.) 389; *Underwriters' Fire Ass'n v. Palmer* (Tex. Civ. App.) 74 S. W. 603; *Dooly v. Hanover Fire Ins. Co.*, 16 Wash. 155, 47 Pac. 507, 58 Am. St. Rep. 26.

(1) Statutory provisions limiting the effect of misrepresentations.

Statutory provisions declaring that misrepresentations shall not avoid the policy, unless fraudulent or material to the risk, have been applied in several interesting cases to statements relating to title or interest. In *Emery v. Piscataqua Fire & Marine Ins. Co.*, 52 Me. 322, the court held that, in view of Act March 15, 1861, c. 34, providing that any misrepresentation of the title or interest, unless fraudulent, shall not prevent the insured from recovering to the amount of his insurable interest, a misrepresentation will not avoid the policy, unless fraudulent. The court holds that the statute is imperative and must control, and that the parties cannot by provisions in the contract evade a rule established on grounds of public policy. The policy in this case contained a condition that, if the property be held by any interest not absolute, it must be so represented to the company or the insurance will be void. Justice Davis held that the effect of the statute was only to prevent

the avoidance of policies where no direct provision was made in the contract. There was no such condition in *Fox v. Phenix Fire Ins. Co.*, 52 Me. 333, and the statute was regarded as applicable without question, by Justice Davis who had dissented in the *Emery Case*. In *Gilman v. Dwelling House Ins. Co.*, 81 Me. 488, 17 Atl. 544, where there was no condition in the policy, and *Atherton v. British American Assur. Co.*, 91 Me. 289, 39 Atl. 1006, where there was a condition calling for disclosure, it was held that, in view of Rev. St. 1883, c. 49, § 20, declaring that erroneous descriptions of title or interest shall not avoid the policy, unless the variance between the title described and the true title materially increase the risk, a misrepresentation as to title or a failure to disclose the exact nature of the interest will not avoid the policy, unless the risk is thereby materially increased.

The New Hampshire statute (Gen. St. c. 157, § 2), providing that no policy shall be avoided by reason of any misrepresentation, unless it is intentionally and fraudulently made, was applied in *Tuck v. Hartford Fire Ins. Co.*, 56 N. H. 326, where there was a failure to disclose the exact interest under a condition calling for such disclosure.⁵ This doctrine was subsequently followed in *Leach v. Public Fire Ins. Co.*, 58 N. H. 245, where there was an erroneous description of plaintiff's interest. The statute was also applied in *Perry v. Dwelling House Ins. Co.*, 67 N. H. 291, 33 Atl. 731, 68 Am. St. Rep. 668. The Massachusetts statute⁶ was applied in *Doyle v. American Fire Ins. Co.*, 181 Mass. 139, 63 N. E. 394, where there was a false statement as to ownership of the property insured. In *Light v. Greenwich Ins. Co.*, 105 Tenn. 480, 58 S. W. 851, the title of a portion of the insured property remained in the vendor as security for the purchase money; but the insured was guilty of no fraud in procuring the policy. It was held that, in view of Shannon's Code, § 3306, providing that no misrepresentation shall avoid the policy, unless made with actual intent to deceive, or unless the matter represented increased the risk, there was not sufficient ground for avoidance, as the existence of the purchase-money lien was not material to the risk.⁷

⁵ See, also, Pub. St. N. H. 1901, c. 170, § 2.

⁶ Pub. St. Mass. c. 119, § 121; Rev. Laws, c. 118, § 21.

⁷ See, also, Civ. Code Ga. 1895, § 2101.

15. CONSTRUCTION AND SUFFICIENCY OF DISCLOSURES AS TO TITLE TO OR INTEREST IN THE PROPERTY INSURED.

- (a) Sufficiency of disclosure in general.
- (b) General principles of construction of conditions and representations.
- (c) Ownership which will support the policy—Absolute ownership and title in fee simple.
- (d) Defective or defeasible title.
- (e) Equitable title or interest.
- (f) Same—Vendee under contract of purchase.
- (g) Property subject to lien—Title of mortgagor or mortgagee.
- (h) Same—Personal property held under conditional sale.
- (i) Property held in trust.
- (j) Leaseholds—Building on leased land.
- (k) Property held under joint or several title
- (l) Partnership or corporate property.
- (m) Property of husband and wife.

(a) Sufficiency of disclosure in general.

For the purpose of laying a foundation for the determination of the truth and adequacy of representations as to title and interest, it is advisable to state a few of the general principles which control in such determination. Though it has been said that the insured was bound to disclose the nature of his interest fully and accurately, especially in view of a condition that any false statement or concealment avoids the policy (*Birmingham v. Empire Ins. Co.*, 42 Barb. [N. Y.] 457), the more liberal rule seems to prevail in most courts. A general statement as to interest is sufficient (*Morrison's Adm'r v. Tennessee Marine & Fire Ins. Co.*, 18 Mo. 262, 59 Am. Dec. 299), especially in view of the fact that, should the insured attempt to disclose the exact nature and extent of his title, he would usually, through lack of exact technical knowledge, be very apt to misdescribe it. Of like tenor is *Allen v. Charlestown Mut. Fire Ins. Co.*, 5 Gray (Mass.) 384, where the court asserted the principle that it is sufficient if the disclosure is substantially true. That is to say, the insured is not bound to answer with exact legal precision. If the title is so described that it can be understood, it is sufficient. So it is not the duty of the insured to attempt to draw distinctions of law between the different kinds of title, but only to give a true statement of the facts (*Williams v. Roger Williams Ins. Co.*, 107 Mass. 377, 9 Am. Rep. 41). It is in accord with these principles that it is said, in *Hill v. Lafayette Ins. Co.*, 2 Mich. 476, that the ex-

istence of litigation affecting the title to the property is not so obviously connected with the true description that a failure to disclose the existence of the litigation would avoid the policy. So, where the policy was on the use and occupancy of an elevator (*Buffalo Elevating Co. v. Prussian National Ins. Co.*, 64 App. Div. 182, 71 N. Y. Supp. 918), the insured was not bound to disclose that with the proprietors of other elevators he had entered into an agreement by which all receipts, after paying the operating expenses, were pooled and divided pro rata.

The general doctrine that if the disclosure, though not full, is such as to put the insurer on inquiry, it is sufficient, is approved in *Phenix Ins. Co. v. Stocks*, 149 Ill. 319, 36 N. E. 408. Thus a policy payable "as interest may appear" is sufficient to put the insurer on inquiry as to the true state of the title (*Fame Ins. Co. v. Mann*, 4 Ill. App. 485). So is a policy payable "to whom it may concern" (*Richmond v. Fire Ins. Co.*, 79 N. Y. 230, reversing 15 Hun, 248); or a policy payable to one as assignee for the benefit of creditors (*Sibley v. Prescott Ins. Co.*, 57 Mich. 14, 23 N. W. 473). In general, it may be said, as in *Miotke v. Milwaukee Mechanics' Ins. Co.*, 113 Mich. 166, 71 N. W. 463, that, if the insurer is not satisfied with the disclosure as to title, the inquiry should be followed up and further inquiry made. If the inquiry as to title is not answered at all (*Dunbar v. Phenix Ins. Co.*, 72 Wis. 492, 40 N. W. 386), or if the answer is ambiguous (*Clawson v. Citizens' Mut. Fire Ins. Co.*, 121 Mich. 591, 80 N. W. 573, 80 Am. St. Rep. 538), it is the duty of the insurer to follow up the inquiry if it is not satisfied.

McCulloch v. Norwood, 58 N. Y. 562; *Farmers' Mut. Fire & Lightning Ins. Co. v. Lecroy*, 91 Ill. App. 41.

(b) General principles of construction of conditions and representations.

The fundamental principle that the written portions of the contract will control the printed provisions was applied in *Sullivan v. Spring Garden Ins. Co.*, 34 App. Div. 128, 54 N. Y. Supp. 629, where the policy contained a printed clause declaring it void if the interest of the insured was less than absolute ownership, or if the building was on ground not owned by the insured, and written portions showed that the insured was a contractor for the erection of a building on land owned by a third person. Under the rule that, where a particular enumeration is followed by general terms, the latter shall be limited in their application to the same class as those

specified, it was held, in *Boulware v. Farmers' & Laborers' Co-operative Ins. Co.*, 77 Mo. App. 639, that where the policy provided that, if the interest of the insured is a leasehold or other interest not absolute, it must be so stated, the phrase "or other interest not absolute" must be construed as referring to estates similar to the leaseholds. The principle was also applied in *Washington Fire Ins. Co. v. Kelly*, 32 Md. 421, 3 Am. Rep. 149.

It was said in *Weber v. American Central Ins. Co.*, 35 Mo. App. 521, that it is the effect of the instrument under which the insured claims title that must control, and not its form. So, in *Rockford Ins. Co. v. Nelson*, 65 Ill. 415, where to the question whether the title was a warranty deed or a bond, the insured answered "W. D.," the court held that, though those letters were construed to mean "warranty deed," the answer did not amount to a representation that the insured had any particular estate, as a warranty deed passed only the estate of the grantor.

A similar rule was announced in *Phenix Ins. Co. v. Stocks*, 40 Ill. App. 64, affirmed in 149 Ill. 335, 36 N. E. 408, and *Pavey v. American Ins. Co.*, 56 Wis. 221, 13 N. W. 925, where the insured stated that he held by a warranty deed.

The term "title," while it expresses ownership, does not import any particular kind of ownership (*Baker v. State Ins. Co.*, 31 Or. 41, 48 Pac. 699, 65 Am. St. Rep. 807). The term "owner" is not necessarily to be construed as meaning that the applicant is the owner in fee simple (*Convis v. Mutual Fire Ins. Co.*, 127 Mich. 616, 86 N. W. 994). The term is comprehensive, and must be held to include any insurable interest or title which the applicant has, and which entitles him to the possession or use of the property. The term is thus defined as one who owns, a rightful proprietor, one who has the legal title, whether he is the possessor or not, and in a general sense one who has or possesses. In *Swift v. Vermont Mut. Fire Ins. Co.*, 18 Vt. 313, where the charter of the company provided that the policy should be void if the insured had a less estate than unincumbered title in fee simple, the court held that a "less estate" was an estate of less duration than fee simple, as an estate for life or for years. The word "clear," used to describe the title of the insured (*Farmers' Mut. Fire & Lightning Ins. Co. v. Lecroy*, 91 Ill. App. 41), does not imply any particular kind of title, as a life estate may be clear, as well as an estate in fee.

In *Alamo Fire Ins. Co. v. Lancaster*, 7 Tex. Civ. App. 677, 28 S. W. 126, and *Rockford Ins. Co. v. Nelson*, 65 Ill. 415, it was said that the

words "dwelling house" do not import title of any kind; and in *Omaha Fire Ins. Co. v. Crighton*, 50 Neb. 314, 69 N. W. 766, a statement that insurance is desired upon household goods while they are in a building was said not to involve a representation that the insured owned the building.

The word "homestead," used to describe the title of the insured (*St. Paul Fire & Marine Ins. Co. v. Neidecken*, 6 Dak. 494, 43 N. W. 696), does not imply an absolute ownership.

In *Hough v. City Fire Ins. Co.*, 29 Conn. 10, 76 Am. Dec. 581, it was said that one may primarily regard property as "his," and so denominate it, when he has a right to it and the power by law to enforce and protect that right; but it does not imply any particular estate.

This principle is also asserted in *Little v. Phoenix Ins. Co.*, 123 Mass. 380, 25 Am. Rep. 96; *Fowle v. Springfield Fire & Marine Ins. Co.*, 122 Mass. 191, 23 Am. Rep. 308; *Niblo v. North American Fire Ins. Co.*, 3 N. Y. Super. Ct. 551; *Phelps v. Gebhard Fire Ins. Co.*, 22 N. Y. Super. Ct. 404; *Rohrback v. Germania Ins. Co.*, 62 N. Y. 47, 20 Am. Rep. 451; *Mutual Fire Ins. Co. v. Deale*, 18 Md. 26, 79 Am. Dec. 673; *Lawrence v. St. Marks Ins. Co.*, 43 Barb. (N. Y.) 479. And a description of the buildings as "his" is sufficient disclosure of interest, in the absence of special inquiry. *Buck v. Phoenix Ins. Co.*, 76 Me. 583.

On the other hand, a description of property as "belonging to" the insured was regarded as an allegation of ownership in *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25, 7 L. Ed. 335, and the doctrine was reasserted on second appeal, reported in 10 Pet. 507, 9 L. Ed. 512.

That the words "his" and "theirs" import ownership has also been asserted in *Lasher v. St. Joseph Fire & Marine Ins. Co.*, 86 N. Y. 423; *Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co.*, 31 Mich. 346; *Mechanics' & Traders' Ins. Co. v. Mutual Real Estate & Bldg. Ass'n*, 98 Ga. 262, 25 S. E. 457; *Smith v. Bowditch Mut. Fire Ins. Co.*, 6 Cush. (Mass.) 448; *Lasher v. Northwestern National Ins. Co.*, 18 Hun (N. Y.) 99, 57 How. Prac. 222; *Security Ins. Co. v. Bronger*, 6 Bush (Ky.) 146.

(c) Ownership which will support the policy—Absolute ownership and title in fee simple.

In some instances, the applicant for insurance represents that he is the owner, the absolute owner, or that he has title in fee simple. In other instances, the policy provides that if the interest of the insured is not absolute, or if his estate is less than title in fee simple,

the true state of the title or interest must be expressed in the policy. An absolute ownership is said to exist when the interest is so completely vested in the insured that he cannot be deprived of it without his own consent.

Hough v. City Fire Ins. Co., 29 Conn. 10, 76 Am. Dec. 581; *East Texas Fire Ins. Co. v. Crawford* (Tex. Sup.) 16 S. W. 1068.

As said in *Monaghan v. Agricultural Fire Ins. Co.*, 53 Mich. 238, 18 N. W. 797, it is the fact of ownership and not the source of the title that is important, and consequently a statement of absolute ownership based on a deed is not falsified by the fact that it was based on a will. According to *Cochran v. Amazon Ins. Co.*, 7 Ohio Dec. 276, it is not necessary that the purchase price has been actually paid. In *Manchester Fire Assur. Co. v. Abrams*, 89 Fed. 933, 32 C. C. A. 426, the court lays down the general principle that one who states that he is the owner is bound to show only an insurable interest, provided he is not guilty of actual misrepresentation or concealment. In accord with this is the principle (*McCoy v. Iowa State Ins. Co.*, 107 Iowa, 80, 77 N. W. 529) that a condition requiring disclosure, if the insured's interest is not absolute, does not require a disclosure of title, but merely a disclosure of interest, if other than absolute. So, in *Hope Ins. Co. v. Brolaskey*, 35 Pa. 282, it was said that a condition requiring the interest to be expressed in the policy, if not absolute, does not require the person insuring a building to give notice that he is not the owner of the land on which it is located. The condition is satisfied where the house is personalty, if the insured is absolute owner thereof.

According to *Garver v. Hawkeye Ins. Co.*, 69 Iowa, 202, 28 N. W. 555, to be a sole owner one must be an owner by fee-simple title. An absolute fee-simple title imports an unlimited interest claimed and held under a deed or other evidence of title purporting to invest him with an estate in fee simple (*Security Ins. Co. v. Kuhn*, 108 Ill. App. 1), and can mean only that the insured holds under a paper title conferring upon him this sort of an estate, as contradistinguished from any limited or inferior one (*Phenix Ins. Co. v. Bowdre*, 67 Miss. 620, 7 South. 596, 19 Am. St. Rep. 326). It is, however, asserted in other cases that a paper title is not necessary. Thus, in *Hubbard v. North British & Mercantile Ins. Co.*, 57 Mo. App. 1, it was said that a fee-simple title is absolute ownership in property, and may exist without a deed. So, in *Capital City Ins. Co. v. Caldwell*, 95 Ala. 77, 10 South. 355, the court said that

a paper title is not necessary to support a statement that the insured has a fee-simple title. In accord with these cases is *Phoenix Ins. Co. v. Whiteleather*, 34 Ill. App. 60, where it was held that a representation that the insured is the owner in fee simple need not necessarily rest on record, but may be satisfied if the insured has held adverse possession for a sufficient length of time to bar an action. A similar doctrine was asserted in *Lockwood v. Middlesex Fire Ins. Co.*, 47 Conn. 555; and in *Wineland v. Security Ins. Co.*, 53 Md. 276, it was said that a verbal gift was sufficient to support an allegation of ownership, though no deed had been executed.

In *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25, 7 L. Ed. 335, and *Id.*, 10 Pet. 507, 9 L. Ed. 512, it was said that, if property is described as "belonging to" the insured, the phrase imports an absolute legal title. So it has been held that the word "his" or "their," used in describing the property insured, implies an absolute estate in fee simple or absolute ownership.

This is asserted in *Mechanics' & Traders' Ins. Co. v. Mutual Real Estate & Bldg. Ass'n*, 98 Ga. 262, 25 S. E. 457; *Smith v. Bowditch Mut. Fire Ins. Co.*, 6 Cush. (Mass.) 448; *Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co.*, 31 Mich. 346; *Lasher v. Northwestern National Ins. Co.*, 57 How. Prac. (N. Y.) 222, reversing 55 How. Prac. 326; *Same v. St. Joseph Fire & Marine Ins. Co.*, 86 N. Y. 423. The contrary doctrine is asserted in *Hough v. City Fire Ins. Co.*, 29 Conn. 10, 76 Am. Dec. 581; *Niblo v. North American Fire Ins. Co.*, 3 N. Y. Super. Ct. 551; *Phelps v. Gebhard Fire Ins. Co.*, 22 N. Y. Super. Ct. 404; *Mutual Fire Ins. Co. v. Deale*, 18 Md. 26, 79 Am. Dec. 673.

A statement that the insured has a deed (*Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452, 29 Am. Rep. 184) does not indicate that his title is in fee as of freehold, but the statement is true if the title is based primarily on a deed, no matter what its nature may be. So it was said, in *Rockford Ins. Co. v. Nelson*, 65 Ill. 415, that a statement that the title was based on a warranty deed does not imply a title in fee simple, as a warranty deed at best passes only the estate of the grantor, and may therefore pass no estate whatever.

This principle was also approved in *Phenix Ins. Co. v. Stocks*, 40 Ill. App. 64, affirmed in 149 Ill. 335, 36 N. E. 408.

A statement that applicant has a "homestead" in the premises does not amount to a representation that the applicant has absolute title in fee, according to *St. Paul Fire & Marine Ins. Co. v. Neidecken*, 6 Dak. 494, 43 N. W. 696.

The phrase "less than fee simple," contained in the condition that the interest of the insured must be disclosed, if his estate is less than fee simple, is construed (*Swift v. Vermont Fire Ins. Co.*, 18 Vt. 313) to mean an estate of less duration than a fee-simple estate, such as an estate for life or for years. In view of this condition it has been held (*Birmingham v. Capital Ins. Co.*, 42 Barb. [N. Y.] 457; *Pierce v. Empire Ins. Co.*, 62 Barb. [N. Y.] 636) that a statement that insured is the owner of the property is in effect a statement that his title is in fee simple. But a statement that the insured had only a bond for title, and had no deed to the property (*Liberty Ins. Co. v. Boulden*, 96 Ala. 508, 11 South. 771), was regarded as a sufficient disclosure of the fact that plaintiff did not have a fee-simple title, where the policy contained a condition that, if the subject of the insurance is a building on ground not owned by the insured in fee simple, it should be void. In *Kenton Ins. Co. v. Wigginton*, 89 Ky. 330, 12 S. W. 668, 7 L. R. A. 81, the fact that the insured owned only one-fourth of the land in fee, having a life estate in the remainder, but claimed the fee of the whole, the matter being in litigation, was sufficient to show his title to be fee simple, as he was the owner of the building and of that portion of the land on which it stood. A statement that the insured is a contractor for the erection of a building on land owned by another person is sufficient, under a condition requiring disclosure if the interest of the insured is other than absolute ownership, or if the building is on ground not owned by the insured (*Sullivan v. Spring Garden Ins. Co.*, 54 N. Y. Supp. 629, 34 App. Div. 128). Where a house insured extended two feet on another lot and twenty feet into the street (*Haider v. St. Paul Fire & Marine Ins. Co.*, 67 Minn. 514, 70 N. W. 805), the court held that, as the plaintiff owned in fee simple a part of the land, a condition that the policy should be void, if the ground was not owned by the insured in fee simple, was not broken. The fact that the wife of the vendor of the insured did not join in the deed (*Southern Mut. Ins. Co. v. Kloeber*, 31 Grat. [Va.] 739) did not render insured's title less than fee simple, as the right of dower of the wife of the vendor was so undefined that it could not affect his title.

A person may insure as owner, though the owner of the adjoining lot has the right to use the applicant's wall as a common wall in constructing a building, *Commercial Ins. Co. v. Allen*, 80 Ala. 571, 1 South. 202; where the insured has given a bond to convey a half interest on payment of a certain sum, *Burbank v. Rockingham Fire Ins. Co.*, 24 N. H. 550, 57 Am. Dec. 300; where the title was based

on a will, *Monaghan v. Agricultural Fire Ins. Co.*, 53 Mich. 238, 18 N. W. 797; a purchaser at a judicial sale, *Susquehanna Mut. Fire Ins. Co. v. Staats*, 102 Pa. 529; *Clapp v. Mutual Fire Ins. Co.*, 27 N. H. 143; a purchaser at foreclosure sale, *Gaylord v. Lamar Fire Ins. Co.*, 40 Mo. 13, 93 Am. Dec. 239. In *Convis v. Citizens' Mut. Fire Ins. Co.*, 127 Mich. 616, 86 N. W. 994, and *Allen v. Charles-town Mut. Fire Ins. Co.*, 5 Gray (Mass.) 384, it was said that a life tenant is owner, though not an absolute owner. Where there is a mere option to purchase the person granting the option is still the owner. *Davis v. Quincy Mut. Fire Ins. Co.*, 10 Allen (Mass.) 113. It makes no difference that the purchase price is not paid. *Cochran v. Amazon Ins. Co.*, 7 Ohio Dec. 276. One in possession of the whole property as rightful owner, though having deed to only a portion of the premises, may insure as owner. *Hoffecker v. New Castle County Mut. Ins. Co.*, 5 Houst. (Del.) 101. So may vendee of personal property, where no lien is retained, *Franklin Fire Ins. Co. v. Vaughn*, 92 U. S. 516, 23 L. Ed. 740; or one not in actual possession, but to whom personal property has been transferred as security for money loaned, *Little v. Phoenix Ins. Co.*, 123 Mass. 380, 25 Am. Rep. 96.

A person may not insure as owner, where he has a deed in which the grantor reserves a homestead, *Continental Ins. Co. v. Gardner*, 62 S. W. 886, 23 Ky. Law Rep. 335; where he claims under a tax title based on defective proceedings, *Pinkham v. Morang*, 40 Me. 587; where one has only a dower interest, *Stephens v. German Ins. Co.*, 61 Mo. App. 194. One having only a life estate is not an owner. *Davis v. Iowa State Ins. Co.*, 67 Iowa, 494, 25 N. W. 745; *Garver v. Hawkeye Ins. Co.*, 69 Iowa, 202, 28 N. W. 555; *Shoup v. Dwelling House Ins. Co.*, 51 Mo. App. 286.

The receivers of the Union Pacific Railroad System, which included the properties of several separate corporations, as receivers of one of such corporations insured its property; the schedule of property insured including that in a warehouse and yards in fact used by the receivers in the operation of its road, but owned by a terminal company. It was held in *Liverpool & L. & G. Ins. Co. v. McNeill*, 89 Fed. 131, 32 C. C. A. 173, that the fact that the company for whose benefit the insurance was taken had, prior to the receivership, transferred all its right to the use of the terminal company's property to one of the other companies, at the time of the insurance also represented by the receivers, did not invalidate the insurance as to property destroyed while in such warehouse and yards, as the effect of the receivership was to abrogate the contracts of each of the insolvent companies with the others so far as required by its individual interests or those of its creditors.

(d) Defective or defeasible title.

The insured may fairly be regarded as an absolute owner or owner in fee simple, though his title is defective by reason of defective execution of the deed under which he claims (*Swift v. Vermont Mut. Fire Ins. Co.*, 18 Vt. 313), or an erroneous description of the property (*Diehlman v. Dwelling House Ins. Co.*, 78 Mich. 141, 43 N. W. 1045). The fact that the title is disputed will not affect the question, if the insured acts in good faith.

Monroe Mut. Fire Ins. Co. v. Robinson, 5 Wkly. Notes Cas. (Pa.) 389; *McNamara v. Dakota Fire & Marine Ins. Co.*, 1 S. D. 342, 47 N. W. 288; *Helvetia Swiss Fire Ins. Co. v. Allis Co.*, 11 Colo. App. 264, 53 Pac. 242.

Similar principles govern *Williams v. Buffalo German Ins. Co.* (C. C.) 17 Fed. 63; *Travis v. Continental Ins. Co.*, 32 Mo. App. 198; *Dooly v. Hanover Fire Ins. Co.*, 47 Pac. 507, 16 Wash. 155, 58 Am. St. Rep. 26; *Wainer v. Milford Fire Ins. Co.*, 153 Mass. 335, 26 N. E. 877, 11 L. R. A. 598.

An interesting case is *Ohio Farmers' Ins. Co. v. Bevis*, 18 Ind. App. 17, 46 N. E. 928, where the wife of the grantor of the insured, though living and under no legal disability, did not join in the conveyance. The court held that the insured certainly had an absolute interest as to two-thirds, and an absolute interest as to the other third, subject only to be defeated if the wife of the grantor survived her husband. His title was, therefore, in view of the court, an absolute title in fee simple, not affected by the contingent interest of the grantor's wife.

As a conveyance in fraud of creditors is nevertheless good as between the parties, the grantee in such conveyance may be regarded as an absolute owner.

German Ins. Co. v. Hyman, 34 Neb. 704, 52 N. W. 401; *Bicknell v. Lancaster City & County Fire Ins. Co.*, 1 Thomp. & C. (N. Y.) 215; *Ayres v. Hartford Fire Ins. Co.*, 17 Iowa, 176, 85 Am. Dec. 553.¹

For the same reason it was said, in *Treadway v. Hamilton Mut. Ins. Co.*, 29 Conn. 68, that the grantor in a fraudulent conveyance is no longer the absolute owner, though a different view seems to have been taken in *Vogel v. People's Mut. Fire Ins. Co.*, 9 Gray (Mass.) 23.

¹ Validity as between the parties of transactions fraudulent as to creditors, see Cent. Dig. vol. 24, "Fraudulent Conveyances," cols. 817-832, §§ 523-529.

To constitute the insured an absolute owner in fee simple, or an owner in fee simple, it is not necessary that his title should be wholly indefeasible and good against the world.

Capital City Ins. Co. v. Caldwell, 95 Ala. 77, 10 South. 355; *Kentucky Mut. Ins. Co. v. Harrison*, 7 Ky. Law Rep. 43; *Gaylord v. Lamar Fire Ins. Co.*, 40 Mo. 13, 93 Am. Dec. 289.

A different view is taken in *Warner v. Middlesex Mut. Ins. Co.*, 21 Conn. 444, *Farmers' & Merchants' Ins. Co. v. Hahn*, 96 N. W. 255, 1 Neb. (Unof.) 510, 513, and other cases, where a mortgage or other lien exists. But if the rights of the third person under the instrument of defeasance have expired by limitation, as in *Kentucky & Louisville Mut. Ins. Co. v. Southard*, 8 B. Mon. (Ky.) 637, the title of the insured may be regarded as absolute.

(c) Equitable title or interest.

It seems to be a well-settled principle in the law of insurance that a statement or condition as to absolute ownership is satisfied if the insured has an equitable title. Thus, in *Walsh v. Philadelphia Fire Ass'n*, 127 Mass. 383, the interest of the insured as equitable owner upon whom the loss by fire must fall, was regarded as sufficiently described by the words "his dwelling house."

In addition to the cases involving the rights of a vendee in an executory contract, the principle that an equitable owner is absolute owner is asserted in *Farmers' Mut. Fire Ins. Co. v. Fogelman*, 85 Mich. 481; *Gaylord v. Lamar Fire Ins. Co.*, 40 Mo. 13, 93 Am. Dec. 289; *Carson v. Jersey City Ins. Co.*, 43 N. J. Law, 300, 39 Am. Rep. 584; *Fowle v. Springfield Fire & Marine Ins. Co.*, 122 Mass. 191, 23 Am. Rep. 308; *Capital City Ins. Co. v. Caldwell*, 95 Ala. 77, 10 South. 355; *Baker v. State Ins. Co.*, 31 Or. 41, 48 Pac. 699, 65 Am. St. Rep. 807; *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90; *McCoy v. Iowa State Ins. Co.*, 107 Iowa, 80, 77 N. W. 529; *Brown v. German-American Ins. Co.*, 10 N. Y. St. Rep. 412; *Southern Ins. & Trust Co. v. Lewis*, 42 Ga. 587; *Lebanon Mut. Ins. Co. v. Erb*, 112 Pa. 149, 14 Atl. 8; *Wineland v. Security Ins. Co. of New Haven, Conn.*, 53 Md. 276.

The contrary rule was announced in *Lasher v. Northwestern Nat. Ins. Co.*, 57 How. Prac. (N. Y.) 222, reversing 55 How. Prac. 326, where there was an express condition requiring the interest to be truly stated and the insured described the property as "her property." But a provision requiring the interest of the insured to be truly stated is sufficiently complied with by a description of the insured as mortgagee, as such provision does not call for a dis-

tinction between legal and equitable title (*Williams v. Roger Williams Ins. Co.*, 107 Mass. 377, 9 Am. Rep. 41).

Though it was said, in *Pierce v. Empire Ins. Co.*, 62 Barb. (N. Y.) 636, that, where the policy requires a fee-simple title, an equitable title is insufficient, the weight of authority seems to be that a fee may be based on an equitable title, as well as on a legal title.

Such, at least, is the doctrine asserted in *Capital City Ins. Co. v. Caldwell*, 95 Ala. 77, 10 South. 355, and *Swift v. Vermont Mutual Fire Ins. Co.*, 18 Vt. 305; and it is apparently approved in *Phenix Ins. Co. v. Bowdre*, 67 Miss. 620, 7 South. 596, 19 Am. St. Rep. 328.

(2) Same—Vendee under contract of purchase.

In accordance with the principles just discussed, it has been asserted as a well-established rule that a vendee in possession under an executory contract for the purchase of property may be described as an absolute owner, or an owner in fee.

This principle is asserted in *Rumsey v. Phoenix Ins. Co.* (C. C.) 1 Fed. 396; *Loventhal v. Home Ins. Co.*, 112 Ala. 108, 20 South. 419, 33 L. R. A. 258, 57 Am. St. Rep. 17; *Hough v. City Fire Ins. Co.*, 29 Conn. 10, 76 Am. Dec. 581; *Bonham v. Iowa Cent. Ins. Co.*, 25 Iowa, 328; *Home Ins. Co. v. Patterson*, 12 Ky. Law Rep. 941; *Lowell v. Middlesex Mut. Fire Ins. Co.*, 8 Cush. (Mass.) 127; *Wainer v. Milford Fire Ins. Co.*, 153 Mass. 335, 26 N. E. 877, 11 L. R. A. 598; *Franklin Fire Ins. Co. v. Martin*, 40 N. J. Law, 568, 29 Am. Rep. 271; *Martin v. Jersey City Ins. Co.*, 44 N. J. Law, 273; *Chase v. Hamilton Mut. Ins. Co.*, 22 Barb. (N. Y.) 527; *Dohn v. Farmers' Joint Stock Ins. Co.*, 5 Lans. (N. Y.) 279; *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90, affirming 12 Wend. 507; *Bicknell v. Lancaster City & County Fire Ins. Co.*, 58 N. Y. 677; *Baker v. State Ins. Co.*, 31 Or. 41, 48 Pac. 699, 65 Am. St. Rep. 807; *Pennsylvania Fire Ins. Co. v. Dougherty*, 102 Pa. 568; *Imperial Fire Ins. Co. v. Dunham*, 117 Pa. 460, 12 Atl. 668, 2 Am. St. Rep. 686; *Elliott v. Ashland Mut. Fire Ins. Co.*, 117 Pa. 548, 12 Atl. 676, 2 Am. St. Rep. 703; *East Texas Ins. Co. v. Dyches*, 56 Tex. 565; *Queen Ins. Co. v. May* (Tex. Civ. App.) 35 S. W. 829; *Underwriters' Fire Ass'n v. Palmer* (Tex. Civ. App.) 74 S. W. 603; *Dooly v. Hanover Fire Ins. Co.*, 47 Pac. 507, 16 Wash. 155, 58 Am. St. Rep. 26.

The doctrine is based on the principles stated in *Hough v. City Fire Ins. Co.*, 29 Conn. 10, 76 Am. Dec. 581, where it is said that "absolute" is synonymous with "vested," and is used in contradistinction to "contingent" or "conditional," so that, as said in *Loventhal v. Home Ins. Co.*, 112 Ala. 108, 20 South. 419, 33 L. R. A. 258, 57 Am. St. Rep. 17, if the vendee in possession under an executory

contract is confessedly armed with the right to go into a court of equity and obtain an absolute unconditional legal estate, on discharge of the quasi mortgage for the purchase money, he is an owner in fee simple. Thus, in *Lingenfelter v. Phoenix Ins. Co.*, 19 Mo. App. 252, where, under a contract for the sale of land, the deed was deposited in escrow for the payment of the purchase money, and the vendee had been already placed in possession, the court held that the facts showed that he had at least a full equitable title, which would support an action for a legal title. It was said, in *Imperial Fire Ins. Co. v. Dunham*, 117 Pa. 475, 12 Atl. 668, 2 Am. St. Rep. 686, that, even if the insured had made no payments on his contract, his title must be regarded as equivalent to a fee simple; the unpaid purchase money being treated merely as an incumbrance.

On the other hand, the doctrine of the foregoing cases is not approved in *Reynolds v. State Mut. Ins. Co.*, 2 Grant, Cas. (Pa.) 326, where it was said that, if the purchase money has been only partly paid, the interest of the vendee or his estate in the land goes no further than the payment. In *Hubbard v. North British & Mercantile Ins. Co.*, 57 Mo. App. 1, where the statement as to absolute ownership was regarded as a warranty, it was held that the warranty was not satisfied by the fact that the insured was a vendee in an executory contract, if all the purchase money was not paid.

The fact that the insured was only a vendee under an executory contract was held to be an insufficient compliance with a statement or condition as to absolute ownership, or title in fee simple, in *Brown v. Commercial Fire Ins. Co.*, 86 Ala. 189, 5 South. 500; *Wooliver v. Boylston Ins. Co.*, 104 Mich. 132, 62 N. W. 149; *Roberts v. State Ins. Co.*, 26 Mo. App. 92; *Birmingham v. Empire Ins. Co.*, 42 Barb. (N. Y.) 457; *Lasher v. Northwestern National Ins. Co.*, 57 How. Prac. (N. Y.) 222, reversing 55 How. Prac. 328. See, also, *Merrill v. Farmers' & Mechanics' Mut. Fire Ins. Co.*, 48 Me. 285, *Smith v. Bowditch Mut. Fire Ins. Co.*, 6 Cush. (Mass.) 448, and *Marshall v. Columbian Mut. Fire Ins. Co.*, 27 N. H. 157, where the fact that the companies were mutual may have had a controlling effect.

A statement that the insured holds the property under a contract is a sufficient disclosure of title.

Lamb v. Council Bluffs Ins. Co., 70 Iowa, 238, 30 N. W. 497; *McCulloch v. Norwood*, 58 N. Y. 562; *Lorillard Fire Ins. Co. v. McCulloch*, 21 Ohio St. 176, 8 Am. Rep. 52.

According to *Born v. Home Ins. Co.*, 120 Iowa, 299, 94 N. W. 849, it was not a misrepresentation of title for the insured to state

that he had an equitable title, where he held a contract for the land which he had pledged as security for a debt. Where plaintiff, holding land under a contract, had agreed to sell the premises to C., and C. obtained a conveyance from the owner without plaintiff's consent (*Acer v. Merchants' Ins. Co.*, 57 Barb. [N. Y.] 68), the court held that plaintiff had an equitable title not affected by the transfer of the property to C., and that such title was an absolute one to the extent of his ownership, so that he was not guilty of fraud in representing himself as owner. A purchaser at a receiver's sale of property held on a contract for purchase may properly state that he holds the property under a contract (*Bicknell v. Lancaster City & County Fire Ins. Co.*, 1 Thomp. & C. 215, affirmed in 58 N. Y. 677).

(g) Property subject to lien—Title of mortgagor or mortgagee.

It has been asserted in several cases that a statement as to title or a condition calling for a disclosure, if title is not absolute, does not render necessary a disclosure of incumbrances.

Reference may be made to *McClelland v. Greenwich Ins. Co.*, 107 La. 124, 31 South. 691; *Buck v. Phoenix Ins. Co.*, 76 Me. 586; *Washington Fire Ins. Co. & Atlantic Fire & Mar. Ins. Co. v. Kelly*, 32 Md. 421, 3 Am. Rep. 149; *Guest v. New Hampshire Fire Ins. Co.*, 66 Mich. 98, 33 N. W. 31; *Newman v. Springfield Fire & Mar. Ins. Co.*, 17 Minn. 123 (Gil. 98); *Boulware v. Farmers' & Laborers' Co-operative Ins. Co.*, 77 Mo. App. 639; *Omaha Fire Ins. Co. v. Thompson*, 50 Neb. 580, 70 N. W. 30; *Koshland v. Hartford Fire Ins. Co.*, 31 Or. 402, 49 Pac. 866; *Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 24 S. E. 393, 53 Am. St. Rep. 846.

In accordance with this principle it has been held (*Merchants' Ins. Co. v. Frick*, 5 Ohio Dec. 47) that the fact that a landlord might have a lien for rent on a building would not give him an interest in the property, so as to make false a statement by the tenant that no one else was interested in the property. Nor is it necessary to disclose a lien for purchase money (*Wooddy v. Old Dominion Ins. Co.*, 31 Grat. [Va.] 362, 31 Am. Rep. 732).

A contrary doctrine was asserted in *Security Ins. Co. v. Bronger*, 6 Bush (Ky.) 146, and the principle that disclosure of incumbrances is necessary has also been asserted in *Fireman's Fund Ins. Co. v. Barker*, 6 Colo. App. 541, 41 Pac. 513, and *Farmville Ins. & Banking Co. v. Butler*, 55 Md. 233, and in *Brown v. People's Mut. Ins. Co.*, 11 Cush. (Mass.) 280, and *Gahagan v. Union Mut. Ins. Co.*, 43 N. H. 176, where the companies were mutual. But a general disclosure was regarded as sufficient in *Buffum v. Bowditch Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 540.

In *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53, 4 Am. Rep. 582, it was said that, if a policy was made payable to another as trustee as his interest may appear, it was a sufficient disclosure that there was a trust deed on the property.

The principle was applied in *Washington Fire Ins. Co. v. Kelly*, 32 Md. 421, 3 Am. Rep. 149, where it was said that a phrase in a policy requiring a disclosure if the interest was not absolute does not require the disclosure of a mortgage, as a mortgage is a mere security; the mortgagor remaining the substantial owner of the property, though the legal estate is in the mortgagee. The mortgagor is the owner of the real and beneficiary estate, equivalent to a fee simple at law, and to all intents and purposes his interest is the absolute interest.

This doctrine has also been asserted in *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507, 27 Am. Rep. 582; *Strong v. Manufacturers' Ins. Co.*, 10 Pick. (Mass.) 40, 20 Am. Dec. 507; *Carson v. Jersey City Ins. Co.*, 43 N. J. Law, 300, 39 Am. Rep. 584; *Koshland v. Hartford Fire Ins. Co.*, 31 Or. 402, 49 Pac. 868.

On the other hand, in *Holloway v. Dwelling House Ins. Co.*, 48 Mo. App. 1, where there was a mortgage on the property which was past due, the court held that, as under the law of Missouri the legal title after condition broken is in the mortgagee, the mortgagor did not own the property by an absolute fee-simple title. In *Falis v. Conway Fire Ins. Co.*, 7 Allen (Mass.) 46, the insured, prior to the issuance of the policy, had deeded the property for an express consideration, and had received from his grantee a bond to reconvey on payment of such consideration, with annual interest. The bond had been renewed at various times, with a new consideration added thereto. It was held that the renewal of the bond, with the addition of the new consideration, transferred the title to the property, and changed the transaction from a mortgage to a mere personal obligation, so that the insured at the time of the application had no estate in the land. In *Warner v. Middlesex Mut. Assur. Co.*, 21 Conn. 444, where, before the insured acquired title, the property had been mortgaged to B., and the mortgage had not been released when the policy was effected, it was held that the title of the insured was not perfect, as it was liable to be defeated by an outstanding title in B. In *Westchester Fire Ins. Co. v. Weaver*, 70 Md. 540, 17 Atl. 401, 18 Atl. 1034, 5 L. R. A. 478, it was held that, under a condition making the policy void if the interest of the insured is not truly stated, the concealment of a mortgage on the

property was fatal. But an outstanding incumbrance, barred at law and in equity by the statute of limitations, is not an imperfection of the title, according to *Lockwood v. Middlesex Mut. Assur. Co.*, 47 Conn. 555.

In *Pennsylvania Fire Ins. Co. v. Dougherty*, 102 Pa. 568, where the insured was in possession under an executory contract, it was held that, as she had the equitable title to the property, her title was, for all the purposes of a policy, equivalent to a fee, and the fact that the property had been sold under a mechanic's lien against her husband and a contractor who had erected a building thereon under the supervision of the husband was not a breach of the statement that the title was in her name. In *Geib v. Enterprise Ins. Co.*, 10 Fed. Cas. 156, the theory was advanced that it is the duty of the owner of property which has been sold under mortgage to disclose this fact, as, if the property is not redeemed, the title will be lost to the insured. So, where the time for redemption had expired, as in *Planters' Mut. Ins. Co. v. Loyd*, 67 Ark. 584, 56 S. W. 44, 77 Am. St. Rep. 136, a statement that the insured was the owner was regarded as a material misrepresentation, as he was not merely not the owner, but he had not even an equitable title. A similar principle governed *Essex Savings Bank v. Meriden Fire Ins. Co.*, 57 Conn. 335, 17 Atl. 930, 18 Atl. 324, 4 L. R. A. 759. However, according to *Weed v. Hamburg-Bremen Fire Ins. Co.*, 133 N. Y. 394, 81 N. E. 231, affirming 61 Hun, 110, 15 N. Y. Supp. 429, the fact that a mortgagee has secured judgment of foreclosure does not change the mortgagor's title.

A representation that the insured is the owner is not complied with where it appears that the insured is in reality a mortgagee (*Jenkins v. Quincy Mut. Fire Ins. Co.*, 7 Gray [Mass.] 370). On the other hand, a mortgagee need not disclose the nature of his title, unless inquiry is made.

Norwich Fire Ins. Co. v. Boomer, 52 Ill. 442, 4 Am. Rep. 618; *Sussex County Mut. Ins. Co. v. Woodruff*, 26 N. J. Law, 541.

It was said in *Buck v. Phoenix Ins. Co.*, 76 Me. 586, that the mortgagee may insure as general owner, without disclosing his particular interest, unless it is inquired about.

Where the insured, in answer to the question as to incumbrances, replied, "First mortgage to A.," giving his own name (*Wyman v. People's Equity Ins. Co.*, 1 Allen [Mass.] 301, 79 Am. Dec. 737),

there was a sufficient disclosure that the insured was not absolute owner. A statement that the insured is mortgagee in possession must be regarded as in accordance with the facts, where he was in possession and a mortgage given by the original owner had been assigned to a third person as trustee for the insured (*Nichols v. Fayette Mut. Fire Ins. Co.*, 1 Allen [Mass.] 63). In *Stout v. Fire Ins. Co.*, 12 Iowa, 371, 79 Am. Dec. 539, the fact that the insured described his interest as that of a mortgagee, whereas it was in truth that of a lienor of a mechanic's lien, did not avoid the policy. Where it was contended that the title was not properly disclosed, in that it was not absolute, but merely that of a mortgagee (*Kentucky & Louisville Mut. Ins. Co. v. Southard*, 8 B. Mon. [Ky.] 637), it appeared that a deed had been given to plaintiff's predecessor in title to secure money loaned; the mortgagor having the right to redeem by an instrument of defeasance. It also appeared that 20 years had elapsed since the deed was given, and there was nothing shown as to whether the right to redeem still existed or not. It was held that, in the absence of anything to show that there was a substantial falsity in the representation, the policy was not avoided.

(b) Same—Personal property held under conditional sale.

In a leading case (*Agricultural Ins. Co. v. Montague*, 38 Mich. 548, 31 Am. Rep. 326), where the insured procured insurance on an organ which he claimed, but which was actually owned by one from whom he had purchased it on credit, the contract of purchase provided that the title was not to pass until the price was fully paid. When the fire occurred, about one-half of the amount had been paid. By one of the conditions of the policy, the insured was required to state whether any other person had an interest in the property, and, if so, its nature, etc. It was held that, as the unquestioned facts showed that the insured had an equitable claim on the organ only to the extent of one-half of its value, the concealment of the vendor's interest was fatal to a recovery on that part of the policy covering the organ. Where the policy requires the interest of the insured to be truly stated, and the property is designated as "her household furniture" (*Lasher v. St. Joseph Fire & Mar. Ins. Co.*, 86 N. Y. 423), the fact that the insurance is made payable to others is not a sufficient disclosure that they are in fact the real owners as vendors under a conditional sale. A similar rule governed *Ehrsam*

Mach. Co. v. Phenix Ins. Co., 43 Neb. 554, 61 N. W. 722, where the court said that a person in possession of personal property under a conditional sale is not the owner of such property, within the meaning of a representation to that effect, and that such a misrepresentation was not evaded by the fact that the policy was made payable to the vendor.

(1) Property held in trust.

The general rule that property held in trust must be insured as such, as said in *Turner v. Stetts*, 28 Ala. 420, is in effect a rule that, where the property to be insured is held in trust or on commission, such fact must be disclosed. The rule that the fact must be disclosed is also asserted in *McCormick v. Orient Ins. Co.*, 86 Cal. 260, 24 Pac. 1003. Such seems to be the rule also governing *Keely v. Insurance Co.*, 1 Phila. (Pa.) 175. According to *Phoenix Ins. Co. v. Hamilton*, 14 Wall. 504, 20 L. Ed. 729, it is unnecessary to disclose who were the owners of the property, which it is represented is held by the insured in trust or on commission. The reason why a disclosure is required is in order that the insurer may determine whether proper care will be bestowed by the insured; but, as property held in trust is in the custody of one other than the owner, the ownership does not affect the risk.

Where the policy is issued to one as trustee, there is a sufficient disclosure, in the absence of special inquiry (*Cross v. National Fire Ins. Co.*, 132 N. Y. 133, 30 N. E. 390). Where property has been conveyed to a creditor in trust for the benefit of creditors, and the grantee under the conveyance has a beneficial interest greater than the amount of insurance taken by him (*White v. Hudson River Ins. Co.*, 7 How. Prac. [N. Y.] 341), the policy may properly represent the property as "his." Property held as collateral security is property held in trust (*Day v. Charter Oak Fire & Mar. Ins. Co.*, 51 Me. 91).

(3) Leaseholds—Building on leased land.

A lessor has a good and perfect title, within the meaning of a clause avoiding the policy if the insured has not a good and unincumbered title (*Lockwood v. Middlesex Mut. Assur. Co.*, 47 Conn. 555). In *Columbia Ins. Co. v. Cooper*, 50 Pa. 331, it was said that a representation by a landlord, taking out insurance on machinery, that the machinery was his own, when in fact part of it belonged to

the tenant and he had only a lien thereon as landlord, will not avoid the policy, unless the statement was willful, for the purpose of deceiving the insurer. On the other hand, where the policy provides that, if the property be a leasehold or other interest not absolute, it must be so represented, one in possession of the property as lessee only cannot insure as owner, but must disclose the nature of his interest; and, even when such provision is not in the policy, the rule seems to apply with equal force.

Reference may be made to *Porter v. Aetna Ins. Co.*, 19 Fed. Cas. 1071; *Mers v. Franklin Ins. Co.*, 68 Mo. 127; *Duda v. Home Ins. Co.*, 20 Pa. Super. Ct. 244; *Planters' Ins. Co. v. Sorrela*, 1 Baxt. (Tenn.) 352, 25 Am. Rep. 780; *Kibbe v. Hamilton Mut. Ins. Co.*, 11 Gray (Mass.) 163.

Where a tenant insured the property as "his," the loss, if any, payable to the lessor (*Lawrence v. St. Marks Fire Ins. Co.*, 43 Barb. [N. Y.] 479), the disclosure was sufficient. In *Imperial Fire Ins. Co. v. Murray*, 73 Pa. 13, it was held that a misrepresentation as to the length of the lessee's term, if made under an honest mistake, would not avoid the policy.

Under the general rule that disclosure is not necessary, in the absence of inquiry it is not obligatory on the insured to state that the building covered by the policy was on leased land.

Washington Mills Emery Mfg. Co. v. Weymouth & Braintree Mut. Fire Ins. Co., 135 Mass. 503; *Fletcher v. Commonwealth Ins. Co.*, 18 Pick. (Mass.) 419; *Slobodisky v. Phenix Ins. Co.*, 53 Neb. 816, 74 N. W. 270.

The basis of the principle is probably the rule governing *Merchants' Ins. Co. v. Frick*, 5 Ohio Dec. 47, where the court said that inquiries as to the ownership of a building do not require disclosure as to ownership of the land.

On the other hand, if the policy contains a clause that it shall be void if the building stands on leased ground, or on ground not owned by the insured, the fact must be disclosed.

The rule is asserted in *Ben Franklin Ins. Co. v. Weary*, 4 Ill. App. 74; *Security Ins. Co. v. Mette*, 27 Ill. App. 324; *Illinois Mut. Ins. Co. v. Same*, Id. 330; *Mackinnon v. Mutual Guaranty Fire Ins. Co.*, 89 Iowa, 170, 56 N. W. 423; *Dowd v. American Fire Ins. Co.*, 41 Hun (N. Y.) 189; *Matthie v. Globe Fire Ins. Co.*, 74 N. Y. Supp. 177, 68 App. Div. 239; *East Texas Fire Ins. Co. v. Brown*, 82 Tex. 631, 18 S. W. 713; *Mutual Assur. Co. v. Mahon*, 2 Bennett, Fire Ins. Cas. 672, 5 Call (Va.) 517.

In *Ahlberg v. German Ins. Co.*, 94 Mich. 259, 53 N. W. 1102, it was held that a clause to the effect that the policy shall be void if the subject of the insurance is a building on ground not owned by the insured in fee simple refers to the future, and not to the time of the application.

Where the buildings insured stood upon lands belonging to the United States, and were described in the policy as the insured's buildings, "occupied as a store, warehouse, officers' and soldiers' club, sleeping rooms, and room for opening goods, * * * at Fort M., M. county," etc., this description was sufficient notice to the company, and its agents by whom the policy was issued, that the buildings insured were situated at a United States military post or fort, and that they were used and occupied by a post trader at that place, and that the insured could not, in the ordinary course of things, own the land on which the buildings were situated (*Broadwater v. Lion Fire Ins. Co.*, 34 Minn. 465, 26 N. W. 455).

A distinction was made in *Hope Ins. Co. v. Brolaskey*, 35 Pa. 282, between mutual and stock companies. The building insured stood on leased premises, but by the lease the insured was privileged to remove the building or sell it to the owner of the land at the expiration of the term. The building was insured as though the lessee was the owner, no disclosure being made as to the nature of his interest. The court held that the house was personalty and the plaintiff was absolute owner thereof, though in the case of mutual insurance there might have been a reason for holding that the house insured was real estate under the provision giving a lien for assessments. The interest of a tenant in a building erected by him with the right to remove it may be regarded as an absolute interest, according to *Nichols v. Farmers' Mut. Ins. Co.*, 18 Fed. Cas. 193. In *Fowle v. Springfield Fire & Mar. Ins. Co.*, 122 Mass. 191, 23 Am. Rep. 308, where it was stated that the building was on leased land, a statement by the lessees that the building was "theirs" was sufficient, though the building would become the property of the lessor on the termination of the lease. In *Caplis v. American Fire Ins. Co.*, 60 Minn. 376, 62 N. W. 440, 51 Am. St. Rep. 535, the policy covered a building standing on leased ground; the insured being the assignee of the lease. It appeared, however, that the lease contained a clause prohibiting assignment without the consent of the lessor, and this consent had not been obtained. It was held that the assignment was nevertheless valid as against the company, and

the facts did not, therefore, operate to discharge the company from liability because of the existence of a condition in the policy that it should be void if the interest of the insured was not truly stated.

(k) Property held under joint or several title.

A representation that the property belongs to the insured, when in fact it is partly owned by another person, is false, so as to avoid the policy.

Wilbur v. Bowditch Mut. Ins. Co., 10 Cnsh. (Mass.) 446; *Pinkham v. Morang*, 40 Me. 587; *Liverpool & London & Globe Ins. Co. v. Cochran*, 77 Miss. 348, 26 South. 932, 78 Am. St. Rep. 524.

So a failure to disclose that the insured is owner of only an undivided interest is fatal.

Catron v. Tennessee Ins. Co., 6 Humph. (Tenn.) 176; *Scottish Union & Nat. Ins. Co. v. Petty*, 21 Fla. 399.

But where the plaintiff applied for insurance on "one-half in common and undivided" of certain buildings, and in answer to the question "Who owns and occupies the buildings?" answered, "The applicant owns and occupies the property" (*Barnes v. Union Mut. Fire Ins. Co.*, 51 Me. 110, 81 Am. Dec. 562), the court said that a fair construction of the representation was that the applicant was the owner of an undivided one-half of the property and sole owner of the property to be insured. It seems to be the doctrine of *Liverpool, London & Globe Ins. Co. v. McGuire*, 52 Miss. 227, that, where the insured property is spoken of in the application as "my residence," but nothing is said about the title, and there is no condition in the policy relating to the title, the silence of the insured is not a ground of a complaint, though the ownership rests in pais; the legal title being shared with another. In *Curry v. Commonwealth Ins. Co.*, 10 Pick. (Mass.) 537, 20 Am. Dec. 547, plaintiff represented the house insured as his. In fact, plaintiff's wife and her sister owned the land in common. There were two houses on the land, and plaintiff and the husband of the wife's sister entered into an arrangement by which one took one house and the other the other, no writings being exchanged, but simply a receipt for the amount of money estimated to represent the difference in value between the two houses. The court said that while the representation was not strictly accurate, if it was fairly made and true in substance, it would not vitiate the policy. In *East Texas Fire Ins. Co. v. Crawford* (Tex. Sup.) 16 S. W. 1069, where plaintiff, in answer to a ques-

tion as to whether his title was absolute, stated that it was "complete," there was not a false representation, though the property was community property, the plaintiff's wife being deceased, with several children surviving, one of whom was a minor; the ground being that plaintiff's dominion was complete as long as he lived. Where plaintiff and G. were joint owners, and by mistake plaintiff only was insured, but on notice to the agent a clause was inserted providing that in case of loss one-half should be payable to G., as his interest may appear, the disclosure as to G.'s title was sufficient.

It was said in *Castner v. Farmers' Mut. Fire Ins. Co.*, 46 Mich. 15, 8 N. W. 554, that parties having separate interests may insure them jointly; minute accuracy in stating the title not being necessary. Following this decision, it was held, in *Beebe v. Ohio Farmers' Ins. Co.*, 93 Mich. 514, 53 N. W. 818, 18 L. R. A. 481, 32 Am. St. Rep. 519, that an affirmative answer to the question, "Are you absolute owner of the property to be insured?" was not contrary to the true state of the facts, so as to avoid the policy, though the property belonged to the several persons who held in severalty, as each of the several persons owning the property in severalty is an absolute owner. In *Rankin v. Andes Ins. Co.*, 47 Vt. 144, where the policy provided that, if the interest is not in fee simple, it must be expressed in the policy, it was said that, though joint interests are involved, the condition was obligatory only in cases where the united interest was less than absolute. A provision invalidating the policy if the building is on ground not owned by the insured in fee simple is not broken because one of the insured owns the land in fee simple, while both own the building (*Mascott v. First Nat. Fire Ins. Co.*, 69 Vt. 116, 37 Atl. 255). It was said, in *German Ins. Co. v. Miller*, 39 Ill. App. 633, where a portion of the personalty was owned by the insured in conjunction with others, that the phrase requiring sole and unconditional ownership "in fee simple" refers only to real estate, and not to personalty. Where an owner of household furniture insures the same and warrants his ownership thereof, the fact that the furniture of another is also contained in the building will not render the policy void, if such other property was not intended to be covered by the policy (*Liverpool & London & Globe Ins. Co. v. Nations*, 24 Tex. Civ. App. 562, 59 S. W. 817). Separate interests may be jointly insured, in the absence of fraud (*Farmers' Mut. Fire & Lightning Ins. Co. v. Ward*, 24 Ohio Cir. Ct. R. 156).

(1) Partnership or corporate property.

In *Gould v. York County Mut. Fire Ins. Co.*, 47 Me. 403, 74 Am. Dec. 494, the principle was asserted that the fact that a business is conducted in a partnership name does not make the property partnership property, but the goods may properly be designated as those of the insured. The converse of this proposition has also been approved, namely, that an insurance effected on property in a firm name, though in fact the property is owned by one member of the firm, is not a representation which will avoid the policy.

The principle is asserted in *Bonnet v. Merchants' Ins. Co.* (Tex. Civ. App.) 42 S. W. 816; *Delaware Ins. Co. v. Bonnet*, 20 Tex. Civ. App. 107, 48 S. W. 1104; *Merchants' Ins. Co. v. Bonnet* (Tex. Civ. App.) 48 S. W. 1110; *American Cent. Ins. Co. v. Heath*, 69 S. W. 235, 29 Tex. Civ. App. 445.

In the *Bonnet Cases*, the insured alone was doing business in a firm name, and the principle governing those cases seems also to have governed *Clement v. British American Assur. Co.*, 141 Mass. 298, 5 N. E. 847. A contrary doctrine seems to have been asserted in *Roberts v. State Ins. Co.*, 26 Mo. App. 92. In *Pelican Ins. Co. v. Smith*, 92 Ala. 428, 9 South. 327, the policy was taken out by S., who was the husband of plaintiff, in the name of S. & Co. The evidence showed that S. conducted the business of S. & Co., though the sole person composing the firm was Mrs. S. In response to the question as to whether he was the owner in fee simple of the property, S. answered, "Yes." The court held that good faith required of S. a disclosure of the fact that he was acting as agent of his wife, and had in fact no interest in the property insured.

Where the legal title to the property insured is in the name of one of the partners in trust for the partnership (*Collins v. Charles-town Mut. Fire Ins. Co.*, 10 Gray [Mass.] 155), the policy is not avoided because the insurance is in the firm name. The fact that a deed purported to convey property to a firm, when in truth it conveyed the title to one of the members (*Weber v. American Cent. Ins. Co.*, 35 Mo. App. 521), did not render false his statement that he was owner in fee. A surviving partner, since he succeeds to the title only for the benefit of the partnership, cannot insure in his own name (*Crescent Ins. Co. v. Camp*, 64 Tex. 521). Neither can one partner insure the partnership property as his own (*McFetridge v. Phenix Ins. Co.*, 84 Wis. 200, 54 N. W. 326). But if it appears that plaintiff owns the property in fact, and has the entire interest, his alleged partner being interested only in the profits (*Irving v. Ex-*

celsior Fire Ins. Co., 14 N. Y. Super. Ct. 507), he may insure the property as his without breach of a condition requiring his interest to be absolute.

This doctrine seems, also, to have governed *Orient Ins. Co. v. McKnight*, 96 Ill. App. 525, and *Traders' Ins. Co. v. Pacaud*, 150 Ill. 245, 37 N. E. 460, 41 Am. St. Rep. 355.

In *Capital City Ins. Co. v. Autry*, 105 Ala. 269, 17 South. 326, 53 Am. St. Rep. 121, however, it was said that a statement by the insured that his ownership is absolute, made a warranty by the policy, will vitiate the contract, if others are interested in the property to the extent that they will share in the profits after all expenses have been paid.

Where the property is represented as belonging to the insured, the policy is avoided if the property in fact belongs to a corporation of which the insured is a stockholder.

Phillips v. Knox County Mut. Ins. Co., 20 Ohio, 174; *McCormick v. Springfield Fire & Mar. Ins. Co.*, 66 Cal. 361, 5 Pac. 617.

In *Abbott v. Shawmut Mut. Fire Ins. Co.*, 3 Allen (Mass.) 213, where representation as to title was made a warranty, it was held that a representation that the property belonged to a corporation, when in fact the insured was an individual doing business under a corporate name, avoided the policy. The contrary doctrine was asserted in *Clark v. German Mut. Ins. Co.*, 7 Mo. App. 77. Where the application stated that the title was in the name of a corporation (*American Basket Co. v. Farmville Ins. Co.*, 1 Fed. Cas. 618), the fact that the record title was vested in an individual, because under the laws of Delaware the corporation could not hold the title, did not show a false representation, avoiding the policy.

(m) Property of husband and wife.

That one who is merely a tenant by curtesy cannot describe himself as owner of the property was asserted in *Leathers v. Farmers' Mut. Fire Ins. Co.*, 24 N. H. 259. Whether the fact that the company was a mutual one was regarded as important does not appear; but in *Mutual Fire Ins. Co. v. Deale*, 18 Md. 26, 79 Am. Dec. 673, where the husband described the property, in which he had only a life estate in the right of his wife, as his, the court, in view of the fact that the company was a mutual one, held that the policy was avoided. A similar doctrine governed *Froehly v. North St. Louis Mut. Fire Ins. Co.*, 32 Mo. App. 302. The rule that a husband

cannot insure as "his" property belonging to his wife has been asserted in several well-considered cases.

Reference may be made to *Planters' Mut. Ins. Co. v. Loyd*, 56 S. W. 44, 67 Ark. 584, 77 Am. St. Rep. 136; *German-American Ins. Co. v. Paul*, 2 Ind. T. 625, 53 S. W. 442; *Eminence Mut. Ins. Co. v. Jesse*, 1 Metc. (Ky.) 523; *Doyle v. American Fire Ins. Co.*, 181 Mass. 139, 63 N. E. 394; *Diffenbaugh v. Union Fire Ins. Co.*, 150 Pa. 270, 24 Atl. 745, 30 Am. St. Rep. 805; *Same v. New Hampshire Fire Ins. Co.*, 24 Atl. 746, 150 Pa. 274; *Trott v. Woolwich Mutual Fire Ins. Co.*, 88 Ma. 362, 22 Atl. 245.

But in *Trade Ins. Co. v. Barraccliff*, 45 N. J. Law, 543, 46 Am. Rep. 792, where the husband had an inchoate right by curtesy, it was held that, as he had an insurable interest, no disclosure of the true title was necessary, in the absence of inquiry. So, in *Doyle v. American Fire Ins. Co.*, 181 Mass. 139, 63 N. E. 394, a general statement by the husband that he is the owner is not falsified by the fact that his estate is only by the curtesy. In *Clarke v. Firemen's Ins. Co.*, 18 La. 431, the court held that as the husband had an insurable interest in the property, though it belonged to his wife, he was authorized to insure it in his own name. Where plaintiff's wife was indebted to him, and executed an instrument certifying the debt, and stating that it should be a lien on her separate property (*Rohrbach v. Germania Fire Ins. Co.*, 62 N. Y. 47, 20 Am. Rep. 451), the court held that as, after the death of the wife, equity would enforce his lien against her real estate, the husband had an insurable interest in the building, and might insure it as his. In *Travis v. Continental Ins. Co.*, 32 Mo. App. 198, Id., 47 Mo. App. 482, it was held that if the husband was in possession of property, claiming it in good faith as his own by virtue of a verbal transfer, he may insure it as his.

Where no inquiry as to the title of the lot upon which the property is located is made, the company cannot avoid the liability because the legal title was in the wife of the insured, so long as he had an insurable interest (*German Ins. Co. v. Davis*, 6 Kan. App. 268, 51 Pac. 60). As a wife has no claim on realty owned by the husband in fee, and conveyed to him alone after marriage, until the death of the husband leaving her surviving, a grantee of the husband becomes absolute owner (*Ohio Farmers' Ins. Co. v. Bevis*, 18 Ind. App. 17, 46 N. E. 928).

Where a husband and wife are tenants by the entirety, as in *Clawson v. Citizens' Mut. Fire Ins. Co.*, 121 Mich. 591, 80 N. W.

573, 80 Am. St. Rep. 538, he may insure the property as his. So it was said, in *Ætna Ins. Co. v. Resh*, 40 Mich. 241, that a person in possession of property under a conveyance to himself and wife jointly has an absolute title, within a statement to that effect in an application for insurance. A statement that insured held title to the property under contract (*Miotke v. Milwaukee Mechanics' Ins. Co.*, 113 Mich. 166, 71 N. W. 463) is not falsified, though in fact the contract ran to himself and wife. Where a husband and wife are insured, and she owns the land in fee simple, and the building is erected with money belonging in part to both (*Mascott v. First Nat. Fire Ins. Co.*, 69 Vt. 116, 37 Atl. 255), a condition requiring the building to be on land owned by the insured in fee simple is fulfilled, as the combined interest of the insured is that of owner in fee simple. Where the policy was taken out by the husband and wife (*Webster v. Dwelling House Ins. Co.*, 53 Ohio St. 558, 42 N. E. 546, 30 L. R. A. 719, 53 Am. St. Rep. 658, affirming 7 Ohio Cir. Ct. R. 511, 4 O. C. D. 704), and it was stated that they were joint owners, there was no breach of warranty, though as a matter of fact the wife owned the real estate, while the husband owned the personality.

In *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53, 4 Am. Rep. 582, the insured was a married woman; the property coming to her through her father. It was contended that, though she may have owned the fee before marriage, her estate was not absolute, because by the marriage and birth of children the husband had become entitled to hold as tenant by curtesy at her death and to joint occupancy during her life. The court held, however, that this did not render her title contingent. Where the wife was abandoned by the husband, as in *Queen Ins. Co. v. May* (Tex. Civ. App.) 35 S. W. 829, she may insure property afterwards acquired by her as her own.

Where the property was community property, a surviving husband in possession may insure it as his, though there are also children surviving, according to *Merchants' Ins. Co. v. Dwyer*, 1 Posey, Unrep. Cas. (Tex.) 441. A contrary rule seems to have been adopted in *East Texas Fire Ins. Co. v. Crawford* (Tex. Sup.) 16 S. W. 1069, and it was held that, where there are also surviving children, the title of a surviving husband in the community property is not complete, in the sense of absolute.

16. WHAT CONSTITUTES BREACH OF CONDITION AS TO SOLE AND UNCONDITIONAL OWNERSHIP OF PROPERTY INSURED.

- (a) Construction of phrase "sole and unconditional ownership."
- (b) Sufficiency of disclosure in general.
- (c) What constitutes sole and unconditional ownership in general.
- (d) Defective and defeasible titles and fraudulent conveyances.
- (e) Title of lessor or lessee.
- (f) Vendor under contract of sale.
- (g) Equitable title—Vendee under contract of purchase.
- (h) Property subject to lien—Interest of mortgagor and mortgagee.
- (i) Partnership or corporate property.
- (j) Property of husband and wife.
- (k) Personal property—Conditional sales—Chattel mortgages.

(a) Construction of phrase "sole and unconditional ownership."

Insurance policies generally contain a clause reciting that the policy shall be void if the insured's interest is other than sole and unconditional, or entire, sole, and unconditional, ownership, and this is not expressed in the policy. Such a condition is reasonable and valid (*Tyree v. Virginia Fire & Marine Ins. Co.* [W. Va.] 46 S. E. 706, 66 L. R. A. 657), and relates to ownership at the time a policy is issued (*Rosenstock v. Mississippi Home Ins. Co.*, 82 Miss. 674, 35 South. 309). Its purpose is to prevent a party who has an undivided or contingent, but insurable, interest in property from appropriating to his own use the proceeds of the policy taken on the valuation of the entire and unconditional title, as if he were the sole owner, and to remove from him the temptation to perpetrate fraud and crime (*Imperial Fire Ins. Co. v. Dunham*, 117 Pa. 460, 12 Atl. 668, 2 Am. St. Rep. 686). It therefore follows that the clause is in most cases held to refer to the character and quality of the title—to the actual and substantial ownership, rather than to the strictly legal title. In other words, the insured's interest must be of such nature that he will sustain the whole loss if the property is destroyed.

That the condition has reference only to actual and substantial ownership, to quality of title, is asserted in *Miller v. Alliance Ins. Co.* (C. C.) 7 Fed. 649; *Lewis v. New England Fire Ins. Co.* (C. C.) 29 Fed. 496; *De Armand v. Home Ins. Co.* (C. C.) 28 Fed. 603; *Sprigg v. American Central Ins. Co.*, 101 Ky. 185, 40 S. W. 575; *Hartford Fire Insurance Co. v. Keating*, 86 Md. 130, 38 Atl. 29, 63 Am. St. Rep. 499; *American Artistic Gold Stamping Co. v. Glens Falls Ins. Co.*,

1 Misc. Rep. 114, 20 N. Y. Supp. 646; *Yost v. Dwelling House Ins. Co.*, 36 Atl. 317, 179 Pa. 381, 57 Am. St. Rep. 604; *East Texas Fire Ins. Co. v. Crawford* (Tex. Sup.) 16 S. W. 1069; *Carrigan v. Lycoming Fire Ins. Co.*, 53 Vt. 418, 38 Am. Rep. 687; *Manhattan Fire Ins. Co. v. Weill*, 28 Grat. (Va.) 389, 26 Am. Rep. 364; *Johannes v. Standard Fire Office*, 70 Wis. 196, 35 N. W. 298, 5 Am. St. Rep. 159.

In *Hebner v. Palatine Ins. Co.*, 55 Ill. App. 275, it is said that the clause means the unconditional and sole ownership of the property, and not merely the unconditional and sole ownership of the insurable interest in the property. The sole and unconditional ownership clause does not refer to incumbrances.

Ellis v. Insurance Co. of North America (C. C.) 32 Fed. 646; *Alamo Fire Ins. Co. v. Lancaster*, 7 Tex. Civ. App. 677, 28 S. W. 123. But a contrary rule is asserted in *Hubbard v. North British Ins. Co.*, 57 Mo. App. 1.

In *German Ins. Co. v. Miller*, 39 Ill. App. 633, it was held that a condition requiring sole and unconditional ownership "in fee simple" referred only to real estate, and not to personal property.

(b) Sufficiency of disclosure in general.

The question as to what constitutes a sufficient disclosure under the sole and unconditional ownership clause often arises, especially where it is required that insured's interest be expressed in the policy, if not sole and unconditional. In general, it may be said that, where it appears on the face of the policy that another than the insured is interested in the insurance, there is a sufficient disclosure that the insured is not the sole and unconditional owner of the property. As said in *Traders' Ins. Co. v. Pacaud & Co.*, 51 Ill. App. 252, the clause does not require the interest of insured to be stated with technical accuracy. Thus it was held, in *Lasher v. Northwestern National Ins. Co.*, 55 How. Prac. (N. Y.) 324, that, where the loss was made payable to others than the insured as their interest might appear, this was equivalent to an express declaration that insured's interest was less than that of entire, sole, and unconditional ownership.¹

A similar doctrine is asserted in *Lycoming Fire Ins. Co. v. Jackson*, 83 Ill. 302, 25 Am. Rep. 386, and *Dakin v. Liverpool & London & Globe Ins. Co.*, 77 N. Y. 600.

¹ This case was, however, reversed by the General Term, reported in 18 Hun (N. Y.) 98, 57 How. Prac. (N. Y.) 222, on the ground that a stipulation requiring insured's interest to be truly stated was not complied with.

Likewise it was held, in *Pioneer Savings & Loan Co. v. Providence-Washington Ins. Co.*, 17 Wash. 175, 49 Pac. 231, 38 L. R. A. 397, that, where a policy contained a union mortgage clause, this was a sufficient disclosure of the mortgagee's interest. And in *Davis v. Pioneer Furniture Co.*, 102 Wis. 394, 78 N. W. 596, the statement that a contract to employ a certain amount of labor for a specified term of years was secured by a conditional mortgage was held a sufficient disclosure of the fact that insured's deed was held in escrow pending performance of the contract. In *Williams v. Roger Williams Ins. Co.*, 107 Mass. 377, 9 Am. Rep. 41, a description of the insured as "mortgagees" was considered a clear representation that their interest was not sole and unconditional. So, in *Dresser v. United Firemen's Ins. Co.*, 45 Hun (N. Y.) 298, a statement in a policy that the building insured was located on leased land was considered to be a sufficient compliance with the clause. But a letter stating that insured had no deed to the property, but only a bond for title (*Liberty Ins. Co. v. Boulden*, 96 Ala. 508, 11 South. 771), is insufficient. The statement in an application of the nature of insured's title was, in *Davis v. Phoenix Ins. Co.*, 111 Cal. 409, 43 Pac. 1115, considered a sufficient compliance with the condition, even though the application was not made a part of the policy. In *Weed v. Fire Association of Philadelphia*, 137 N. Y. 567, 33 N. E. 339, affirming 17 N. Y. Supp. 206, 62 Hun, 621, an insurance effected in the name of the "estate of R." by a policy containing the sole and unconditional ownership clause was held not avoided, though the interest of a trustee was not stated, as it appeared the term "estate of R." was used to include the interest of the trustee. But a different conclusion was reached in *Weed v. London & Lancashire Fire Ins. Co.*, 116 N. Y. 106, 22 N. E. 229, which was an action on a similar policy. The decision in this case was based on the fact that at the time of effecting the insurance neither party knew of the existence of the trust deed.

(c) What constitutes sole and unconditional ownership in general.

In actions on policies containing conditions requiring sole and unconditional ownership it often becomes necessary to determine what constitutes such ownership. The general rule is unquestionably the one laid down in *Vankirk v. Citizens' Ins. Co.*, 79 Wis. 627, 48 N. W. 798, where it was held that one who is the owner in fee simple absolute of property insured is the sole and uncondi-

tional owner, within the terms of such clause in a policy. In *Yost v. Dwelling House Ins. Co.*, 179 Pa. 381, 36 Atl. 317, 57 Am. St. Rep. 604, it was held that one to whom a dwelling house was devised, "to be his forever, for his own personal use," subject only to a restriction of alienation until he was 30 years old, had "unconditional and sole ownership." In *Nelson v. Atlanta Home Ins. Co.*, 120 N. C. 302, 27 S. E. 38, one who had a deed and was in possession of property was held to be the owner; and in *Rochester Loan & Banking Co. v. Liberty Ins. Co.*, 44 Neb. 537, 62 N. W. 877, 48 Am. St. Rep. 745, it was said to be immaterial whether or not a consideration had passed. But where a deed is made without the grantee's knowledge, and the grantor retains possession of the property and of the deed, except while it is being recorded (*Franklin Ins. Co. v. Feist*, 31 Ind. App. 390, 68 N. E. 188), the latter is still the sole and unconditional owner. However, a contrary rule appears to be asserted in *Messelback v. Norman*, 46 Hun (N. Y.) 414, apparently on the ground that the grantee was in possession with the grantor and had knowledge of the deed, without in any manner dissenting from the action of the grantor. Insured is not the sole and unconditional owner, where he has executed a deed absolute on its face, though it was in fact given as security for a debt.

Such is the doctrine in *Orient Ins. Co. v. Williamson*, 98 Ga. 464, 25 S. E. 560, and reasserted on a second appeal, reported as *Williamson v. Orient Ins. Co.*, 100 Ga. 791, 28 S. E. 914. But a contrary rule appears to be asserted in *Hawley v. Liverpool & London & Globe Ins. Co.*, 102 Cal. 651, 36 Pac. 923.

However, if the conveyance is on its face clearly a mortgage (*Hare v. Headley*, 54 N. J. Eq. 545, 35 Atl. 445), the condition is not broken. A mortgagor, who had executed a warranty deed to the mortgagee to enable him to sell the property and realize the debt, was, in *De Armand v. Home Ins. Co.* (C. C.) 28 Fed. 603, held to be the sole and unconditional owner, as he retained the equitable title. In *Breedlove v. Norwich Union Fire Ins. Soc.*, 124 Cal. 164, 56 Pac. 770, the court in banc, reversing the opinion in department reported in 54 Pac. 93, held that a grantee of a mortgagor who had failed to record his deed was not the sole and unconditional owner, especially since the insurance was taken out pending foreclosure proceedings. In *Davis v. Pioneer Furniture Co.*, 102 Wis. 394, 78 N. W. 596, the insured was considered the sole and unconditional owner, though the deed had been placed in escrow to

be delivered on erection of a factory and its operation for five years, or on the payment of a certain sum of money.

The owner of personal property is not divested of the sole and unconditional ownership by the mere execution of a bill of sale pending litigation, without delivery of possession, *Forward v. Continental Ins. Co.*, 142 N. Y. 382, 37 N. E. 615, 25 L. R. A. 637; nor by the execution of a bill of sale as security for a debt, *Kronk v. Birmingham Fire Ins. Co.*, 91 Pa. 300. Consequently the holder of property as collateral security for a debt is not the sole and unconditional owner, *Henning v. Western Assur. Co.*, 77 Iowa, 319, 42 N. W. 308; but one holding property as security under a bill of sale is the sole and unconditional owner, if the debt is past due, *First Nat. Bank v. London, Liverpool & Globe Ins. Co.*, 92 Wis. 538, 66 N. W. 693.

A mortgagor, who has transferred his equity of redemption to an assignee, is divested of the sole and unconditional ownership, *Wheeler v. Watertown Fire Ins. Co.*, 181 Mass. 1; and this is so, even though the assignee and the mortgagee have promised to reconvey the property to the mortgagor, *Miller v. Amazon Ins. Co.*, 46 Mich. 466, 9 N. W. 493. Likewise, an owner of wheat in a warehouse, who has obtained money on it through a draft, accompanied by the warehouse receipt for a portion of it, is not the sole and unconditional owner thereof, *Richmond v. Niagara Fire Ins. Co.*, 15 Hun (N. Y.) 248; but in an opinion reported in 79 N. Y. 230, the Court of Appeals reversed the decision of the Supreme Court, on the ground that a breach of the condition was not involved in the case.

The execution of a trust deed does not deprive the grantor of the sole and unconditional ownership, *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507, 27 Am. Rep. 582; *Wolpert v. Northern Assurance Co.*, 44 W. Va. 734, 29 S. E. 1024; though a contrary view appears to be taken in *Weed v. London & Lancashire Fire Ins. Co.*, 116 N. Y. 106, 22 N. E. 229, and *Weed v. Fire Association*, 137 N. Y. 567, 33 N. E. 339, s. c. 17 N. Y. Supp. 206, 62 Hun, 621; and, of course, a trustee holding the mere legal title is not the sole and unconditional owner, *Bradley v. German-American Ins. Co.*, 90 Mo. App. 369.

A mere life estate is insufficient. *Collins v. St. Paul Fire & Marine Ins. Co.*, 44 Minn. 440, 46 N. W. 906. But an ownership in fee of an undivided one-fourth, with a life estate in the other three-fourths, is sufficient, where the insured is entitled to have the land on which the building is located set off in fee to him. *Kenton Ins. Co. v. Wiggenton*, 10 Ky. Law Rep. 587. And a life estate coupled with a power of sale is sufficient. *Security Ins. Co. v. Kuhn*, 207 Ill. 166, 69 N. E. 822, affirming 108 Ill. App. 1.

A father is not the sole owner of property which in part belongs to his minor son, even though he is in law bound to protect the son's interest by insurance. *Adema v. Lafayette Fire Ins. Co.*, 36 La. Ann. 660. Neither is the purchaser of property at a foreclosure sale which has not been ratified. *Hartford Fire Ins. Co. v. Keating*, 86 Md. 180, 33 Atl. 29, 63 Am. St. Rep. 499. But, if the sale is subse-

quently ratified, this will relate back, and make the purchaser the sole and unconditional owner. *Queen Ins. Co. v. May* (Tex. Civ. App.) 35 S. W. 829. Following the latter rule, it is said, in *Reaper City Ins. Co. v. Brennan*, 58 Ill. 158, 11 Am. Rep. 54, that one whose property has been sold on execution is divested of the sole and unconditional ownership, even though the period of redemption has not expired.

A pastor and ex officio trustee of a church corporation, who has bought the church edifice at a foreclosure sale and entered into possession, and so continued without objection, is the sole and unconditional owner. *Caraher v. Royal Ins. Co.*, 136 N. Y. 645, 32 N. E. 1015, s. c. 17 N. Y. Supp. 858, 63 Hun, 82; *Caraher v. American Cent. Ins. Co.*, 63 Hun, 82, 17 N. Y. Supp. 858. And the condition as to sole and unconditional ownership is not broken by the mere fact that insured's house extends two feet onto the adjoining lot and twenty feet onto the street in front of the lots, where he is the owner in fee of half the street, and no one has asserted title to the strip appropriated from the adjoining lot, which insured in good faith believes to be his. *Haider v. St. Paul Fire & Marine Ins. Co.*, 67 Minn. 514, 78 N. W. 805. Likewise, the owner of petroleum in a pipe line, in common with others, is the sole and unconditional owner of his interest therein. *Grandin v. German Ins. Co.*, 107 Pa. 26.

It is, of course, evident that the condition is broken if the insured owns only a part of the property, or an undivided interest therein. *Sisk v. Citizens' Insurance Co.*, 16 Ind. App. 565, 45 N. E. 804; *Springfield Fire & Marine Insurance Co. v. Green* (Tex. Civ. App.) 36 S. W. 143; *Liverpool & London & Globe Ins. Co. v. Cochran*, 77 Miss. 348, 26 South. 932, 78 Am. St. Rep. 524; *Palatine Ins. Co. v. Dickenson*, 43 S. E. 52, 116 Ga. 794; *Simonds v. Firemen's Fund Ins. Co.* (Tex. Civ. App.) 35 S. W. 300; *Fire Association v. Calhoun*, 28 Tex. Civ. App. 409, 67 S. W. 153.

(d) Defective and defeasible titles and fraudulent conveyances.

According to *Miller v. Alliance Ins. Co.* (C. C.) 7 Fed. 649, a condition requiring sole and unconditional ownership is satisfied if the insured has the exclusive use and enjoyment of the property, without any assertion of an adverse right or interest in it by any other person, under a deed using apt terms of description to convey to the grantee the land, as well as the buildings upon it, though his grantor might have been entitled to only an easement in the property. But, in *Dwelling House Ins. Co. v. Dowdall*, 49 Ill. App. 33, a devise to a wife of an estate for years, contingent on her not remarrying, was held not to give her sole and unconditional ownership. So, in *Southwick v. Atlantic Fire & Marine Ins. Co.*, 133 Mass. 457, the holder of a quitclaim deed from a second mortgagee was not considered sole owner, as his title was defeasible and in-

ferior to that of the first mortgagee. But a conveyance in fraud of creditors is regarded as vesting the grantee with sole and unconditional ownership.

Such appears to be the doctrine of *Steinmeyer v. Steinmeyer*, 64 S. C. 413, 42 S. E. 184, 59 L. R. A. 319, 92 Am. St. Rep. 809; *Rochester Loan & Banking Co. v. Liberty Ins. Co.*, 44 Neb. 537, 62 N. W. 877, 48 Am. St. Rep. 745; *Smith v. Agricultural Ins. Co.*, 6 N. Y. St. Rep. 127; *Western Assur. Co. v. Weaver*, 23 Ill. App. 95.

(c) Title of lessor or lessee.

The existence of a mere leasehold interest in another than the insured will not amount to a breach of the sole and unconditional ownership clause (*Dolliver v. St. Joseph Fire & Mar. Ins. Co.*, 128 Mass. 315, 35 Am. Rep. 378). In *Insurance Co. v. Haven*, 95 U. S. 242, 24 L. Ed. 473, it was held that the condition was not broken if buildings erected by a lessee, but in part paid for by the lessor, were a part of the real estate, though the lease had still several years to run.

The converse of this rule in regard to the ownership of a lessor is asserted in *Security Ins. Co. v. Mette*, 27 Ill. App. 324, and *Mt. Leonard Milling Co. v. Liverpool & London & Globe Ins. Co.*, 25 Mo. App. 259.

In *Duda v. Home Ins. Co.*, 20 Pa. Super. Ct. 244, it is said that a mere lessee is not the sole and unconditional owner, even though he has the option to settle in cash for property not returned on the termination of the lease. But, if the lessee is entitled to remove buildings erected by him at the termination of the lease, he is the sole and unconditional owner (*Lion Fire Ins. Co. of London v. Wicker*, 93 Tex. 397, 55 S. W. 741). In *Dresser v. United Firemen's Ins. Co.*, 45 Hun (N. Y.) 298, he was held to be so, even though the lease provided that the rent should be a lien on the buildings.

(d) Vendor under contract of sale.

A vendor under a contract of sale, who has given up possession to the vendee, is not the sole and unconditional owner.

This principle is supported by *Barnard v. National Fire Ins. Co.*, 27 Mo. App. 26; *Ambrose v. First Nat. Fire Ins. Co.*, 19 Pa. Super. Ct. 117; *Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co.*, 31 Mich. 346; *Rathmell v. Aurora Fire Ins. Co.*, 88 Wkly. Notes Cas. (Pa.) 356; *Hamilton v. Dwelling House Ins. Co.*, 98 Mich. 535, 57 N. W. 735, 22 L. R. A. 527; *Rosenstock v. Mississippi Home Ins. Co.*, 82 Miss. 674, 35 South. 309; *Virginia Fire & Marine Insurance Co. v. Richmond Mica Co.*, 102 Va. 429, 46 S. E. 463.

But a contrary rule prevails if nothing has been done under the contract (*Erb v. Fidelity Ins. Co.*, 99 Iowa, 727, 69 N. W. 261). And a property owner, giving another a mere option to purchase the property, does not thereby divest himself of the sole and unconditional ownership, though the option is irrevocable as to him (*Phenix Ins. Co. v. Kerr*, 129 Fed. 723, 64 C. C. A. 251, 66 L. R. A. 569). In *Washington Mills Emery Mfg. Co. v. Commercial Fire Ins. Co.* (C. C.) 13 Fed. 646, a vendor was considered the sole and unconditional owner of buildings reserved by him, though they were to be forfeited to the vendee if not removed by a certain time.

(g) Equitable title—Vendee under contract of purchase.

If insured has an equitable title, it is a sufficient compliance with the condition in an insurance policy requiring sole and unconditional ownership in the insured.

Equitable ownership was held sufficient in *Miller v. Alliance Ins. Co.* (C. C.) 7 Fed. 649; *Mallery v. Frye*, 21 App. D. C. 105; *Tuck v. Hartford Ins. Co.*, 56 N. H. 826; *Hanover Fire Ins. Co. v. Shrader*, 11 Tex. Civ. App. 255, 31 S. W. 1100; *Johannes v. Standard Fire Office*, 70 Wis. 196, 35 N. W. 298, 5 Am. St. Rep. 159.

Accordingly a vendee in possession of property under a valid contract of purchase, and entitled to specific performance, is the sole and unconditional owner.

Such is the doctrine of *Ramsey v. Phoenix Ins. Co.* (C. C.) 2 Fed. 429; *Rumsey v. Phoenix Ins. Co.* (C. C.) 1 Fed. 896; *Lewis v. New England Fire Ins. Co.* (C. C.) 29 Fed. 496; *Loventhal v. Home Ins. Co.*, 112 Ala. 108, 20 South. 419, 33 L. R. A. 258, 57 Am. St. Rep. 17; *Knop v. National Fire Ins. Co.*, 101 Mich. 359, 59 N. W. 653; *Martin v. State Ins. Co.*, 44 N. J. Law, 485, 43 Am. Rep. 397; *Baker v. State Ins. Co.*, 48 Pac. 699, 31 Or. 41, 65 Am. St. Rep. 807; *Queen Ins. Co. v. May* (Tex. Civ. App.) 35 S. W. 829; *Hamburg-Bremen Fire Ins. Co. v. Ruddell* (Tex. Civ. App.) 82 S. W. 826; *Matthews v. Capital Fire Ins. Co.*, 91 N. W. 675, 115 Wis. 272.

This doctrine is by a large majority of the cases held to apply, even if the vendee has not fully performed his part of the contract and a portion of the purchase money is still unpaid.

This is supported by *Williams v. Buffalo German Ins. Co.* (C. C.) 17 Fed. 63; *Pennsylvania Fire Ins. Co. v. Hughes*, 108 Fed. 497, 47 C. C. A. 459; *Phenix Ins. Co. v. Kerr*, 129 Fed. 723, 64 C. C. A. 251, 66 L. R. A. 569; *Boulden v. Phoenix Ins. Co.*, 112 Ala. 422, 20 South. 587; *McClelland v. Greenwich Ins. Co.*, 107 La. 124, 31 South. 691; *Dupreau v. Hibernia Ins. Co.*, 76 Mich. 615, 43 N. W. 585, 5 L. R. A.

671; *Pelton v. Westchester Fire Ins. Co.*, 13 Hun (N. Y.) 23, affirmed 77 N. Y. 605; *Millville Mut. Fire Ins. Co. v. Willgus*, 88 Pa. 107; *Chandler v. Commerce Fire Ins. Co.*, 88 Pa. 223; *Franklin Fire Ins. Co. v. Crockett*, 7 Lea (Tenn.) 725; *Liverpool & London & Globe Ins. Co. v. Ricker*, 10 Tex. Civ. App. 264, 31 S. W. 248; *Johannes v. Standard Fire Office*, 70 Wis. 196, 35 N. W. 298, 5 Am. St. Rep. 159; *Davis v. Pioneer Furniture Co.*, 102 Wis. 394, 78 N. W. 596. In *Imperial Fire Ins. Co. v. Dunham*, 117 Pa. 475, 12 Atl. 668, 2 Am. St. Rep. 686, it was held sufficient, even though no part of the purchase price had been paid. But a contrary view was taken in the early case of *Brown v. Commercial Fire Ins. Co.*, 86 Ala. 189, 5 South. 500, and part payment was held insufficient in the early cases of *Lasher v. Northwestern Nat. Ins. Co.*, 55 How. Prac. (N. Y.) 324, and *Liberty Ins. Co. v. Boulden*, 96 Ala. 508, 11 South. 771, and in the later cases of *Hubbard v. North British Ins. Co.*, 57 Mo. App. 1, and *Harness v. National Fire Ins. Co.*, 62 Mo. App. 245. In *Van Kirk v. Citizens' Ins. Co.*, 79 Wis. 627, 48 N. W. 798, the condition was regarded as violated if the insured was in default. But this was considered doubtful in *Carey v. Allemania Fire Ins. Co. of Pittsburgh*, 171 Pa. 204, 33 Atl. 185, at least where no forfeiture had been declared.

Possession under a verbal contract of purchase was regarded as sufficient in *Milwaukee Mechanics' Ins. Co. v. Rhea*, 123 Fed. 9, 60 C. C. A. 103, where it was said that in some courts the ground on which such a parol vendee in possession was held to be the equitable owner was that the contract was capable of enforcement, there having been a part performance; in others the vendee was regarded as having an insurable interest, whether the contract was enforceable or not; and in still others, the vendee was regarded as the equitable owner, irrespective of the doctrine of part performance, on the ground that the agreement, though in parol, was enforceable in equity, when neither party elected to disaffirm it, under the statute of frauds, because it was not in writing.

A similar rule is also asserted in *Milwaukee Mechanics' Ins. Co. v. Rhea & Son*, 123 Fed. 9, 60 C. C. A. 103, and *Southern Ins. Co. v. Estes*, 106 Tenn. 472, 62 S. W. 149, 52 L. R. A. 915, 82 Am. St. Rep. 892. But in *Fire Association of Philadelphia v. Calhoun*, 28 Tex. Civ. App. 409, 67 S. W. 153, and *Liverpool & London & Globe Ins. Co. v. Cochran*, 77 Miss. 348, 28 South. 932, 78 Am. St. Rep. 524, it was held that, if the agreement was wholly executory and the situation of the parties had not been changed, the condition was not complied with.

In *Mott v. Citizens' Ins. Co.*, 69 Hun, 501, 23 N. Y. Supp. 400, the court appears to extend this rule to one who has taken and retained possession of the premises for a number of years. Likewise a contract made with another than the actual owner was, in *Carpenter v. Ger-*

man-American Ins. Co., 52 Hun, 249, 4 N. Y. Supp. 925, held insufficient. A pledgee or assignee of a contract as security for a debt has insufficient ownership, according to *Gettelman v. Commercial Union Assur. Co.*, 97 Wis. 237, 72 N. W. 627, and *Chandler v. Commerce Fire Ins. Co.*, 88 Pa. 223.

The rule that a vendee in an executory contract of purchase is the owner of land, within the meaning of a sole and unconditional ownership clause, is in *Pennsylvania Fire Ins. Co. v. Hughes*, 108 Fed. 497, 47 C. C. A. 459, stated to apply with equal or greater force, in the absence of a contrary stipulation, to personal property, the title to which passes by delivery.

A similar rule is laid down in *Manhattan Ins. Co. v. Barker*, 7 Helsk. (Tenn.) 503; *Light v. Greenwich Ins. Co.*, 105 Tenn. 480, 58 S. W. 851; *First National Bank v. Liverpool & London & Globe Ins. Co.*, 92 Wis. 538, 66 N. W. 693.

An option to reconvey the property before the lapse of a certain time does not affect a buyer's ownership (*Stowell v. Clark*, 62 N. Y. Supp. 155, 47 App. Div. 626, affirmed without opinion in 171 N. Y. 673, 64 N. E. 1125). Likewise it is stated, in *Kells v. Northwestern Live Stock Ins. Co.*, 64 Minn. 390, 67 N. W. 215, 58 Am. St. Rep. 541, that an agreement by the seller to take the insurance in full satisfaction of the purchase price does not diminish the buyer's ownership.

(h) Property subject to lien—Interest of mortgagor and mortgagee.

It is a well-settled rule that a sole and unconditional ownership clause is not violated by the existence of liens and incumbrances.

Such is the doctrine of *Hartford Fire Ins. Co. v. Enoch* (Ark.) 77 S. W. 899; *Fireman's Fund Ins. Co. v. Meschendorf*, 14 Ky. Law Rep. 757; *McClelland v. Greenwich Ins. Co.*, 107 La. 124, 31 South. 691; *Clay Fire & Marine Stock Ins. Co. v. Beck*, 43 Md. 358; *Phenix Ins. Co. v. Fuller*, 53 Neb. 811, 74 N. W. 269, 40 L. R. A. 408, 68 Am. St. Rep. 637; *Slobodsky v. Phenix Ins. Co.*, 53 Neb. 816, 74 N. W. 270; *American Artistic Gold Stamping Co. v. Glens Falls Ins. Co.* (Com. Pl.) 20 N. Y. Supp. 646; *Chandler v. Commerce Fire Ins. Co.*, 88 Pa. 223; *Imperial Fire Ins. Co. v. Dunham*, 117 Pa. 460, 12 Atl. 608, 2 Am. St. Rep. 686; *Collins v. London Assur. Corp.*, 165 Pa. 298, 30 Atl. 924; *Steinmeyer v. Steinmeyer*, 64 S. C. 413, 42 S. E. 184, 59 L. R. A. 319, 92 Am. St. Rep. 809; *Franklin Fire Ins. Co. v. Crockett*, 7 Lea (Tenn.) 725; *Manhattan Ins. Co. v. Barker*, 7 Helsk. (Tenn.) 503; *Alamo Fire Ins. Co. v. Lancaster*, 7 Tex. Civ. App. 677, 28 S. W. 126; *Alamo Fire Ins. Co. v. Brooks* (Tex. Civ. App.) 32 S. W. 714; *Phoenix Ins. Co. v. Swann* (Tex. Civ. App.) 41 S. W. 519; *Man-*

hattan Fire Ins. Co. v. Weill, 28 Grat. (Va.) 389, 28 Am. Rep. 394; Morotock Ins. Co. v. Rodefer, 92 Va. 747, 24 S. E. 393, 53 Am. St. Rep. 846; Carrigan v. Lycoming Fire Ins. Co., 53 Vt. 418, 38 Am. Rep. 687; Wolpert v. Northern Assur. Co., 44 W. Va. 734, 29 S. E. 1024; Vankirk v. Citizens' Ins. Co., 79 Wis. 627, 48 N. W. 798; Gettelman v. Commercial Union Assur. Co., 97 Wis. 237, 72 N. W. 627.

A contrary rule, however, appears to be asserted in *Farmers' & Drovers' Ins. Co. v. Curry*, 13 Bush (Ky.) 312, 26 Am. Rep. 194, where it is held that the existence of a vendor's lien will violate the clause.

As the owner of property subject to incumbrances in general is the sole and unconditional owner thereof, within the meaning of such a clause in an insurance policy, it follows that a mortgagor is the sole and unconditional owner of the mortgaged property, as he is, at least in equity, the real owner.

Such is the principle asserted in *Ellis v. Insurance Company of North America* (C. C.) 32 Fed. 646; *Western Assur. Co. v. Mason*, 5 Ill. App. 142; *Westchester Fire Ins. Co. v. Weaver*, 70 Md. 536, 17 Atl. 401, 5 L. R. A. 478; *Dolliver v. St. Joseph Fire & Marine Ins. Co.*, 128 Mass. 315, 35 Am. Rep. 378; *Hare v. Headley*, 35 Atl. 445, 54 N. J. Eq. 545; *Woodward v. Republic Fire Ins. Co.*, 32 Hun (N. Y.) 365; *Huff v. Jewett*, 44 N. Y. Supp. 311, 20 Misc. Rep. 35; *Manhattan Ins. Co. v. Barker*, 7 Helsk. (Tenn.) 503; *Southern Ins. Co. v. Estes*, 62 S. W. 149, 106 Tenn. 472, 52 L. R. A. 915, 82 Am. St. Rep. 892; *Union Assur. Soc. v. Nalls*, 44 S. E. 896, 101 Va. 613, 99 Am. St. Rep. 923; *Manhattan Fire Ins. Co. v. Weill*, 28 Grat. (Va.) 389, 28 Am. Rep. 364; *Wolf v. Theresa Village Mut. Fire Ins. Co.*, 91 N. W. 1014, 115 Wis. 402.

In *Chandler v. Commerce Fire Ins. Co.*, 88 Pa. 223, it was held that the assignment of a land contract as security for a debt did not deprive the vendee of the ownership required by the condition. And in *Southern Ins. Co. v. Estes*, 106 Tenn. 472, 62 S. W. 149, 52 L. R. A. 915, 82 Am. St. Rep. 892, the commencement of foreclosure proceedings was not regarded as affecting the rights of a mortgagor.

As a corollary to the rule that a mortgagor is the sole and unconditional owner, it may be said that the condition will be violated if the insured is only a mortgagee.

This doctrine is asserted in *Waller v. Northern Assur. Co.* (C. C.) 10 Fed. 232; *Waller v. Northern Assur. Co.*, 64 Iowa, 101, 19 N. W. 865; *Henning v. Western Assur. Co.*, 77 Iowa, 319, 42 N. W. 808; *Ordway v. Chace*, 57 N. J. Eq. 478, 42 Atl. 149; *Palatine Ins. Co. v. Dickenson*, 116 Ga. 794, 43 S. E. 52.

Where, however, as in *Hanover Fire Ins. Co. v. Bohn*, 48 Neb. 743, 67 N. W. 774, 58 Am. St. Rep. 719, a policy made payable to a mortgagee and having a union mortgage clause contains an entire and sole ownership clause, this means only that the mortgagee's interest shall be unconditional.

(1) Partnership or corporate property.

It is obvious that, as held in *McGrath v. Home Ins. Co.*, 84 N. Y. Supp. 374, 88 App. Div. 153, a member of a firm is not the sole and unconditional owner of the firm property. But the mere fact that one furnishing capital has agreed to share the net profits with another as compensation for services does not affect such other's interest as sole and unconditional owner.

Such is the doctrine of *Manchester Fire Assur. Co. v. Abrams*, 89 Fed. 932, 32 C. C. A. 426; *Erb v. Fidelity Ins. Co.*, 99 Iowa, 727, 69 N. W. 281; *Traders' Ins. Co. v. Pacaud & Co.*, 51 Ill. App. 252; *Orient Ins. Co. v. McKnight*, 96 Ill. App. 525, affirmed in 64 N. E. 339, 197 Ill. 190; *Queen Ins. Co. v. Leonard*, 9 Ohio Cir. Ct. R. 46, 6 O. C. D. 49, 2 Ohio Dec. 122; *Pittsburgh Ins. Co. v. Frazee*, 107 Pa. 521; *Boutelle v. Westchester Fire Ins. Co.*, 51 Vt. 4, 31 Am. Rep. 666; *Welch v. Franklin Ins. Co.*, 23 W. Va. 288.

In *Noyes v. Hartford Fire Ins. Co.*, 54 N. Y. 668, it was doubted whether the owners of a cotton plantation were the sole and unconditional owners of the product thereof, as they had secured another to operate it for a part of the net profits, each to furnish a share of the stock and implements. But, as the owners had expended more than the crop was worth, their ownership was considered sufficient. However, an insurance on the use and occupancy of an elevator is not affected by a pooling arrangement made by insured with the owners of other elevators.

Michael v. Prussian Nat. Ins. Co., 171 N. Y. 25, 63 N. E. 810, affirming *Buffalo Elevating Co. v. Prussian Nat. Ins. Co.*, 64 App. Div. 182, 71 N. Y. Supp. 918.

A deed to a partnership in its firm name conveys the equitable title, so as to vest the partnership with the "unconditional and sole ownership" (*Missouri Sav. Ass'n v. German-American Ins. Co.*, 73 Mo. App. 158). Likewise a sale of an interest in a business to another, to be paid for out of the profits (*Hanover Fire Ins. Co. v. Shrader*, 11 Tex. Civ. App. 255, 31 S. W. 1100), vests the firm with the interest required by the condition. In *Wood v. American Fire Ins. Co. of Philadelphia*, 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep.

733, affirming 78 Hun, 109, 29 N. Y. Supp. 250, it was held that an assignment by a member of the firm of his interest, and a sale by the assignee, had no effect on the unconditional and sole ownership of the firm as to its real estate or stock. The fact that the insured uses the name of another merely to strengthen his credit does not constitute him other than the sole owner (*Phoenix Ins. Co. v. McKernan*, 20 Ky. Law Rep. 337, 46 S. W. 10). And in *Pencil v. Home Ins. Co.*, 3 Wash. St. 485, 28 Pac. 1031, and *Lycoming Ins. Co. v. Barringer*, 73 Ill. 230, it was held that an insured who had entered into an agreement to sell a part interest was not deprived of his sole ownership, where nothing had been done under the agreement. A surviving partner cannot, according to *Crescent Ins. Co. v. Camp*, 71 Tex. 503, 9 S. W. 473, insure the firm's property by a policy containing a sole and unconditional ownership clause, unless the deceased partner's interest has been vested in him by what in law would amount to a sale. Likewise it was held, in *Syndicate Ins. Co. v. Bohn*, 65 Fed. 165, 12 C. C. A. 531, 27 L. R. A. 614, that stockholders are not the sole and unconditional owners of a corporation's property, though they may own all the stock, as the corporation is a separate and distinct entity. But a different view appears to have been taken in *Phoenix Assur. Co. of London v. Deavenport*, 16 Tex. Civ. App. 283, 41 S. W. 399, where it was held that a stockholder owning nearly all the shares in a corporation which had ceased to do business could transfer its real estate, so as to vest the grantee with sole and unconditional ownership.

(9) Property of husband and wife.

Ordinarily a husband is treated as the sole owner of the community estate, and according to *Queen Ins. Co. v. May* (Tex. Civ. App.) 35 S. W. 829, it cannot be contended that he is not the sole and unconditional owner, within the meaning of a clause in a policy of insurance requiring such ownership.

But a contrary rule is asserted in *Schroedel v. Humboldt Fire Ins. Co.*, 158 Pa. 459, 27 Atl. 1077, and *Genesee Falls Permanent Sav. & Loan Ass'n v. United States Fire Ins. Co.*, 44 N. Y. Supp. 979, 16 App. Div. 587.

However, a husband, in actual possession and enjoyment of personalty owned by the wife as her separate property, can insure it as the sole and unconditional owner thereof (*Georgia Home Ins. Co. v. Brady* [Tex. Civ. App.] 41 S. W. 513). But in *Reithmueller v. Fire Ass'n*, 20 Mo. App. 246, it was held that a wife could not insure a

stock of goods belonging to her husband. And according to *German Ins. Co. v. Hunter* (Tex. Civ. App.) 32 S. W. 344, the sole and unconditional ownership clause is broken if not all the property insured by a married woman has been bought with her separate money. In *Watertown Fire Ins. Co. v. Simons*, 96 Pa. 520, it is asserted that a husband's ownership is not affected by the fact that the dry trust of the legal title is in the wife. So in *Perry v. Faneuil Hall Ins. Co.* (C. C.) 11 Fed. 482, it was held that an insurance in the name of the husband and wife was not vitiated by the fact that it was on the wife's separate property. A married woman is, according to *Sun Ins. Office v. Beneke* (Tex. Civ. App.) 53 S. W. 98, the unconditional and sole owner of her separate property, though her husband has a right of homestead therein. But in *Warren v. Springfield Fire & Mar. Ins. Co.*, 13 Tex. Civ. App. 466, 35 S. W. 810, it was held that a husband, effecting insurance on a dwelling which was community property, but located on land owned by the wife separately, was nevertheless sole and unconditional owner, principally on account of his homestead right in the property. In *Rockford Ins. Co. v. Nelson*, 65 Ill. 415, it was held that a wife, who had been abandoned and had been made a verbal gift of the husband's share of the property, and who had made improvements thereon with her separate earnings, was in fact the sole and unconditional owner; and a similar rule was asserted in *Queen Ins. Co. v. May* (Tex. Civ. App.) 35 S. W. 829, the only difference being that the old homestead had been sold and the proceeds divided, whereupon the wife had purchased the property insured with her separate money. But a surviving wife is not the sole owner of the unpartitioned property of which the husband was seised during his lifetime, according to *Overton v. American Cent. Ins. Co.*, 79 Mo. App. 1. In *Hanover Fire Ins. Co. v. Shrader*, 11 Tex. Civ. App. 255, 31 S. W. 1100, it was intimated that a husband was not divested of the sole and unconditional ownership of personal property which had been purchased in the wife's name, but without intention of making it her separate property.

(k) Personal property—Conditional sales—Chattel mortgages.

It is a well-established rule that one who buys personal property on condition that the title thereto shall remain in the seller until it is paid for is not the sole and unconditional owner of such property before full payment of the purchase price.

In support of this principle it is sufficient to cite *Dumas v. Northwestern Nat. Ins. Co.*, 12 App. D. C. 245, 40 L. R. A. 358; *Phoenix*

Ins. Co. v. Public Parks Amusement Co., 63 Ark. 187, 37 S. W. 959; *Geiss v. Franklin Ins. Co.*, 123 Ind. 172, 24 N. E. 99, 18 Am. St. Rep. 324; *Westchester Fire Ins. Co. v. Weaver*, 70 Md. 540, 17 Atl. 401, 5 L. R. A. 478; *Lasher v. Northwestern Nat. Ins. Co.*, 18 Hun (N. Y.) 99, 57 How. Prac. (N. Y.) 222, reversing 55 How. Prac. (N. Y.) 324; *McWilliams v. Cascade Fire & Marine Ins. Co.*, 7 Wash. 48, 34 Pac. 140; *Cooper v. Insurance Co. of Pennsylvania*, 96 Wis. 362, 71 N. W. 606.

Conversely, the seller retains the sole and unconditional ownership until the purchase price is paid for (*Burson v. Fire Ass'n*, 136 Pa. 267, 20 Atl. 401, 20 Am. St. Rep. 919). But, if a sale is made unconditionally, the ownership is transferred to the buyer (*Scottish Union & Nat. Ins. Co. v. Strain*, 24 Ky. Law Rep. 958, 70 S. W. 274). This being true, the existence of a chattel mortgage on property insured is not a violation of the sole and unconditional ownership clause.

That the clause is not violated by a chattel mortgage is asserted in *Friezen v. Allemania Fire Ins. Co. (C. C.)* 30 Fed. 352; *Dumas v. Northwestern Nat. Ins. Co.*, 12 App. D. C. 245, 40 L. R. A. 358; *Phoenix Ins. Co. v. Public Parks Amusement Co.*, 63 Ark. 187, 37 S. W. 959; *Fireman's Fund Ins. Co. v. Meschendorf*, 14 Ky. Law Rep. 757; *Lancashire Ins. Co. v. Monroe*, 101 Ky. 12, 39 S. W. 434; *Westchester Fire Ins. Co. v. Weaver*, 70 Md. 536, 17 Atl. 401, 5 L. R. A. 478; *Omaha Fire Ins. Co. v. Thompson*, 50 Neb. 530, 70 N. W. 30; *American Artistic Gold Stamping Co. v. Glens Falls Ins. Co.*, 1 Misc. Rep. 114, 20 N. Y. Supp. 646; *Kronk v. Birmingham Fire Ins. Co.*, 91 Pa. 300; *Light v. Greenwich Ins. Co.*, 105 Tenn. 480, 58 S. W. 851; *Union Assur. Soc. v. Nalls*, 101 Va. 613, 44 S. E. 896, 99 Am. St. Rep. 923; *Hubbard v. Hartford Fire Ins. Co.*, 33 Iowa, 325, 11 Am. Rep. 125.

However, a rule contrary to the one just stated is asserted in *Woodward v. Republic Fire Ins. Co.*, 32 Hun (N. Y.) 365, and *Fireman's Fund Ins. Co. v. Barker*, 6 Colo. App. 541, 41 Pac. 513; but the decision in the Barker Case is perhaps also based on the requirement that insured's interest should be truly stated. In *Hunt v. Springfield Fire & Marine Ins. Co.*, 25 Sup. Ct. 179, 196 U. S. 47, 49 L. Ed. —, the United States Supreme Court intimates that the condition is violated by the existence of a trust deed, which is in legal effect a chattel mortgage with power of sale.

**17. PLEADING AND PRACTICE WITH REFERENCE TO MIS-
REPRESENTATION, CONCEALMENT, AND BREACH
OF WARRANTY OR CONDITION AS TO
TITLE OR INTEREST.**

- (a) Complaint, petition, or declaration.
- (b) Plea, answer, or affidavit of defense.
- (c) Subsequent pleadings and stipulations.
- (d) Issues and proof.
- (e) Evidence—Presumptions—Burden of proof.
- (f) Same—Admissibility.
- (g) Same—Weight and sufficiency.
- (h) Questions for jury.
- (i) Instructions.
- (j) Trial and review.

(a) Complaint, petition, or declaration.

It is elementary that insured must allege ownership in order to recover on a policy of insurance.

Reference to the following cases is sufficient: *Scott v. Phoenix Ins. Co.*, 65 Mo. App. 75; *Wolf v. Sun Ins. Co.*, 75 Mo. App. 306; *Clevinger v. Northwestern Nat. Ins. Co.*, 71 Mo. App. 73; *Harness v. National Fire Ins. Co.*, 62 Mo. App. 245; *Milwaukee Fire Ins. Co. v. Todd*, 82 Ind. App. 214, 67 N. E. 697; *Farmers' Mut. Fire Ins. Co. v. Yetter*, 80 Ind. App. 187, 65 N. E. 762.

This allegation of ownership may be in general terms, even where the contract requires insured to have a specified interest or title. As said in *Gardner v. Continental Ins. Co. (Ky.)* 75 S. W. 283, and *Indian River State Bank v. Hartford Fire Ins. Co. (Fla.)* 35 South. 228, the insured need not anticipate a defense that he did not have the title or interest required by the insurance contract.

That it is sufficient to allege ownership generally is supported by *Phoenix Ins. Co. v. Rowe*, 117 Ind. 202, 20 N. E. 122; *Phoenix Ins. Co. v. Stark*, 120 Ind. 444, 22 N. E. 413; *Jones v. Philadelphia Underwriters*, 78 Mo. App. 296, 2 Mo. App. Rep'r, 246; *Ferrer v. Home Mut. Ins. Co.*, 47 Cal. 416; *American Cent. Ins. Co. v. White (Tex. Civ. App.)* 73 S. W. 827; *Sullivan v. Spring Garden Ins. Co.*, 84 App. Div. 128, 54 N. Y. Supp. 629.

An allegation that a direct loss occurred to plaintiff by the destruction of the property is sufficient (*Pennsylvania Fire Ins. Co. v. Jameson*, 31 Tex. Civ. App. 651, 73 S. W. 418). Likewise a complaint describing the property in the same words used in the policy, and making

the policy a part, is sufficient (*Davis v. Grand Rapids Fire Ins. Co.*, 15 Misc. Rep. 263, 36 N. Y. Supp. 792; *Id.*, 157 N. Y. 685, 51 N. E. 1090). A mere allegation that plaintiff was insured on his stock of goods appears to have been regarded as inadequate in *Clevinger v. Northwestern Nat. Ins. Co.*, 71 Mo. App. 73; but a similar averment was, in *Shaver v. Mercantile Town Mut. Ins. Co.*, 79 Mo. App. 420, held sufficient after verdict. An allegation of insurable interest, in addition to an averment of ownership (*St. Paul Fire & Marine Ins. Co. v. Kelly*, 43 Kan. 741, 23 Pac. 1046), is mere surplusage, and does not modify the averment of ownership. In *Bode v. Fireman's Ins. Co.*, 103 Mo. App. 289, 77 S. W. 116, a defect in the complaint in regard to the averment of ownership was held cured by an answer setting up a breach of the condition requiring sole and unconditional ownership. Similarly it was said, in *Price v. Patrons' & Farmers' Home Protection Ins. Co.*, 77 Mo. App. 236, that, where the answer expressly admitted plaintiff's ownership of the property, it was not open to objection that the complaint failed to allege it. In *American Central Ins. Co. v. Heath*, 29 Tex. Civ. App. 445, 69 S. W. 235, an allegation that a firm insured was composed of certain persons was not regarded as amounting to evidence of a representation that the persons named were the owners of the property insured.

(b) Plea, answer, or affidavit of defense.

A misrepresentation or breach of warranty or condition as to title or interest must be pleaded specially in order to be available, as such matter is an affirmative defense.

Reference to the following cases is sufficient: *Gardner v. Continental Ins. Co.* (Ky.) 75 S. W. 283; *American Cent. Ins. Co. v. Murphy* (Tex. Civ. App.) 61 S. W. 956; *Indian River State Bank v. Hartford Ins. Co.* (Fla.) 35 South. 228; *Queen Ins. Co. v. Leonard*, 9 Ohio Cir. Ct. R. 48, 6 O. C. D. 49; *Helvetia Swiss Fire Ins. Co. v. Edward P. Allis Co.*, 11 Colo. App. 264, 53 Pac. 242; *White v. Hudson River Ins. Co.*, 7 How. Prac. (N. Y.) 341; *Erb v. German-American Ins. Co.*, 98 Iowa, 606, 67 N. W. 583, 40 L. R. A. 845; *Girard Fire Ins. Co. v. Boulden* (Ala.) 11 South. 778; *German Ins. Co. v. Hunter* (Tex. Civ. App.) 32 S. W. 344; *Wolf v. Theresa Village Mut. Fire Ins. Co.*, 115 Wis. 402, 91 N. W. 1014.

But a different rule is asserted in *Home Ins. Co. v. Field*, 42 Ill. App. 392, where it is held that a breach of condition as to ownership can be shown under a plea of the general issue. Under the general rule stated, a mere defect of title must, as said in *Sprigg v. American Cent. Ins. Co.*, 101 Ky. 185, 40 S. W. 575, be specifically pointed out, in order

to be available. But in *Moore v. Susquehanna Mut. Fire Ins. Co.*, 196 Pa. 30, 46 Atl. 266, a general averment in an affidavit of defense that at the time the policy was issued the house and barn were not unconditionally and solely owned by insured, and that they were not on ground owned by him in fee simple, was held sufficient, without further allegation as to ownership. Under Rev. St. Ohio, § 3643, which requires an insurer to pay a loss, in the absence of intentional fraud increasing the risk, a concealment of interest is not available as a defense, unless predicated on fraud (*United Firemen's Ins. Co. v. Kukral*, 7 Ohio Cir. Ct. R. 356, 4 O. C. D. 633); but ordinarily there is no requirement that fraud must be alleged (*Wich v. Equitable Fire & Marine Ins. Co.*, 2 Colo. App. 484, 31 Pac. 389). In *Smith v. Commonwealth Ins. Co.*, 49 Wis. 322, 5 N. W. 804, an answer averring a breach of condition as to ownership and a concealment of interest in the proofs of loss was regarded as essentially a plea in bar, although it contained matter in abatement. It is, of course, evident, as is said in *Burrows v. McCalley*, 17 Wash. 269, 49 Pac. 508, that only the insurer can avail itself of the defense that a condition as to ownership has been broken.

(c) Subsequent pleadings and stipulations.

A replication averring that defendant was advised of the facts set out in the answer, so far as truly stated, and containing a general denial, does not admit the averments in the answer (*Hartford Fire Ins. Co. v. Landfare*, 63 Neb. 559, 88 N. W. 780). And in *Martin v. Insurance Co. of North America*, 57 N. J. Law, 623, 31 Atl. 213, it was held that a replication to a defense of breach of condition as to interest cannot be based on fraud in an action at law. In *State Mut. Fire Ins. Co. v. Arthur*, 30 Pa. 315, it was held that when plaintiffs replied to an answer relying on concealment of interest by asserting that defendants had knowledge of the facts, defendants properly reasserted a breach of condition in the rejoinder. A stipulation admitting plaintiff's ownership of the property at the time of the execution of the policy cures a misrepresentation as to ownership (*Burbank v. Lockingham Fire Ins. Co.*, 24 N. H. 550, 57 Am. Dec. 300).

(d) Issues and proof.

In *Illinois Mut. Fire Ins. Co. v. Marsailles Mfg. Co.*, 1 Gilman (Ill.) 236, defendant pleaded non assumpsit, with notice of special matter to the effect that insured had no title in fee to a portion of the premises and had concealed its true interest. It was held that defendants had a right to avail themselves of any matter of defense arising from the illegality

of the insurance. In *German American Ins. Co. v. Paul*, 2 Ind. T. 625, 53 S. W. 442, it was held that on the issue of breach of condition as to ownership plaintiff may properly be asked as to who owned the property at the time of the application. A reply setting out matter in confession and avoidance to an answer averring the execution of a deed to another does not constitute a departure from a complaint averring title in plaintiff, according to *Franklin Ins. Co. v. Feist*, 31 Ind. App. 390, 68 N. E. 188.

(c) Evidence—Presumptions—Burden of proof.

It is, of course, true, as said in *Morris v. Imperial Ins. Co.*, 106 Ga. 461, 32 S. E. 595, and *Milwaukee Fire Ins. Co. v. Todd*, 32 Ind. App. 214, 67 N. E. 697, that the insured must not only allege ownership but must also prove it. But, as said in *Richmond v. Niagara Fire Ins. Co.*, 79 N. Y. 230, it cannot be assumed that the insured did not correctly represent the nature of his title, in the absence of any proof on this subject. Consequently the insurer has the burden of proving matters in avoidance based on misrepresentation or breach of warranty or condition as to title or interest.

Such is the doctrine of *Richmond v. Niagara Fire Ins. Co.*, 79 N. Y. 230, reversing 15 Hun, 248; *Morris v. Imperial Ins. Co. of London*, 106 Ga. 461, 32 S. E. 595; *Wood v. American Fire Ins. Co.*, of Philadelphia, 78 Hun, 109, 29 N. Y. Supp. 250; *Boulden v. Phoenix Ins. Co.*, 112 Ala. 422, 20 South. 587.

(d) Same—Admissibility.

Verbal representations made at the time of the application are not admissible according to *Kentucky & Louisville Mut. Ins. Co. v. Southard*, 8 B. Mon. (Ky.) 637, unless the application was oral, as was the case in *Planters' & Mechanics' Ins. Co. v. Thurston*, 93 Ala. 255, 9 South. 268.

Claims of ownership made by a third person in the presence of insured are admissible. *Simonds v. Fireman's Fund Ins. Co.* (Tex. Civ. App.) 35 S. W. 800. The testimony of a third person who claims ownership in the property insured is admissible. *Gallagher v. London Assur. Corporation*, 149 Pa. 25, 24 Atl. 415. If a policy is made payable to another than insured, evidence as to the terms of the contract under which insured was in possession of the property is admissible. *Graham v. American Fire Ins. Co.*, 48 S. C. 195, 26 S. E. 323, 59 Am. St. Rep. 707. The record of a judgment establishing the validity of the title of insured as against the deed of another, relied on by defendant, is admissible. *Sprigg v. American Central Ins. Co.*, 101 Ky. 185, 40 S. W. 575. Where a deed introduced by plaintiff appears on its face to convey merely a

trust estate, evidence to show a spoliation of the deed is admissible. *Mix v. Royal Ins. Co. of Liverpool*, 169 Pa. 639, 32 Atl. 460. An affidavit as to ownership and value, made as a part of the proof of loss, is admissible to show that proof of loss has been made. *Fire Ins. Co. v. McNerney* (Tex. Civ. App.) 54 S. W. 1053.

Where there is a conflict as to whether certain persons in possession are vendees or mere tenants, a person who was present at the time of the alleged trade, and who heard insured say, after the trade, that the property was sold, is competent to testify to such facts. *Southern Ins. Co. v. White*, 58 Ark. 277, 24 S. W. 425. Evidence by plaintiff that he held the property by reason of a verbal contract of trade is admissible, even though a deed has subsequently been issued to him. *Fire Ass'n v. Jones* (Tex. Civ. App.) 40 S. W. 44. Statements as to the title or interest, contradictory to the proof of loss, cannot be introduced by insured. *Irving v. Excelsior Fire Ins. Co.*, 1 Bosw. (N. Y.) 507. The terms of a contract of purchase are irrelevant, where the deed itself is in evidence. *McBride v. Republic Fire Ins. Co.*, 30 Wis. 562. Evidence to show that insured, who had purchased the property at a receiver's sale, had in reality bid it in for the debtors, is inadmissible. *Bicknell v. Lancaster City & County Fire Ins. Co.*, 58 N. Y. 677, affirming 1 Thomp. & C. 215. It is obvious that evidence of misrepresentation or breach of warranty as to title or ownership is not admissible, unless such matter is pleaded. *Girard Fire Ins. Co. v. Boulden* (Ala.) 11 South. 773.

(g) Same—Weight and sufficiency.

In an action on an insurance policy, it is, of course, incumbent on plaintiff in the first instance to make out a prima facie case of ownership in the property insured.

But misrepresentation or breach of warranty or condition as to title, relied on as a defense, must be proved by defendant by a preponderance of the evidence.

Orient Ins. Co. v. Weaver, 22 Ill. App. 122; *Cochran v. Amazon Ins. Co.*, 7 Ohio Dec. 276.

Possession of property insured is prima facie evidence of ownership.

Liverpool & London & Globe Ins. Co. v. Nations, 24 Tex. Civ. App. 562, 59 S. W. 817; *Spriggs v. American Central Ins. Co.*, 101 Ky. 185, 40 S. W. 575; *Kansas Ins. Co. v. Berry*, 8 Kan. 159.

A policy of fire insurance is prima facie an admission by the insurer of the title or ownership of the insured. *American Fire Ins. Co. v. Landfare*, 56 Neb. 482, 76 N. W. 1068. A showing that the property insured was in insured's private dwelling house when destroyed is prima facie evidence of ownership. *American Central Ins. Co. v. White* (Tex. Civ. App.) 73 S. W. 827. Testimony by a witness that he was manager of the building, which belonged to

plaintiff, is sufficient to make out a prima facie case as to ownership. *Schilansky v. Merchants' & Manufacturers' Fire Ins. Co.* (Del. Super.) 55 Atl. 1014. A showing that a deed has been properly executed and left with an attorney for delivery, and that no claim for unpaid purchase money has been filed with grantee's administrator, makes out a prima facie case of ownership. *Southern Ins. Co. v. Estes*, 106 Tenn. 472, 62 S. W. 149, 52 L. R. A. 915, 82 Am. St. Rep. 892.

The sufficiency of the evidence is considered in *Shute v. Manchester Fire Assur. Co.*, 36 S. E. 541, 58 S. C. 186; *Helvetia Swiss Fire Ins. Co. v. Edward P. Allis Co.*, 11 Colo. App. 284, 53 Pac. 242; *State Ins. Co. v. New Hampshire Trust Co.*, 47 Neb. 62, 66 N. W. 9, 1106; *Underwriters' Fire Ass'n v. Palmer & Co.* (Tex. Civ. App.) 74 S. W. 603; *Schroedel v. Humboldt Fire Ins. Co.*, 158 Pa. 459, 27 Atl. 1077; *Knox v. Lycoming Fire Ins. Co.*, 50 Wis. 671, 7 N. W. 776.

(h) Questions for jury.

Generally the materiality of a misrepresentation or concealment as to title or interest is a question for the jury.

Such is the doctrine of *Columbia Ins. Co. v. Lawrence*, 10 Pet. 507, 9 L. Ed. 512; *White v. Merchants' Ins. Co.*, 93 Mo. App. 282; *Sweat v. Piscataquis Mut. Ins. Co.*, 79 Me. 109, 8 Atl. 457; *Franklin Fire Ins. Co. v. Coates*, 14 Md. 285; *White v. Hudson River Ins. Co.*, 7 How. Prac. (N. Y.) 341; *Insurance Co. v. Chase*, 5 Wall. 509, 18 L. Ed. 524; *Columbian Ins. Co. v. Lawrence*, 10 Pet. 507, 9 L. Ed. 512; *Atherton v. British America Assur. Co.*, 39 Atl. 1006, 91 Me. 289; *Brooks v. Erie Ins. Co.*, 78 N. Y. Supp. 748, 76 App. Div. 275; *Fletcher v. Commonwealth Ins. Co.*, 18 Pick. (Mass.) 419; *Wich v. Equitable Fire & Marine Ins. Co.*, 2 Colo. App. 484, 31 Pac. 389.

(i) Instructions.

If the defense that the insured was not the sole owner of the building is not pleaded, the trial court may properly ignore it in submitting the issues to the jury, though such defense is established by the evidence (*American Cent. Ins. Co. v. Murphy* [Tex. Civ. App.] 61 S. W. 956). Where a policy requires that the interest of insured must be absolute, and the testimony conflicts as to whether the property belonged to insured or his wife, it is error to charge that it is not essential that plaintiff be the absolute owner (*German Ins. Co. v. Paul*, 2 Ind. T. 625, 53 S. W. 442). If the pleadings and the evidence proceed on the theory that plaintiff is the owner, the court is justified in assuming such fact in its instructions (*Price v. Patrons' & Farmers' Home Protection Co.*, 77 Mo. App. 236). An instruction charging that plaintiff must show exclusive ownership, without specifying whether such ownership should

be shown to have existed at the time the policy was issued or at the time of the fire, is not reversible error (*Fire Ins. Co. v. McNerney* [Tex. Civ. App.] 54 S. W. 1053). Where plaintiff's possession under deeds duly executed and recorded is shown, and there is no evidence impeaching his title, it is not error to instruct, on the special issue whether plaintiff was the owner of the insured property, that the jury shall answer in the affirmative if they believe the evidence (*Nelson v. Atlantic Home Ins. Co.*, 120 N. C. 302, 27 S. E. 38). Where plaintiff's testimony is the only evidence in support of a replication setting out matters in avoidance of a fully proved defense based on breach of condition as to ownership, defendant is entitled to an affirmative charge (*Pope v. Glens Falls Ins. Co.*, 136 Ala. 670, 34 South. 29). Where it appeared that defendant had carried policies on the property for several years, and there was no evidence of any representation whatever, the trial court properly refused to submit to the jury the defense that the policy was issued on the representation of the husband of the insured that he was the owner of the property, and that the policy was taken out in his name, when in fact it was taken out in the name of the wife, who was the owner of the property (*Scottish Union & National Ins. Co. v. Strain* [Ky.] 70 S. W. 274).

(j) Trial and review.

If the jury find for defendant generally on the issues that insured burned the property and that he misrepresented his interest, this amounts to a finding that insured burned the property, and consequently a failure to sustain exceptions to the defense of misrepresentation as to title is not prejudicial error (*Joy v. Liverpool & London & Globe Ins. Co.* [Tex. Civ. App.] 74 S. W. 822). A general exception to a finding that plaintiff is entitled to recover is not sufficient to raise a defense based on matters in avoidance (*Redfield v. Holland Purchase Ins. Co.*, 56 N. Y. 354, 15 Am. Rep. 424).

A defense based on misrepresentation or breach of warranty or condition as to title or interest cannot be raised for the first time on appeal.

Adams v. Greenwich Ins. Co., 70 N. Y. 166; *Cone v. Niagara Fire Ins. Co.*, 60 N. Y. 619; *McGivney v. Phoenix Fire Ins. Co.*, 1 Wend. (N. Y.) 85; *Brooks v. Erie Ins. Co.*, 78 N. Y. Supp. 748, 76 App. Div. 275; *Crete Farmers' Mutual Township Ins. Co. v. Miller*, 70 Ill. App. 599; *Richmond v. Niagara Fire Ins. Co.*, 79 N. Y. 230; *Redfield v. Holland Purchase Ins. Co.*, 56 N. Y. 354, 15 Am. Rep. 424.

A verdict as to ownership on conflicting evidence is conclusive on appeal (*Wright v. Hartford Fire Ins. Co.*, 36 Wis. 522). Where all

the evidence in relation to an alleged misrepresentation as to interest was submitted to the jury, their verdict is decisive, unless the decision of the judge as to the sufficiency of the evidence was erroneous, even though a particular phase as to the effect of the misrepresentation, pointed out on the appeal, was not called to the attention of the jury (*Curry v. Commonwealth Ins. Co.*, 10 Pick. [Mass.] 535, 20 Am. Dec. 547). A decision on an appeal as to a matter in avoidance of an insurance policy sued on is conclusive as to a subsequent appeal of the same case (*Dowd v. American Fire Ins. Co.*, 48 Hun, 619, 1 N. Y. Supp. 31).

18. EFFECT OF CONCEALMENT, MISREPRESENTATION, OR BREACH OF WARRANTY OR CONDITION AS TO EXISTING INCUMBRANCES ON THE PROPERTY INSURED.

- (a) Statements as to incumbrances as representations or warranties.
- (b) Conditions in policy.
- (c) Necessity of disclosure of incumbrances.
- (d) Same—Under conditions of policy.
- (e) Effect of false statements, concealment, or breach of condition.
- (f) Same—As dependent on materiality.
- (g) Same—As dependent on knowledge and intent.
- (h) Same—Statutory provisions limiting effect of false statements.
- (i) Questions of practice—Pleading.
- (j) Same—Evidence.
- (k) Same—Trial and review.

(a) Statements as to incumbrances as representations or warranties.

As the extent of the insured's interest in the property covered by a policy is regarded as important by reason of its relation to the moral hazard, the insured is usually required to disclose whether there are any incumbrances on the property, and, if so, their amount. Whether his answers shall be regarded as representations or as warranties is determined by the general rules on which the distinction rests.

Where the statement as to the existence and amount of incumbrances is made a part of the contract by appropriate reference in the policy, it is a warranty.

Reference may be made to *Hosford v. Germania Ins. Co.*, 127 U. S. 399, 8 Sup. Ct. 1199, 32 L. Ed. 196; *Capital City Ins. Co. v. Autrey*, 105 Ala. 269, 17 South. 328, 58 Am. St. Rep. 121; *Southern Ins. Co.*

v. Hastings, 41 S. W. 1093, 64 Ark. 253; Battles v. York County Mut. Fire Ins. Co., 41 Me. 208; Gould v. York County Mut. Fire Ins. Co., 47 Me. 403, 74 Am. Dec. 494; Abbott v. Shawmut Fire Ins. Co., 8 Allen (Mass.) 213; Home Ins. Co. v. Curtis, 32 Mich. 402; Cerys v. State Ins. Co., 71 Minn. 338, 73 N. W. 849; Loehner v. Home Mut. Ins. Co., 17 Mo. 247; Holloway v. Dwelling House Ins. Co., 48 Mo. App. 1; Lama v. Dwelling House Ins. Co., 51 Mo. App. 447; Baxter v. State Ins. Co., 65 Mo. App. 235; Dougherty v. German-American Ins. Co., 67 Mo. App. 526; Smith v. Empire Ins. Co., 25 Barb. (N. Y.) 497; Shoemaker v. Glens Falls Ins. Co., 60 Barb. (N. Y.) 84; King v. Tioga County Patron's Fire Relief Ass'n, 54 N. Y. Supp. 1057, 35 App. Div. 58; Merrill v. Agricultural Ins. Co., 73 N. Y. 452, 29 Am. Rep. 184; Titus v. Glens Falls Ins. Co., 81 N. Y. 410; Johnson v. Dakota F. & M. Ins. Co., 1 N. D. 167, 45 N. W. 799; Philips v. Knox County Mut. Ins. Co., 20 Ohio, 174; Byers v. Farmers' Ins. Co., 35 Ohio St. 606, 35 Am. Rep. 623; Miller v. Germania Fire Ins. Co., 34 Leg. Int. (Pa.) 339; Flaherty v. Germania Ins. Co., 1 Wkly. Notes Cas. (Pa.) 352; Pennsylvania Ins. Co. v. Gottsman's Adm'rs, 48 Pa. 151; Blooming Grove Mut. Fire Ins. Co. v. McAnerney, 102 Pa. 335, 48 Am. Rep. 209; McNamara v. Dakota Fire & Marine Ins. Co., 1 S. D. 342, 47 N. W. 238; Southern Mut. Ins. Co. v. Yates, 28 Grat. (Va.) 585; Schumitsch v. American Ins. Co., 48 Wis. 26, 3 N. W. 595.

So, where the by-laws of a mutual company declare that the application shall be construed as part of the contract and a warranty (Van Buren v. St. Joseph County Village Fire Ins. Co., 28 Mich. 398), statements as to incumbrances are warranties.

Though a statement as to incumbrances, properly referred to, becomes a warranty, the reference may be so insufficient, or so qualified, as to preclude the character of warranty from attaching to the statement (Lebanon Mut. Ins. Co. v. Losch, 109 Pa. 100). Thus it was said, in Columbia Ins. Co. v. Cooper, 50 Pa. 331, that, though the application is referred to as part of the contract, if the policy contains no express condition that the answers shall be warranties, a statement as to incumbrances cannot be regarded as a warranty. Where the answers are referred to as warranties, but are qualified by words indicating an intent to declare them absolutely true only so far as they are material to the risk, the statements as to incumbrances cannot be regarded as technical warranties.

Planters' Ins. Co. v. Myers, 55 Miss. 479, 30 Am. Rep. 521; Eddy v. Hawkeye Ins. Co., 70 Iowa, 472, 30 N. W. 808, 59 Am. Rep. 444; Phoenix Assur. Co. of London v. Munger Improved Cotton-Mach. Mfg. Co. (Tex. Civ. App.) 49 S. W. 271.

The contrary doctrine seems to have been adopted in New York, and it has been held that such qualified clauses refer only to statements that are not made part of the policy, and therefore warranties.

Such, at least, seems to have been the rule governing *Shoemaker v. Glens Falls Ins. Co.*, 60 Barb. (N. Y.) 84, and it is distinctly asserted in *King v. Tiooga County Patron's Fire Relief Ass'n*, 35 App. Div. 58, 54 N. Y. Supp. 1057.

Though it is undoubtedly the general rule, as said in *Carson v. Jersey City Ins. Co.*, 43 N. J. Law, 300, 39 Am. Rep. 584, affirmed in 44 N. J. Law, 214, that a warranty cannot be based on an incomplete or ambiguous answer as to incumbrances, it was nevertheless said, in *Johnston v. Northwestern Live Stock Ins. Co.*, 107 Wis. 337, 83 N. W. 641, that the statement that the property is mortgaged for "about \$500" cannot be regarded as reduced to the status of a representation, in the absence of proof that the insured did not know the exact amount, or that the agent understood him to have no intention of stating the exact amount. In *Parker v. Otsego County Farmers' Co-operative Fire Ins. Co.*, 47 App. Div. 204, 62 N. Y. Supp. 199, affirmed in 168 N. Y. 655, 61 N. E. 1132, it was said that where the recital in the application, that "the aforesaid premises are not incumbered by mortgage or otherwise to exceed the sum of ——— dollars," was not completed by the filling of the blank, it was neither an affirmation nor a denial of the existence of an incumbrance.

In *Ames v. New York Union Ins. Co.*, 14 N. Y. 253, where an application for renewal, not made by the insured, but by the agent of the insurer, was involved, the court inclined to the opinion that statements as to incumbrances could not be regarded as warranties, though the question was not directly decided. In *Sprague v. Holland Purchase Ins. Co.*, 69 N. Y. 128, where the policy contained a condition that the application must be made out by an authorized agent of the insurer, the court said that statements as to incumbrances were not warranties by the insured, though he signed the application. Where the application was the unauthorized act of the insurer's agent, as in *Blass v. Agricultural Ins. Co.*, 18 App. Div. 481, 46 N. Y. Supp. 392, the court said that a statement as to incumbrances was not a warranty, or even a representation binding on insured. *South Bend Toy Mfg. Co. v. Dakota Fire & Marine Ins. Co.*, 2 S. D. 17, 48 N. W. 310, seems to support the principle that statements by a third person cannot be regarded as warranties by the insured.

(b) Conditions in policy.

Policies of insurance usually contain conditions providing in substance that, if the subject of the insurance is incumbered, it must be so represented to the insurer, or the policy will be void. Such conditions, if unqualified by disclosure, have been regarded as in the nature of warranties that there are no incumbrances.

Ramer v. American Central Ins. Co., 70 Mo. App. 47; *Ætna Ins. Co. v. Holcomb*, 89 Tex. 404, 34 S. W. 915.

Generally, however, these provisions of the policy are regarded as in the nature of conditions precedent.

Reference may be made to *Dumas v. Northwestern Nat. Ins. Co.*, 12 App. D. C. 245, 40 L. R. A. 358; *Crikelair v. Citizens' Ins. Co.*, 68 Ill. App. 637; *Indiana Ins. Co. v. Pringle*, 21 Ind. App. 559, 52 N. E. 821; *Hickey v. Dwelling House Ins. Co.*, 20 Ohio Cir. Ct. R. 385, 11 O. C. D. 135; *Slope Mine Coal Co. v. Quaker City Mut. Fire Ins. Co. of Philadelphia*, 13 Pa. Super. Ct. 628; *Peet v. Dakota Fire & Marine Ins. Co.*, 7 S. D. 410, 64 N. W. 206; *Guinn v. Phoenix Ins. Co. (Tex. Civ. App.)* 31 S. W. 566; *Insurance Co. of North America v. Wicker (Tex. Civ. App.)* 54 S. W. 300; *Wilcox v. Continental Ins. Co.*, 85 Wis. 193, 55 N. W. 188.

Such conditions are valid, and may be rightfully inserted in the policy and enforced against the insured.

Dumas v. Northwestern National Ins. Co., 12 App. D. C. 245, 40 L. R. A. 358; *German Mutual Ins. Co. v. Niewedde*, 11 Ind. App. 624, 39 N. E. 534; *Shaffer v. Milwaukee Mechanics' Ins. Co.*, 17 Ind. App. 204, 46 N. E. 557; *Phoenix Ins. Co. v. Overman*, 21 Ind. App. 516, 52 N. E. 771.

(c) Necessity of disclosure of incumbrances.

While it may be regarded as a fundamental principle that an inquiry regarding the existence of incumbrances on property calls for a full and true disclosure (*Loehner v. Home Ins. Co.*, 17 Mo. 247), authorities are far from being agreed as to the necessity of disclosure where there is no inquiry. In a few cases the broad principle has been asserted that, as the existence of incumbrances is of necessity a material fact, there must be a disclosure, though no inquiry is made and there is no stipulation in the policy expressly intended to elicit information.

Reference may be made to *Geib v. Enterprise Co.*, 10 Fed. Cas. 156, note; *Smith v. Columbia Ins. Co.*, 17 Pa. 253, 55 Am. Dec. 546;

Slope Mine Coal Co. v. Quaker City Mut. Fire Ins. Co., 13 Pa. Super. Ct. 626.

It must, however, be regarded as the rule established by the weight of authority that, if there is not a condition in the policy expressly calling for information as to incumbrances, disclosure is not necessary, in the absence of specific inquiry.

This rule is approved in *Hosford v. Germania Ins. Co.*, 127 U. S. 399, 8 Sup. Ct. 1199, 32 L. Ed. 196; *Friezen v. Allemania Fire Ins. Co.* (C. C.) 80 Fed. 852; *Western Assur. Co. v. Mason*, 5 Ill. App. 141; *McClelland v. Greenwich Ins. Co.*, 31 South. 691, 107 La. 124; *Strong v. Manufacturers' Ins. Co.*, 10 Pick. (Mass.) 40, 20 Am. Dec. 507; *Tiefenthal v. Citizens' Mutual Fire Ins. Co.*, 53 Mich. 306, 19 N. W. 9; *Insurance Co. of North America v. Bachler*, 44 Neb. 549, 62 N. W. 911; *Omaha Fire Ins. Co. v. Thompson*, 50 Neb. 580, 70 N. W. 80; *Seal v. Farmers' & Merchants' Ins. Co.*, 80 N. W. 807, 59 Neb. 253; *Dohn v. Farmers' Joint-Stock Ins. Co.*, 5 Lans. (N. Y.) 275; *American Artistic Gold Stamping Co. v. Glens Falls Ins. Co.*, 1 Misc. Rep. 114, 20 N. Y. Supp. 646; *Huff v. Jewett*, 20 Misc. Rep. 35, 44 N. Y. Supp. 311; *Merchants' Ins. Co. v. Frick*, 5 Ohio Dec. 47, 2 Am. Law Rec. 336; *Sproul v. Western Assur. Co.*, 33 Or. 108, 54 Pac. 180; *Arthur v. Palatine Ins. Co.*, 35 Or. 27, 57 Pac. 62, 76 Am. St. Rep. 450; *Niagara Fire Ins. Co. v. Miller*, 120 Pa. 504, 14 Atl. 385, 6 Am. St. Rep. 726; *West Rockingham Mut. Fire Ins. Co. v. Sheets*, 28 Grat. (Va.) 854; *Union Assur. Soc. v. Nalls*, 101 Va. 613, 44 S. E. 896, 99 Am. St. Rep. 923; *Alkan v. New Hampshire Ins. Co.*, 53 Wis. 136, 10 N. W. 91.

The rule was applied in *Fayette County Mutual Fire Ins. Co. v. Neel*, 6 Wkly. Notes Cas. (Pa.) 233, to a renewal policy, though the secretary was authorized by the by-laws only to extend the policy in the absence of known reasons why no renewal should be made. Generally it may be said that, in the case of mutual companies, the peculiar provisions of the by-laws require disclosure of incumbrances to be made, though there is no inquiry.

Leonard v. American Ins. Co., 97 Ind. 299; *Brown v. People's Mut. Ins. Co.*, 11 Cush. (Mass.) 280; *Bowditch Mutual Fire Ins. Co. v. Winslow*, 3 Gray (Mass.) 415; *Van Buren v. St. Joseph County Village Fire Ins. Co.*, 28 Mich. 398.

(d) Same—Under conditions of policy.

General stipulations providing that the failure to make known every material fact respecting the condition, situation, etc., of the property shall render the policy void refer only to the physical status of the property (*Alkan v. New Hampshire Ins. Co.*, 53 Wis. 136,

10 N. W. 91), and, in the absence of a clause expressly calling for such information, do not require a disclosure of incumbrances.

A similar rule governed *American Insurance Co. v. Gilbert*, 27 Mich. 429; *Insurance Co. of North America v. Bachler*, 44 Neb. 549, 62 N. W. 911; *Vankirk v. Citizens' Ins. Co.*, 79 Wis. 627, 48 N. W. 798.

Similarly it was said, in *O'Brien v. Ohio Ins. Co.*, 52 Mich. 131, 17 N. W. 726, that the provision that the company shall not be liable if there be any omission or false representation by the insured as to the condition, etc., of the property, either in the application or otherwise, did not require a disclosure as to incumbrances, in the absence of inquiry.

The authorities are far from being agreed as to the necessity of disclosure, in the absence of inquiry, when the policy contains a stipulation declaring it void if the property is incumbered, and not so represented to the insurer. It has, however, been held in numerous well-considered cases that, even if the policy contains a condition declaring it to be void if the interest of the insured be not truly stated, or if the property is incumbered and not so represented, or if the subject of insurance be personal property and be incumbered by a chattel mortgage, disclosure is not necessary, in the absence of inquiry.

This is the doctrine asserted in *Fireman's Fund Ins. Co. v. Meschen-dorf*, 14 Ky. Law Rep. 757; *Queen Ins. Co. v. Kline*, 17 Ky. Law Rep. 619, 32 S. W. 214; *Lancashire Ins. Co. v. Monroe*, 101 Ky. 12, 39 S. W. 434; *Dohn v. Farmers' Joint-Stock Ins. Co.*, 5 Lans. (N. Y.) 279; *Wright v. Fire Ins. Co.*, 12 Mont. 474, 31 Pac. 87, 19 L. R. A. 211; *Koshland v. Hartford Fire Ins. Co.*, 49 Pac. 868, 31 Or. 402; *Arthur v. Palatine Ins. Co.*, 35 Or. 27, 57 Pac. 62, 76 Am. St. Rep. 450; *Mascott v. National Fire Ins. Co.*, 69 Vt. 116, 37 Atl. 255; *Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 24 S. E. 398, 53 Am. St. Rep. 846.

That a disclosure of incumbrances is not necessary under a condition calling for a representation as to title or interest, if not absolute in fee simple, or sole and unconditional, seems to be supported by the weight of authority.

Reference may be made to *McClelland v. Greenwich Ins. Co.*, 107 La. 124, 31 South. 691; *Buck v. Phoenix Ins. Co.*, 76 Me. 586; *Washington Fire Ins. Co. v. Kelly*, 32 Md. 421, 3 Am. Rep. 149; *Guest v. New Hampshire Fire Ins. Co.*, 66 Mich. 98, 33 N. W. 31; *Newman v. Springfield Fire & Marine Ins. Co.*, 17 Minn. 123 (Gil. 98); *Boulware v. Farmers' & Laborers' Co-operative Ins. Co.*, 77 Mo.

App. 639; Omaha Fire Ins. Co. v. Thompson, 50 Neb. 530, 70 N. W. 80; Koshland v. Hartford Fire Ins. Co., 81 Or. 402, 49 Pac. 868; Wooddy v. Old Dominion Ins. Co., 81 Grat. (Va.) 362, 31 Am. Rep. 732; Morotock Ins. Co. v. Bodefer, 92 Va. 747, 24 S. E. 393, 53 Am. St. Rep. 846.

It would seem to be fundamental that, where the condition refers to a change of interest subsequent to the issuing of the policy, it cannot require a disclosure of existing incumbrances.

Cowart v. Capital City Ins. Co., 114 Ala. 356, 22 South. 574; Chamberlain v. Insurance Co. of North America (Sup.) 3 N. Y. Supp. 701.

On the other hand, it was said, in Westchester Fire Ins. Co. v. Weaver, 70 Md. 536, 17 Atl. 401, 5 L. R. A. 478, that, if the policy contains a warranty that the insured has not omitted to state any information material to the risk, a true disclosure must be made as to incumbrances. Under conditions that the policy shall be void, if the property is incumbered and not so represented to the insurer, or if the subject of the insurance is personal property incumbered by chattel mortgage, disclosure is necessary, is the doctrine that has prevailed in some courts.

Such is the rule announced in Dumas v. Northwestern National Ins. Co., 12 App. D. C. 245, 40 L. R. A. 358; Crikelair v. Citizens' Ins. Co., 68 Ill. App. 637, affirmed in 168 Ill. 309, 38 N. E. 167, 61 Am. St. Rep. 119; Indiana Ins. Co. v. Pringle, 21 Ind. App. 559, 52 N. E. 821; Baldwin v. German Ins. Co., 105 Iowa, 379, 75 N. W. 326; Skinner v. Norman, 46 N. Y. Supp. 65, 18 App. Div. 609; Guinn v. Phoenix Ins. Co. (Tex. Civ. App.) 81 S. W. 566; Ætna Ins. Co. v. Holcomb, 89 Tex. 404, 34 S. W. 915; Wilcox v. Continental Ins. Co., 85 Wis. 193, 55 N. W. 188.

On the other hand, in Allesina v. London & L. & G. Ins. Co. (Or.) 78 Pac. 392, it was held that the condition as to the existence of chattel mortgages, since it was not known to the insured until after the policy was delivered, did not impose on him the duty of disclosure. A general condition declaring that the policy shall be void if the property "shall" be incumbered by mortgage or otherwise refers only to the future, and does not call for a disclosure of incumbrances existing when the policy is issued (Dwelling House Ins. Co. v. Hoffmann, 125 Pa. 626, 18 Atl. 397).

In Beck v. Hibernia Ins. Co., 44 Md. 95, the policy provided that all policies must be issued on a survey and description, which should constitute the application. Another condition provided that, in all cases of application for insurance, the applicant shall state the

amount of incumbrances, if any exist, on the property. The court held that, though the application was not a formal application required by the first condition, it was nevertheless such an application as fell within the provisions of the second condition, and therefore disclosure of incumbrances was necessary.

The question has been raised in some cases whether the fact that the mortgage was of record excused disclosure. In *Ætna Ins. Co. v. Holcomb* (Tex. Civ. App.) 31 S. W. 1086, the court held that, in view of Sayles' Civ. St. art. 3190b, § 7, providing that by registration all persons shall be charged with notice of chattel mortgages, disclosure was not necessary where the mortgage was properly recorded. This decision was based on *Wright v. Fire Ins. Co.*, 12 Mont. 474, 31 Pac. 87, 19 L. R. A. 211; but, as pointed out in the decision of the Supreme Court, reported in 89 Tex. 404, 34 S. W. 915, reversing the Court of Civil Appeals on the ground that the notice by record extends only to creditors, subsequent purchasers, or incumbrancers, it is doubtful if the Supreme Court of Montana intended in the *Wright Case* to announce the doctrine that the record excused disclosure. There were other elements on which stress was laid, and while the fact of record was regarded as one of the circumstances which, in connection with the others, excused disclosure, it cannot be said that the court, even by implication, regarded the fact of record as sufficient in itself. It seems to have been intimated in *Collins v. London Assur. Corp.*, 165 Pa. 298, 30 Atl. 924, that the court regarded the record of the incumbrances as excusing the disclosure, in the absence of inquiry.¹ However that may be, the better doctrine seems to be that the record of an incumbrance does not excuse disclosure under the conditions of the policy.

This is the rule adopted in *Milwaukee Mechanics' Ins. Co. v. Niewedde*, 12 Ind. App. 145, 39 N. E. 757; *Mutual Ins. Co. v. Deale*, 18 Md. 26, 79 Am. Dec. 673; *Crikelair v. Citizens' Ins. Co.*, 68 Ill. App. 687, affirmed in 168 Ill. 309, 48 N. E. 167, 61 Am. St. Rep. 119; *Fireman's Fund Ins. Co. v. Barker*, 6 Colo. App. 535, 41 Pac. 513.

Conditions calling for a disclosure of title or interest have also in a few cases been regarded as requiring a disclosure as to incumbrances.

This is the principle governing *Fireman's Fund Ins. Co. v. Barker*, 6 Colo. App. 541, 41 Pac. 513; *Westchester Fire Ins. Co. v. Weaver*,

¹ But see *Maul v. Rider*, 59 Pa. 167, where it was said that the record of an instrument is notice only to those who are bound to search for it, and not publication to the world at large.

70 Md. 540, 17 Atl. 401, 5 L. R. A. 478; *Brown v. People's Mut. Ins. Co.*, 11 Cush. (Mass.) 280; *Holloway v. Dwelling House Ins. Co.*, 48 Mo. App. 1; *Gahagan v. Union Mut. Ins. Co.*, 43 N. H. 176.

In *Harding v. Norwich Union Fire Ins. Soc.*, 10 S. D. 64, 71 N. W. 755, it was said that Comp. Laws, §§ 4126, 4142, declaring that information of the nature and amount of the interest of the insured need not be communicated, unless in answer to inquiries, does not apply to chattel mortgages, and consequently does not excuse a failure to disclose a chattel mortgage, in the absence of inquiry. Similarly Rev. St. Ohio, § 3643, requiring the insurer to examine the property, was held, in *Hickey v. Dwelling House Ins. Co.*, 20 Ohio Cir. Ct. R. 385, 11 O. C. D. 135, to refer to the physical condition of the property only, and not to the condition of the title, and therefore does not relieve the insured from the duty to disclose incumbrances, though no inquiry was made.

(e) Effect of false statements, concealment, or breach of condition.

The general principle that a false warranty avoids the policy applies, of course, where the warranty is as to the existence or amount of incumbrances.

Reference may be made to *Southern Ins. Co. v. Hastings*, 64 Ark. 253, 41 S. W. 1093; *Phenix Ins. Co. v. Pickel*, 119 Ind. 155, 21 N. E. 546, 12 Am. St. Rep. 398; *Gould v. York County Mut. Fire Ins. Co.*, 47 Me. 408, 74 Am. Dec. 494; *Lama v. Dwelling House Ins. Co.*, 51 Mo. App. 447; *Baxter v. State Ins. Co.*, 65 Mo. App. 255; *Brennen v. Connecticut Fire Ins. Co.*, 99 Mo. App. 718, 74 S. W. 406; *State Ins. Co. v. Jordan*, 24 Neb. 358, 88 N. W. 839; *Smith v. Empire Ins. Co.*, 25 Barb. (N. Y.) 497; *Schumitsch v. American Ins. Co.*, 48 Wis. 28, 3 N. W. 595; *Johnston v. Northwestern Live Stock Ins. Co.*, 94 Wis. 117, 68 N. W. 868.

In a case of the warranty, the existence of incumbrances is unquestionably material under the general rule. In other cases, it has been stated generally that false statements as to the existence or amount of incumbrances avoid the policy, and it may be implied that in all such cases the statement is regarded as material.

It is sufficient to refer to *Mulville v. Adams* (C. C.) 19 Fed. 887; *Planters' Mutual Ins. Co. v. Loyd*, 67 Ark. 584, 56 S. W. 44, 77 Am. St. Rep. 136; *Germania Fire Ins. Co. v. McKee*, 94 Ill. 494, 500; *Murphy v. People's Equitable Mut. Fire Ins. Co.*, 7 Allen (Mass.) 239; *Niles v. Farmers' Mut. Fire Ins. Co.*, 119 Mich. 252, 77 N. W. 933; *Holloway v. Dwelling House Ins. Co.*, 48 Mo. App. 1; *Patten v. Merchants' & Farmers' Mut. Fire Ins. Co.*, 88 N. H. 338;

Smith v. Agricultural Ins. Co., 118 N. Y. 522, 23 N. E. 883; *Planters' Ins. Co. v. Sorrels*, 1 Baxt. (Tenn.) 352, 25 Am. Rep. 780; *Queen Ins. Co. v. May* (Tex. Civ. App.) 35 S. W. 829; *Southern Mut. Ins. Co. v. Yates*, 23 Grat. (Va.) 585; *Ryan v. Springfield Fire & Marine Ins. Co.*, 46 Wis. 671, 1 N. W. 426; *O'Brien v. Home Ins. Co.*, 79 Wis. 399, 48 N. W. 714.

In *Patten v. Insurance Co.*, 40 N. H. 375, the rule was applied, though the company had actual knowledge of the facts. It does not appear, however, that this was decided on the ground that there was no estoppel, but rather on the ground that, though the insurer had knowledge, the company was justified in believing that the insured was telling the truth.

Where the false statement is made by a third person without authority from the insured, misrepresentation or breach of warranty cannot be predicated thereon.

Commercial Union Assur. Co. v. Elliott (Pa.) 13 Atl. 970; *South Bend Toy Mfg. Co. v. Dakota Fire & Marine Ins. Co.*, 2 S. D. 17, 48 N. W. 310.

This rule also applies where the statement is made by the agent or officer of the insurer.

Mowry v. Agricultural Ins. Co., 64 Hun, 187, 18 N. Y. Supp. 834; *Raymond v. Farmers' Mut. Fire Ins. Co.*, 114 Mich. 386, 72 N. W. 254.

On the other hand, in *Richardson v. Maine Ins. Co.*, 46 Me. 394, 74 Am. Dec. 459, where the application was made by the agent, and the policy contained a stipulation that it was made and accepted in reference to the application, the insured, by his acceptance of the policy, covenanted that the application contained a just, full, and true statement of the facts and circumstances in regard to the risk, and therefore ratified the application and answers therein, so that they were as effective as if the signature to the application had been written by himself.

If the question intended to elicit information as to existing incumbrances is ambiguous, or the answer is imperfect (*Ætna Live Stock Fire & Tornado Ins. Co. v. Olmstead*, 21 Mich. 246, 4 Am. Rep. 483), breach of warranty cannot be predicated thereon. A similar rule was announced in *Phoenix Assur. Co. v. Munger Improved Cotton-Mach. Mfg. Co.* (Tex. Civ. App.) 49 S. W. 272. So it was said, in *Home Ins. Co. v. Koob*, 24 Ky. Law Rep. 223, 68 S. W. 453, 58 L. R. A. 58, that where the answers do not pretend to be exact, but are qualified by the word "about," or similar expressions, misrepre-

sentation, fatal to the policy, cannot be based thereon. A different rule seems to have been adopted in *Glade v. Germania Fire Ins. Co.*, 56 Iowa, 400, 9 N. W. 320, where it was said that, if the insured did not know the amount, he should have declined to answer until he had found out. In *Anson v. Winnesheik Ins. Co.*, 23 Iowa, 84, it was said that, though the statement in the application was erroneous, if within a few days the agent was notified thereof, and immediately sent word to the company before the policy was issued, the information became an amendment or correction of the application, so as to make it true in fact.

A failure to disclose the existence and amount of an incumbrance will avoid the policy.

Gelb v. International Ins. Co., 10 Fed. Cas. 157; *Brown v. People's Ins. Co.*, 11 Cush. (Mass.) 280; *Smith v. Columbia Ins. Co.*, 17 Pa. 253, 55 Am. Dec. 546.

This must, however, be looked upon as a general statement only, and is qualified, not only by cases where the effect of a concealment is discussed directly, but also those which hold that disclosure is not generally necessary, in the absence of inquiry. Thus it has been directly asserted that, in the absence of inquiry, failure to disclose is not a concealment which avoids the policy.

Phenix Ins. Co. v. Fuller, 53 Neb. 812, 74 N. W. 269, 40 L. R. A. 408, 68 Am. St. Rep. 637; *Harding v. Norwich Union Fire Ins. Soc.*, 10 S. D. 64, 71 N. W. 755; *Union Assur. Soc. v. Nalls*, 101 Va. 613, 44 S. E. 896, 99 Am. St. Rep. 923; *Dunbar v. Phenix Ins. Co.*, 72 Wis. 500, 40 N. W. 386.

It has also been said that, in the absence of a stipulation to that effect, a failure to disclose the existence or amount of incumbrances is not fatal.

American Artistic Gold Stamping Co. v. Glens Falls Ins. Co., 1 Misc. Rep. 114, 20 N. Y. Supp. 646; *Huff v. Jewett*, 44 N. Y. Supp. 311, 20 Misc. Rep. 35.

It has even been held, in *Koshland v. Hartford Fire Ins. Co.*, 31 Or. 402, 49 Pac. 866, that concealment cannot be based on a failure to disclose an incumbrance, though the policy contains a clause that it should be void if a material fact is not disclosed. But, where the policy contained the general condition that it would be void for misrepresentations in the application (*O'Brien v. Home Ins. Co.*, 79 Wis. 403, 48 N. W. 714), it was held that the policy was void by reason of a gross understatement in the amount of the incumbrance.

It has also been asserted that, where the policy contains a condition that it shall be void if the property is incumbered and not so represented, a failure to disclose is fatal.

Reference may be made to *Baldwin v. German Ins. Co.*, 105 Iowa, 379, 75 N. W. 326; *Bowman v. Franklin Fire Ins. Co.*, 40 Md. 620; *Lester v. Mississippi Home Ins. Co.* (Miss.) 19 South. 99; *Cagle v. Chillicothe Town Mut. Fire Ins. Co.*, 78 Mo. App. 215; *Seal v. Farmers' & Merchants' Ins. Co.*, 59 Neb. 253, 80 N. W. 807; *Dohn v. Farmers' Joint-Stock Ins. Co.*, 5 Lans. (N. Y.) 275.

Though, in *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247, the court takes the position that, where there is an inquiry as to incumbrances, a failure to answer amounts to an assertion that no incumbrance exists, the contrary rule seems to be supported by the weight of authority, and it is asserted that neither misrepresentation nor concealment can be predicated on a failure to answer a question in the application, if the policy is issued on such defective application.

Such seems to be the rule laid down in *Carson v. Jersey City Ins. Co.*, 43 N. J. Law, 300, 39 Am. Rep. 584; *Masters v. Madison County Mut. Ins. Co.*, 11 Barb. (N. Y.) 624; *Phoenix Assur. Co. v. Munger Improved Cotton-Mach. Mfg. Co.* (Tex. Civ. App.) 49 S. W. 272; *Dunbar v. Phoenix Ins. Co.*, 72 Wis. 500, 40 N. W. 386.

A misrepresentation or concealment cannot be claimed merely because a blank for stating the amount of existing incumbrances is not filled.

Bersche v. St. Louis Mut. Fire & Marine Ins. Co., 31 Mo. 555; *Dohn v. Farmers' Joint-Stock Ins. Co.*, 5 Lans. (N. Y.) 275.

A failure to fill such a blank is not an affirmation or denial of the existence of the incumbrance (*Parker v. Otsego County Farmers' Co-operative Fire Ins. Co.*, 47 App. Div. 204, 62 N. Y. Supp. 199, affirmed in 168 N. Y. 655, 61 N. E. 1132).

Where the policy contains a condition that it shall be void if the property is incumbered, unless so represented to the insurer, the existence of the incumbrance undisclosed is a breach of condition, avoiding the policy.

It is deemed sufficient to refer to *Fireman's Fund Ins. Co. v. Barker*, 6 Colo. App. 535, 41 Pac. 513; *Dumas v. Northwestern National Ins. Co.*, 12 App. D. C. 245, 40 L. R. A. 358; *Addison v. Kentucky & Louisville Ins. Co.*, 7 B. Mon. (Ky.) 470; *Orikelair v. Citizens' Ins. Co.*, 68 Ill. App. 637, affirmed in 168 Ill. 309, 48 N. E. 167, 61 Am. St. Rep. 119; *Continental Ins. Co. v. Vanlue*, 126 Ind. 410,

26 N. E. 119, 10 L. R. A. 843; *Bowlus v. Phenix Ins. Co.*, 133 Ind. 106, 32 N. E. 319, 20 L. R. A. 400; *Indiana Ins. Co. v. Pringle*, 52 N. E. 821, 21 Ind. App. 559; *Wierengo v. American Fire Ins. Co.*, 98 Mich. 621, 57 N. W. 833; *Ramer v. Insurance Co.*, 70 Mo. App. 47; *American Artistic Gold Stamping Co. v. Glens Falls Ins. Co.*, 1 Misc. Rep. 114, 20 N. Y. Supp. 646; *Hickey v. Dwelling House Ins. Co.*, 20 Ohio Cir. Ct. R. 385, 11 O. C. D. 135; *Slope Mine Coal Co. v. Quaker City Mut. Fire Ins. Co. of Philadelphia*, 13 Pa. Super. Ct. 626; *Guinn v. Phoenix Ins. Co. (Tex. Civ. App.)* 31 S. W. 566; *Insurance Co. of North America v. Wicker*, 55 S. W. 740, 93 Tex. 390, affirming (Civ. App.) 54 S. W. 300.

On the other hand, it was said, in *Benninghoff v. Agricultural Ins. Co.*, 93 N. Y. 495, that where there was no written application, and nothing to show but what an incumbrance had been disclosed, the existence of the incumbrance does not show a breach of the condition that, if the property is incumbered, it must be so represented. Where, in the course of the negotiation of a preliminary agreement for the issuance of a policy, no inquiry was made touching incumbrances, and no intimation given that incumbrance would affect the issuance of the policy, and the company subsequently denied the agreement and withheld the policy (*Sproul v. Western Assur. Co.*, 33 Or. 109, 54 Pac. 180), a breach of condition cannot be predicated thereon.

In *Lebanon Mut. Ins. Co. v. Losch*, 109 Pa. 100, it was said that a breach of warranty as to existing incumbrances cannot be predicated where the mortgage was discharged and a new mortgage covering the entire premises placed thereon with the consent of the company, for which consent they were paid. In *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410, the policy provided that the insurance might be continued under the original contract if there was no change in the risk. At the expiration of the policy it was renewed, the certificate of renewal reciting: "Provided, always, that the original policy is in full force." It appeared that at the date of the original policy there was a judgment, which was a lien on the property and which was not disclosed, but this judgment was paid before the renewal. The court took the ground that the clause was intended to reach a case where the cause of avoidance existed at the time of the renewal, and did not apply where the cause of avoidance had terminated at the time of the renewal of the policy, though it may have existed previously. On the other hand, in *Insurance Co. of North America v. Wicker (Tex. Civ. App.)* 54 S. W. 300, where

an existing mortgage was removed the day after the policy was issued, the court held that this did not evade the effect of the breach of the condition that, "if the subject of insurance be personal property, and be or become incumbered by a chattel mortgage," the policy shall be void.

The assignee of the policy with the consent of the insurer is not affected by failure on the part of the original insured to disclose an incumbrance at the time the policy was issued, according to *Ellis v. Council Bluffs Ins. Co.*, 64 Iowa, 507, 20 N. W. 782; but, as pointed out in *Ellis v. State Insurance Co.*, 68 Iowa, 578, 27 N. W. 762, 56 Am. Rep. 865, the rule is otherwise if the incumbrance is placed on the property subsequent to the issuance of the original policy, though prior to the assignment, and the policy contains a condition that, if the title to the property is incumbered, it shall be void. This condition becomes one of the conditions of a new contract with the assignee, and is therefore falsified by the existence of the incumbrance. In *Bowditch Mut. Insurance Co. v. Winslow*, 8 Gray (Mass.) 38, it was said that an assignment transfers the policy of the insured only, and does not create a new policy, so that an assignment with the consent of the company does not evade the effect of a failure to disclose an existing incumbrance. It would seem to be the rule that, though the policy is payable to the mortgagee, the failure of the mortgagor, who is the original insured, to disclose the existence of other mortgages, will avoid the policy.

This seems to be the rule governing *Baldwin v. German Ins. Co.*, 105 Iowa, 379, 75 N. W. 828; *Fitchburg Sav. Bank v. Amazon Ins. Co.*, 125 Mass. 431; *Flaherty v. Germania Ins. Co.*, 1 Wkly. Notes Cas. (Pa.) 352; *Hanover Fire Ins. Co. v. National Exch. Bank* (Tex. Civ. App.) 84 S. W. 333; *American Cent. Ins. Co. v. Cowan*, Id. 460.

The opposite principle was asserted in *State Ins. Co. v. New Hampshire Trust Co.*, 47 Neb. 62, 66 N. W. 9; Id., 66 N. W. 1106; *Elliott v. Agricultural Ins. Co.* (N. J. Sup.) 3 Atl. 171.

(f) Same—As dependent on materiality.

In view of the general rule as to warranties, it is a fundamental principle that a breach of warranty as to the existence or amount of incumbrances avoids the policy, irrespective of the actual materiality of the fact; a warranty being necessarily material.

This rule is applied in *Southern Ins. Co. v. Hastings*, 64 Ark. 253, 41 S. W. 1093; *Kingston Mutual County Fire & Lightning Ins. Co. v. Olmstead*, 68 Ill. App. 111; *Ætna Ins. Co. v. Resh*, 40 Mich.

241; *Cerys v. State Ins. Co.*, 71 Minn. 338, 73 N. W. 849; *Shoemaker v. Glens Falls Ins. Co.*, 60 Barb. (N. Y.) 84; *King v. Tioga County Patron's Fire Relief Ass'n*, 35 App. Div. 58, 54 N. Y. Supp. 1057; *Byers v. Farmers' Ins. Co.*, 35 Ohio St. 603, 35 Am. Rep. 623; *Pennsylvania Ins. Co. v. Gottsman's Adm'rs*, 48 Pa. 151; *Cooper v. Farmers' Mutual Fire Ins. Co.*, 50 Pa. 299, 38 Am. Dec. 544; *Schumitsch v. American Ins. Co.*, 48 Wis. 26, 3 N. W. 595; *Johnston v. Northwestern Live Stock Ins. Co.*, 94 Wis. 117, 68 N. W. 868.

Even where the policy was against hail, and consequently no moral hazard existed, it was held (*Johnson v. Dakota Fire & Marine Ins. Co.*, 1 N. D. 167, 45 N. W. 799) that, as the statements as to incumbrances were warranties, they must be regarded as material. But, where the policy contains a condition that false answers material to the risk shall render the policy void (*Eddy v. Hawkeye Ins. Co.*, 70 Iowa, 472, 30 N. W. 808, 59 Am. Rep. 444), the warranty must be regarded as qualified, so that a breach will not avoid the policy if the fact that the property is incumbered is clearly shown to be immaterial.

Under a condition that, if the property is incumbered, it must be so represented and expressed in the policy, or the contract shall be avoided, the existence of incumbrances is a material fact.

Reference may be made to *Fireman's Fund Ins. Co. v. Barker*, 6 Colo. App. 541, 41 Pac. 513; *Baldwin v. German Ins. Co.*, 105 Iowa, 379, 75 N. W. 326; *Westchester Fire Ins. Co. v. Weaver*, 70 Md. 536, 17 Atl. 401, 5 L. R. A. 478; *Arthur v. Palatine Ins. Co.*, 35 Or. 27, 57 Pac. 62, 76 Am. St. Rep. 450; *Peet v. Dakota Fire & Marine Ins. Co.*, 7 S. D. 410, 64 N. W. 206.

If the statements as to incumbrances are not warranties, the effect of falsity to avoid the policy must, in accordance with the general rule, depend, in the absence of fraud, on the materiality of the statement.

This principle is applied in *Phenix Ins. Co. v. Coomes* (Ky.) 20 S. W. 900; *Springfield Fire & Marine Ins. Co. v. Phillips*, 16 Ky. Law Rep. 352; *American Ins. Co. v. Gilbert*, 27 Mich. 429; *Johnston v. Northwestern Live Stock Ins. Co.*, 94 Wis. 117, 68 N. W. 868.

The existence or the amount of incumbrances is not necessarily material.

Phoenix Assur. Co. v. Munger Improved Cotton Mach. Mfg. Co., 92 Tex. 297, 49 S. W. 222; *Mascott v. First Nat. Fire Ins. Co.*, 69 Vt.

116, 37 Atl. 255. The immateriality of the fact is also asserted in *Delahay v. Memphis Ins. Co.*, 8 Humph. (Tenn.) 684; *Light v. Greenwich Ins. Co.*, 105 Tenn. 480, 58 S. W. 851.

In *Mascott v. First Nat. Fire Ins. Co.*, 69 Vt. 116, 37 Atl. 255, the general principle was qualified to the extent that statements as to incumbrances were said not to be material, unless made so by inquiry. This leads us to the rule, asserted in several important cases, to the effect that, where the insurer makes an express and direct inquiry as to incumbrances, the facts must be deemed material.

The rule is supported by *Richardson v. Maine Ins. Co.*, 46 Me. 394, 74 Am. Dec. 459; *Davenport v. New England Mut. Fire Ins. Co.*, 6 Cush. (Mass.) 340; *Clark v. New England Fire Ins. Co.*, 6 Cush. (Mass.) 342, 53 Am. Dec. 44; *Draper v. Charter Oak Fire Ins. Co.*, 2 Allen (Mass.) 569; *Town v. Fitchburg Fire Ins. Co.*, 7 Allen (Mass.) 51; *Seal v. Farmers' & Merchants' Ins. Co.*, 59 Neb. 253, 80 N. W. 807; *Hutchins v. Cleveland Mut. Ins. Co.*, 11 Ohio St. 477; *West Rockingham Mut. Fire Ins. Co. v. Sheets*, 26 Grat. (Va.) 854.

In *Arthur v. Palatine Ins. Co.*, 35 Or. 27, 57 Pac. 62, 76 Am. St. Rep. 450, it was said that, if the insured knows the facts are material, he must disclose them, though there is no inquiry.

In view of the lien on the property insured given to mutual companies to secure the payment of assessments, where the policy is in such a company, the existence of an incumbrance is regarded as material to the risk as a matter of law.

This rule is laid down in *Battles v. York Co. Mut. Fire Ins. Co.*, 41 Me. 208; *Gould v. York County Mut. Fire Ins. Co.*, 47 Me. 403, 74 Am. Dec. 494; *Merrill v. Farmers' & Mechanics' Mut. Fire Ins. Co.*, 48 Me. 285; *Clark v. New England Fire Ins. Co.*, 6 Cush. (Mass.) 342, 53 Am. Dec. 44; *Friesmuth v. Agawam Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 587; *Bowditch Mut. Fire Ins. Co. v. Winslow*, 3 Gray (Mass.) 415; *Draper v. Charter Oak Fire Ins. Co.*, 2 Allen (Mass.) 569; *Gahagan v. Union Mut. Ins. Co.*, 43 N. H. 176; *Phillips, Beckel & Co. v. Knox Co. Mut. Ins. Co.*, 20 Ohio, 174.

As said in *Davenport v. New England Mut. Fire Ins. Co.*, 6 Cush. (Mass.) 340, *Hayward v. New England Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 444, and *Packard v. Agawam Mut. Fire Ins. Co.*, 2 Gray (Mass.) 334, the responsibility of the insured and his ability to meet his engagements are important elements in mutual insurance.

The general rules for determining whether a statement is material or not have been applied to statements as to the existence and amount of incumbrances. Thus the statements have been regarded

as material, as tending to induce the insurer to accept or refuse the risk and as affecting the premium.

Westchester Fire Ins. Co. v. Weaver, 70 Md. 540, 17 Atl. 401, 5 L. R. A. 478; *Planters' Ins. Co. v. Myers*, 55 Miss. 479, 80 Am. Rep. 521; *Ryan v. Springfield Fire & Marine Ins. Co.*, 46 Wis. 671, 1 N. W. 428.

Since the insurer's right of subrogation to the rights of the mortgagee insured is an inducement to take the risk, it was held, in *Smith v. Columbia Ins. Co.*, 17 Pa. 253, 55 Am. Dec. 546, that the concealment of a prior mortgage was material as affecting such right. The statements are also regarded as material, in view of the relation between the extent of the interest of the insured and the moral hazard. It is important that the insurer should know how far the interest of the insured is enlisted in guarding the property from loss.

Such seems to be the theory of *Addison v. Kentucky & Louisville Ins. Co.*, 7 B. Mon. (Ky.) 470, and *Ryan v. Springfield Fire & Marine Ins. Co.*, 46 Wis. 671, 1 N. W. 428.

In *Strong v. Manufacturers' Ins. Co.*, 10 Pick. (Mass.) 40, 20 Am. Dec. 507, the existence of a mortgage was held not to be material on the ground that, as the destruction of the house did not extinguish the mortgage debt, the insured was still interested to the full amount of the value of the property. But the moral hazard was, in *Smith v. Insurance Co.*, 60 Vt. 682, 15 Atl. 353, 1 L. R. A. 216, 6 Am. St. Rep. 144, considered as great if the insured believed there was a mortgage on the property, though in fact the mortgage had been discharged without his knowledge, as though the mortgage was actually in existence.

As an element in determining the moral hazard, consideration should be given to the relation between the amount of the incumbrance and the value of the land and the amount of the insurance (*McNamara v. Dakota Fire & Marine Ins. Co.*, 1 S. D. 342, 47 N. W. 288). It seems to be regarded as important, in *Patten v. Merchants' & Farmers' Fire Ins. Co.*, 38 N. H. 338, that the incumbrance should be for a substantial, and not a nominal, amount. A similar principle seems to have been approved in *Ætna Ins. Co. v. Resh*, 40 Mich. 241. So, in *Springfield Fire & Marine Ins. Co. v. Phillips*, 16 Ky. Law Rep. 352, it was said that if the lien, compared with the valuation of the property, is so small that it cannot possibly affect the interest of the insured, the court will say, as a matter of law, that the lien is not material. In this case, however, the amount

of the lien was not so small that the court could pronounce it immaterial.

These principles have been applied in *Phenix Ins. Co. v. Fulton*, 80 Ga. 224, 4 S. E. 806; *Southern California Ins. Co. v. Lucas*, 15 Ky. Law Rep. 574; *Hayward v. New England Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 444; *Holloway v. Dwelling House Ins. Co.*, 48 Mo. App. 1; *Mascott v. National Fire Ins. Co.*, 69 Vt. 116, 37 Atl. 255.

It is in accordance with the principle just discussed that it was held, in *Eddy v. Hawkeye Ins. Co.*, 70 Iowa, 472, 30 N. W. 808, 59 Am. Rep. 444, that, where the building insured was situated on a certain 40-acre tract of a farm of 260 acres, the existence of a mortgage on other subdivisions of the farm was immaterial, though the statements were declared warranties. So, in *McCarty v. Scottish Union & National Ins. Co.*, 126 N. C. 820, 36 S. E. 284, it was said that, where the incumbrance covered other lands sufficient to satisfy it, the fact of its existence was not material.

Closely related to the foregoing is the principle that, in determining the effect of a false statement as to incumbrance, the materiality of the variance between the true and stated amount of the incumbrance must be considered. It may be regarded as a fairly well established principle that, unless the variance between the amount as stated and the true amount of the incumbrance is substantial, the false statement, if not a warranty, will not avoid the policy.

The rule seems to be approved in *Home Ins. Co. v. Koob*, 68 S. W. 453, 24 Ky. Law Rep. 223, 58 L. R. A. 58; *Jacobs v. Eagle Mut. Fire Ins. Co.*, 7 Allen (Mass.) 132; *McNamara v. Dakota Fire & Marine Ins. Co.*, 1 S. D. 342, 47 N. W. 288.

It is in accordance with this principle that in the *McNamara Case* a variance of \$40 was not regarded as material, where the true amount was only \$390. On the other hand, in *Jacobs v. Eagle Mut. Fire Ins. Co.*, 7 Allen (Mass.) 132, where the true amount was \$3,000, and the amount stated was \$2,700, the variance of 10 per cent. was regarded as material.

In *Cerys v. State Ins. Co.*, 71 Minn. 338, 73 N. W. 849, *Crook v. Phoenix Ins. Co.*, 38 Mo. App. 582, and *Glade v. Germania Fire Ins. Co.*, 56 Iowa, 400, 9 N. W. 320, a variance of 20 per cent. and over was regarded as material.

The rule that a slight variance is immaterial was applied in *Hosford v. Hartford Fire Ins. Co.*, 127 U. S. 404, 8 Sup. Ct. 1202, 32 L. Ed. 198, where the mortgage was stated to be \$3,000, and in fact

there was \$79.45 interest also due. The court held that the variance was not material, though the statement as to incumbrances was made a warranty. On the other hand, in *Abbott v. Shawmut Fire Ins. Co.*, 3 Allen (Mass.) 213, where the variance was only \$84 on a mortgage of over \$6,600, and in *Johnston v. Northwestern Live Stock Ins. Co.*, 94 Wis. 117, 68 N. W. 868, and 107 Wis. 337, 83 N. W. 641, where the variance was \$25 on a mortgage of over \$500, it was held that, as the statements were warranties, the policy was avoided, though the variance was inconsiderable.

(g) Same—As dependent on knowledge and intent.

Where the statements as to incumbrances are representations only, or where there is a failure to disclose the existence of an incumbrance, good faith on the part of the insured will absolve him from the penalty ordinarily attached to misrepresentation or concealment.

This seems to be the rule to be deduced from *St. Paul Fire & Marine Ins. Co. v. Niedecken*, 6 Dak. 494, 43 N. W. 696; *Phenix Ins. Co. v. Coomes* (Ky.) 20 S. W. 900; *Fireman's Fund Ins. Co. v. Meschen-dorf*, 14 Ky. Law Rep. 757; *Lancashire Ins. Co. v. Monroe*, 101 Ky. 12, 39 S. W. 434; *McClelland v. Greenwich Ins. Co.*, 31 South. 691, 107 La. 124; *Strong v. Manufacturers' Ins. Co.*, 10 Pick. (Mass.) 40, 20 Am. Dec. 507; *Insurance Company of North America v. Bachler*, 44 Neb. 549, 62 N. W. 911; *Hanover Fire Ins. Co. v. Bohn*, 48 Neb. 743, 67 N. W. 774, 58 Am. St. Rep. 719; *Gahagan v. Union Mut. Ins. Co.*, 48 N. H. 176; *Jersey City Ins. Co. v. Carson*, 44 N. J. Law, 210, affirming 43 N. J. Law, 300, 39 Am. Rep. 584; *American Artistic Gold Stamping Co. v. Glens Falls Ins. Co.*, 1 Misc. Rep. 114, 20 N. Y. Supp. 646; *Parker v. Otsego County Farmers' Co-operative Fire Ins. Co.*, 62 N. Y. Supp. 199, 47 App. Div. 204, affirmed in 168 N. Y. 655, 61 N. E. 1132; *Arthur v. Palatine Ins. Co.*, 85 Or. 27, 57 Pac. 62, 76 Am. St. Rep. 450; *Columbia Ins. Co. v. Cooper*, 50 Pa. 331; *West Rockingham Mut. Fire Ins. Co. v. Sheets*, 26 Grat. (Va.) 854; *Virginia Fire & Marine Ins. Co. v. Kloeber*, 31 Grat. (Va.) 749; *Alkan v. New Hampshire Ins. Co.*, 53 Wis. 136, 10 N. W. 91; *Vankirk v. Citizens' Ins. Co.*, 79 Wis. 627, 48 N. W. 798; *Johnston v. Northwestern Live Stock Ins. Co.*, 94 Wis. 117, 68 N. W. 868.

So it was said, in *Farmers' Fire Ins. Co. v. Johnston*, 113 Mich. 426, 71 N. W. 1074, that the naming by the insured of one whom he mistakenly believes to own the mortgage of the property insured does not avoid the policy. In *Columbia Ins. Co. v. Cooper*, 50 Pa. 331, where the policy was on machinery in a mill, and the fact whether a judgment which was a lien on the real estate was an in-

cumbrance depended on whether the machinery was regarded as fixtures or personalty, a statement that there was no incumbrance on the insured property, if made in good faith, was held not to avoid the policy. In *Niagara Fire Ins. Co. v. Miller*, 120 Pa. 504, 14 Atl. 385, 6 Am. St. Rep. 726, it was said that, in order to impose on the insured the duty to disclose the existence of an incumbrance, he must know the fact to be material.

On the other hand, if the statements as to incumbrances are warranties the intent of the insured in making an untrue statement is immaterial.

State Ins. Co. v. Jordan, 24 Neb. 358, 38 N. W. 839; *Byers v. Farmers' Ins. Co.*, 85 Ohio St. 606, 35 Am. Rep. 623.

So, if the failure to disclose is in violation of a condition in the policy, the good faith of the insured does not avail him.

Fireman's Fund Ins. Co. v. Barker, 6 Colo. App. 535, 41 Pac. 518; *Hayes v. United States Fire Ins. Co.*, 132 N. C. 702, 44 S. E. 404; *Guinn v. Phoenix Ins. Co.* (Tex. Civ. App.) 81 S. W. 536.

As in such instances the facts as to incumbrances are regarded as having been made material by the terms of the contract, we may deduce the additional rule that, where the facts as to the existence or amount of incumbrances are conceded to be material to the risk, a false answer or concealment is fatal to the policy, irrespective of the intent of the insured.

The rule is asserted in *Gould v. York County Mut. Fire Ins. Co.*, 47 Me. 403, 74 Am. Dec. 494; *Clark v. New England Fire Ins. Co.*, 6 Cush. (Mass.) 842, 53 Am. Dec. 44; *Davenport v. New England Mut. Fire Ins. Co.*, 6 Cush. (Mass.) 840; *Lowell v. Middlesex Mut. Fire Ins. Co.*, 8 Cush. (Mass.) 127; *Seal v. Farmers' & Merchants' Ins. Co.*, 59 Neb. 253, 80 N. W. 807; *Hayes v. United States Fire Ins. Co.*, 132 N. C. 702, 44 S. E. 404.

(h) Same—Statutory provisions limiting effect of false statements.

Where there is a statute limiting the effect of misrepresentations to avoid the policy to such as are material to the risk, the fraudulent effect of false statements as to incumbrances has been so limited.

Reference may be made to *Phenix Ins. Co. v. Fulton*, 80 Ga. 224, 4 S. E. 866; *Lancashire Ins. Co. v. Monroe*, 101 Ky. 12, 39 S. W. 434; *Home Ins. Co. v. Koob*, 68 S. W. 453, 24 Ky. Law Rep. 223, 53 L. R. A. 58; *Manchester Assur. Co. v. E. V. Dowell & Co.*, 25 Ky. Law Rep. 2240, 80 S. W. 207; *Sweat v. Piscataquis Mut. Ins. Co.*, 79 Me. 109, 8 Atl. 457; *Perry v. Dwelling House Ins. Co.*, 67 N. H. 291, 33 Atl. 731, 68 Am. St. Rep. 668; *McCarty v. Imperial Ins.*

Co., 36 S. E. 284, 126 N. C. 820; United Firemen's Ins. Co. v. Kukral, 7 Ohio Cir. Ct. R. 356, 4 O. C. D. 633; Light v. Greenwich Ins. Co., 58 S. W. 851, 106 Tenn. 480; Continental Fire Ins. Co. v. Whitaker & Dillard (Tenn.) 79 S. W. 119, 64 L. R. A. 451.²

In *Bellatty v. Thomaston & F. Ins. Co.*, 61 Me. 414, the statute was regarded as applicable, even in the case of mutual companies, if there was no inconsistency between the statute and the provisions of the charter.

(1) Questions of practice—Pleading.

The truth of a warranty as to the incumbrance on property need not be pleaded or proved by the insured (*Smith v. Home Ins. Co.*, 47 Hun [N. Y.] 30). So, too, the insured need not negative the breach of the condition declaring the policy void if the personalty is incumbered by chattel mortgage (*Indian River State Bank v. Hartford Fire Ins. Co.* [Fla.] 35 South. 228). Though it was said, in *Western Assur. Co. v. Mason*, 5 Ill. App. 141, that a defense as to the existence of incumbrances may be shown under the general issue, the case seems to have been overruled by *Danvers Mut. Fire Ins. Co. v. Schertz*, 95 Ill. App. 656, where it was held that, in order to take advantage of a breach of warranty as to incumbrances on the premises, there must be a special plea setting up the facts. So, in *Home Ins. Co. v. Curtis*, 32 Mich. 402, where defendant had pleaded only the general issue without notice of special defenses, the court held that the company could not raise a defense as to incumbrances, though a breach of warranty was incidentally shown in the testimony introduced by the plaintiff. It was, however, said, in *Southern Ins. Co. v. Hastings*, 64 Ark. 253, 41 S. W. 1093, that, in view of testimony disclosing a breach of warranty as to incumbrances, an amendment to the answer setting up such additional breaches should have been allowed.

An answer alleging that the insured concealed the fact that the property was incumbered by a chattel mortgage, which is alleged to be of record, does not sufficiently aver that the property was in fact incumbered (*Lancashire Ins. Co. v. Monroe*, 101 Ky. 12, 39 S. W. 434). It was also held, in *Phoenix Assur. Co. v. Munger Improved Cotton Machine Mfg. Co.*, 92 Tex. 297, 49 S. W. 222, that, if the statements are not warranties, their materiality must be alleged in the answer. So, in the same case, allegations to the effect

² See ante, p. 1189.

that when the policy was issued there existed on the property an indebtedness exceeding the amount stated in the application, and that the amount of each of these excessive incumbrances is well known to the plaintiff and the persons to whom the same are due, but is unknown to defendant, were regarded as too general. A special plea that the personal property insured was not free from incumbrance, but that in fact there existed a chattel mortgage thereon, was held to be insufficient in *Elliott v. Agricultural Ins. Co.* (N. J. Sup.) 3 Atl. 171, as it did not set out the condition said to have been violated, nor describe the alleged incumbrance, nor did the plea conclude with a verification.

In *Murphy v. People's Equitable Mut. Fire Ins. Co.*, 7 Allen (Mass.) 239, where the answer alleged that there was an incumbrance on the property, a replication averring that defendant had waived such objection was held not to constitute an admission of the facts stated in the answer. But it was said, in *Farmers' & Merchants' Ins. Co. v. Peterson*, 47 Neb. 747, 66 N. W. 847, that where defendants alleged the issuance of a policy containing a condition against incumbrances, and, moreover, that in the application the property was described as not incumbered, a reply denying every allegation of new matter in the answer, but admitting that insured signed an application, did not amount to an admission that it was the application relied on by the defendant. Nor did an admission that the condition set up in the plea existed in the policy amount to an admission of a breach of such condition. So, in *Hartford Fire Ins. Co. v. Landfare*, 63 Neb. 559, 88 N. W. 779, where defendant alleged that the property was incumbered by mortgage, a reply that defendant was at all times fully advised of the facts set out in the answer as to incumbrances, and denying generally the allegations of the answer, does not amount to an admission of the allegations of the answer.

(J) Same—Evidence.

According to *Hartford Fire Ins. Co. v. Landfare*, 63 Neb. 559, 88 N. W. 779, the burden is on defendant to show the existence of an incumbrance. So, too, the burden of showing the materiality of a misrepresentation as to incumbrances is on the insurer.

Home Ins. Co. v. Koob, 68 S. W. 453, 24 Ky. Law Rep. 223, 58 L. R. A. 58; *McCarty v. Scottish Union & National Ins. Co.*, 126 N. C. 820, 86 S. E. 284.

In the latter case it is also said that the burden of showing the fraudulent intent of the insured is on the insurer. Parol evidence to contradict a statement in the application as to incumbrances is inadmissible.

Rae v. Washington Mut. Ins. Co., 1 Code Rep. N. S. (N. Y.) 185, 6 How. Prac. 21; *Southern Mut. Ins. Co. v. Yates*, 28 Grat. (Va.) 585.

A mere abstract of a judgment is insufficient proof of a judgment lien on insured property to render the insurance void (*North British & Mercantile Ins. Co. v. Gunter*, 12 Tex. Civ. App. 598, 35 S. W. 715).

(b) Same—Trial and review.

Where the evidence as to whether an inquiry as to incumbrances was made is conflicting, it is a question for the jury (*Geib v. International Ins. Co.*, 10 Fed. Cas. 157). The question whether the incumbrance was greater than represented is for the jury (*Sabotta v. St. Paul Fire & Marine Ins. Co.*, 54 Wis. 687, 12 N. W. 18). In *Phoenix Ins. Co. v. Overman*, 52 N. E. 771, 21 Ind. App. 516, it was held that the question whether a mortgage on insured chattels was ever delivered, so as to constitute an incumbrance in violation of the policy, was for the jury. Though it seems to have been held, in *American Fire Ins. Co. v. Landfare*, 56 Neb. 482, 76 N. W. 1068, that the materiality of the existence of an incumbrance is for the court, the established rule seems to be that the question is one for the jury.

Reference may be made to *Phenix Ins. Co. v. Fulton*, 80 Ga. 224, 4 S. E. 866; *Sweat v. Piscataquis Mut. Ins. Co.*, 79 Me. 109, 8 Atl. 457; *McCarty v. Scottish Union & National Ins. Co.*, 126 N. C. 820, 36 S. E. 284; *Mascott v. First National Fire Ins. Co.*, 69 Vt. 118, 37 Atl. 255; *Virginia Fire & Marine Ins. Co. v. Kloeber*, 31 Grat. (Va.) 749.

Where the insured stated that the property was incumbered for \$3,000, and the jury found specially that the property was incumbered for \$4,500 (*Ryan v. Springfield Fire & Marine Ins. Co.*, 46 Wis. 671, 1 N. W. 426), the court held that the special findings, being inconsistent with a general verdict for the plaintiff, must control it.

Where the company set up a defense of the existence of a mortgage, and the insured replied merely by a general denial (*Insurance Co. of North America v. Bachler*, 44 Neb. 549, 62 N. W. 911),

in the absence of objection that testimony on the part of the plaintiff showing that the insured did not know that it was his duty to communicate the existence of the mortgage was irrelevant under the pleadings, the question cannot be raised for the first time in the appellate court. Findings of the court as to the amount of incumbrances will not be set aside on appeal (*Lewis v. Burlington Ins. Co.*, 80 Iowa, 259, 45 N. W. 749). In *Mascott v. First National Fire Ins. Co.*, 69 Vt. 116, 37 Atl. 255, the policy provided that it should be void if the insured misrepresented or concealed "a material fact." There was a mortgage on the property for \$200, which was not disclosed by the insured. It was held that, as defendant did not go to the jury on the question of the materiality of the concealment, it would not be assumed on appeal that it was material.

**19. CONSTRUCTION OF STATEMENTS AND SUFFICIENCY OF
DISCLOSURE AS TO EXISTENCE AND AMOUNT
OF INCUMBRANCES.**

- (a) In general.
- (b) What constitutes an incumbrance.
- (c) Same—Mortgages.
- (d) Same—Liens.
- (e) Same—Judgments.

(a) In general.

The general rule that, where there is an ambiguous question and answer, they will be construed most favorably to the insured, was applied in *Ætna Live Stock Fire & Tornado Ins. Co. v. Olmstead*, 21 Mich. 246, 4 Am. Rep. 483, where the interrogatory: "Incumbrance, if any; state the amount. Is there any insurance by the mortgagees? State the amount"—was answered: "No." The court held that the interrogatory and answer were ambiguous, that the only part of the interrogatory that could be properly answered by "No" was as to whether there was any insurance by the mortgagees, and that therefore there was no certainty that the applicant, in signing the application, understood his reply to assert anything more than that there was no insurance on behalf of the mortgagee. **When the question as to incumbrance asks for information only as to mortgages, a failure to disclose the existence of other kinds of liens is not fatal.**

Hosford v. Germania Fire Ins. Co., 127 U. S. 399, 8 Sup. Ct. 1199, 32 L. Ed. 196; *Merchants' Ins. Co. v. Frick*, 5 Ohio Dec. 47, 2 Am. Law Rec. 336.

So it was held, in *Southern Mut. Ins. Co. v. Kloeber*, 31 Grat. (Va.) 739, that the question as to the existence of incumbrances could not be regarded as calling for a disclosure as to the existence of a contingent right of dower. It was said, in *Davis v. Pioneer Furniture Co.*, 102 Wis. 394, 78 N. W. 596, that, where the existence of an incumbrance is brought to the insured's knowledge, a mere inaccuracy in describing the nature of the incumbrance does not avoid the policy.

In *Mutual Mill Ins. Co. v. Gordon*, 121 Ill. 366, 12 N. E. 747, affirming 20 Ill. App. 559, where the property insured was machinery in a mill, it appeared that the mill property was owned by three tenants in common, of whom insured was one; that they mortgaged the mill and other real estate for \$37,000, and subsequently partitioned the property. The mill was deeded to insured, and it was verbally agreed between the parties that the mill property should be held for \$17,000 of the mortgage, and the remainder of the mortgage apportioned between the tracts taken by the other tenants in common. This arrangement was consented to by the mortgagees. In his application for insurance, insured stated that the incumbrance on the property was \$17,000. The court held that the insurer could not attack the validity of the agreement as to the apportionment of the incumbrance, and consequently there was no such misrepresentation as would avoid the policy. Similarly, in *Holmes v. Drew*, 16 Hun (N. Y.) 491, where a mortgage covered two farms and the insurance was on a building on one of the farms, an apportionment of the mortgage in the application between the two farms was held to be no breach of warranty, if made in good faith. This principle seems to have been repudiated in *Niles v. Farmers' Mut. Fire Ins. Co.*, 119 Mich. 252, 77 N. W. 933. In this case the insured held the premises under a land contract, by virtue of which he was to pay \$350 for a tract consisting of 10 acres. This tract was part of a tract of 80 acres, on which there was a mortgage for \$500. In response to an inquiry as to the existence of incumbrances the insured stated that the property was incumbered to the extent of \$350, the amount he was to pay for the premises. The court held that this was a concealment, avoiding the policy, as the land was in fact mortgaged for \$150 more than was disclosed. The court seems, however, to have overlooked the fact that, should the mortgage be foreclosed, the 70 acres remaining would be first subject to sale before the 10 acres could be sold.

In *Dougherty v. German-American Ins. Co.*, 67 Mo. App. 526, a

statement that the property is mortgaged for \$850, when in fact the original mortgage was for \$1,350, was regarded as true, where there had been paid on the mortgage \$500. A disclosure of the amount of the incumbrance, except that the interest running from the last date when interest was due was not included, was held a sufficient disclosure in *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410. In *Battles v. York County Mut. Fire Ins. Co.*, 41 Me. 208, the answer to the question regarding incumbrances was: "Mortgage for \$1,100 to C." It appeared that there was also a mortgage to B. for \$1,200. It was contended that the existence of the mortgage to B. was wholly immaterial, as C. had agreed to apply the payments from the plaintiff as fast as made to the extinguishment of the B. mortgage, and had actually left the notes and mortgage in the hands of an agent for that purpose. The court, however, held that this contention could not avail, as the mortgage to C. was not so large by \$100 as the mortgage to B., so that, if it had been duly assigned and appropriated in payment, it would not have discharged the B. mortgage by \$100. In *American Ins. Co. v. Gilbert*, 27 Mich. 429, the insured held under a contract for purchase from P. for \$4,000. At the time of the contract there was an outstanding mortgage to S., on which was due \$300. P. covenanted to give a good title, free from incumbrance. The court held that, in view of this covenant, P. was bound to pay the incumbrance, and that a disclosure of the incumbrance of \$4,000 of purchase price of the land was a sufficient disclosure of the whole amount of the incumbrance.

In *Parker v. Otsego County Farmers' Co-operative Fire Ins. Co.*, 47 App. Div. 204, 62 N. Y. Supp. 199, affirmed in 168 N. Y. 655, 61 N. E. 1132, it was said that where the application contained a recital, "The aforesaid premises are not incumbered, by mortgage or otherwise, to exceed the sum of ——— dollars," the failure to fill the blank conveyed the idea that there was some incumbrance thereon, either of an uncertain, or unknown, or unstated amount, notwithstanding the failure to fill the blank. A similar principle governed *Bersche v. St. Louis Mut. Fire Ins. Co.*, 31 Mo. 555. In view of these decisions, it may be stated as a general principle that, if the disclosure as to incumbrances is insufficient or unsatisfactory, it must be followed up and additional information asked for by the insurer.

This is asserted in *Nichols v. Fayette Mut. Fire Ins. Co.*, 1 Allen (Mass.) 63; *Buffum v. Bowditch Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 540; *Farmers' Mut. Fire & Lightning Ins. Co. v. Lecroy*, 91 Ill. App. 41.

So, where the disclosures made indicated that there might be a lien on the premises (*McCulloch v. Norwood*, 58 N. Y. 562), it was held that if the company desired to know the extent of the incumbrance, it was its duty to make inquiry. On the other hand, in *Skinner v. Norman*, 18 App. Div. 609, 40 N. Y. Supp. 65, where, in answer to the inquiry as to the existence of incumbrances on the property, the insured answered that he did not know of any, but that the agent might go to the owner and find out, the court held that it was not obligatory on the company to ascertain the condition of the property, and that, if plaintiff knew of the incumbrance, he should have made it known to the insurer as a fact material to the risk.

Where it appeared that, after disclosing facts which indicated that there might be an incumbrance, the insured, in answer to a question of the agent whether he should state that there were or were not incumbrances, told him to do as he pleased, a negative answer was regarded as falsified by the existence of a judgment against the insured, though he did not know that it had been entered (*Blooming Grove Mut. Fire Ins. Co. v. McAnerney*, 102 Pa. 335, 48 Am. Rep. 209). Where the buildings insured were on a certain 40-acre tract of a farm, on which there was no mortgage, the fact that there was a mortgage on other portions of the farm did not avoid the policy (*Eddy v. Hawkeye Ins. Co.*, 70 Iowa, 472, 30 N. W. 808, 59 Am. Rep. 444). An incumbrance in violation of a condition in the policy is not shown to exist against an insured building on lot 2, block 3, of a certain addition, by showing an incumbrance against the west 77 feet of the east 90 feet of said lot and all buildings on said part (*Greenlee v. Iowa State Ins. Co.*, 102 Iowa, 260, 71 N. W. 224). The fact that the insured has named one as owner of a mortgage whom he mistakenly believes to be such owner, whereas it is in truth owned by another person, does not avoid the policy (*Farmers' Fire Ins. Co. v. Johnston*, 113 Mich. 426, 71 N. W. 1074). An application made February 2d, reciting that there was no incumbrance on the property, was made the basis of a policy issued December 3d, without further questions being asked. It was held that the fact that a mortgage was placed on the property in July following the application did not render the statement false, so as to avoid the policy (*Schroeder v. Trade Ins. Co.*, 109 Ill. 157).

Where a policy is made payable to a trustee, it is a sufficient disclosure that there is a deed of trust on the premises.

Commercial Ins. Co. v. Spankneble, 52 Ill. 53; *Home Mut. Fire Ins. Co. v. Garfield*, 60 Ill. 124, 127, 14 Am. Rep. 27.

1. Where the property was incumbered for a principal debt of \$40,000, with large arrears of interest, but there had been a decree reducing the apparent debt to \$10,000, which decree had been appealed from and was then pending in the appellate court (*Planters' Ins. Co. v. Myers*, 55 Miss. 479, 30 Am. Rep. 521), such facts should have been disclosed as material to the risk. And where the policy was made payable, first, to S., mortgagee, and, after that interest has been satisfied, the loss, if any, payable to M., mortgagee, as his interest may appear, and the only disclosure was of the amount of the mortgage to S. (*Seal v. Farmers' & Merchants' Ins. Co.*, 59 Neb. 253, 80 N. W. 807), the addition of the clause making the policy payable in the second event to M., mortgagee, was not a sufficient disclosure of the existence of a mortgage of \$2,200 in his favor.

(b) What constitutes an incumbrance.

For the purpose of determining whether there has been a false statement, concealment, or breach of condition as to the existence of incumbrances, it is necessary to decide, first, what may fairly be regarded as an incumbrance. It has been stated in some cases that, to fall within the provision of the policy, the incumbrance must be one which has come into existence through the voluntary act of the insured, or with his consent.

Such is the doctrine asserted in *Georgia Home Ins. Co. v. Schild*, 73 Miss. 128, 19 South. 94; *Hosford v. Hartford Fire Ins. Co.*, 127 U. S. 404, 8 Sup. Ct. 1202, 32 L. Ed. 198.¹

On the other hand, in *Bowman v. Franklin Fire Ins. Co.*, 40 Md. 620, it was regarded as immaterial whether the incumbrance came into existence through the act of the insured or by operation of law. It has also been said, in *Owen v. Farmers' Joint Stock Ins. Co.*, 57 Barb. (N. Y.) 518, that the lien must be of a specific character, and, if merely a general lien, it does not come within the purview of the word "incumbrance" as used in the policy.

Various specific claims and charges on property have been before the courts for the determination of their character as incumbrances. In *Southern Mut. Ins. Co. v. Kloeber*, 31 Grat. (Va.) 739, and *Ohio Farmers' Ins. Co. v. Britton*, 31 Ohio St. 488, it was held that a contingent right of dower is not an incumbrance within the meaning of the policy. Where the property was held by the insured under

¹ See, also, Code Supp. Iowa 1902, § 1743, which limits the right to avoid the policy for incumbrances to such as are created by the voluntary act of the insured.

a will, subject to a charge of \$8,000 to be paid in annual installments to the testator's other children (*Renninger v. Dwelling House Ins. Co.*, 168 Pa. 350, 31 Atl. 1083), it was held that the charge on the property was an incumbrance within the meaning of the policy. According to *Read v. State Ins. Co.*, 103 Iowa, 307, 72 N. W. 665, 64 Am. St. Rep. 180, a lease of a store is not an incumbrance on the merchandise therein. The mere fact that the merchandise is liable to a lien for unpaid rent does not make the lease an incumbrance. It was said, in *Caplis v. American Fire Ins. Co.*, 60 Minn. 376, 62 N. W. 440, 51 Am. St. Rep. 535, that a clause in a lease that the lessor shall have at all times a first lien upon the buildings for any unpaid rental or taxes does not amount to or create a chattel mortgage on the insured building, within the meaning of a stipulation in the policy that it should be void if the property be or become incumbered by chattel mortgage. On the other hand, in *Peet v. Dakota Fire & Marine Ins. Co.*, 7 S. D. 410, 64 N. W. 206, where the lease of the ground on which the insured building stood provided that the lessor should have the right to distrain and seize the property, the same as though it were personal property, the court held that this gave the lessor a lien, and was therefore an incumbrance, within the provisions of the policy. It was not the less an incumbrance because, at the time of the issuance of the policy, no rent was due. A bond to convey was held, in *Newhall v. Union Mutual Fire Ins. Co.*, 52 Me. 180, not to be an incumbrance, so as to falsify a representation that the property was unincumbered. An execution was regarded as an incumbrance in *Pennsylvania Ins. Co. v. Gottsman's Adm'rs*, 48 Pa. 151; but it was said, in *Clapp v. Mutual Fire Ins. Co.*, 27 N. H. 143, that the right of a judgment debtor to redeem from an execution sale does not constitute an incumbrance.

(c) Same—Mortgages.

While it is, of course, fundamental that a valid mortgage constitutes an incumbrance, within the meaning of the term as used in an application or policy, an invalid mortgage stands upon a different footing. The general principle that a mortgage, void for fraud of the mortgagee, is not an incumbrance, was applied in *Lycoming Fire Ins. Co. v. Jackson*, 83 Ill. 302, 25 Am. Rep. 386; but a mortgage, or an absolute deed intended as a mortgage, given by the insured without consideration and with intent to defraud his creditors, constitutes an incumbrance, according to *Treadway v. Hamilton Mut. Ins. Co.*, 29 Conn. 68, as such instruments are valid as be-

tween the parties.² A bill of sale, executed without consideration, which is merely colorable, in view of certain litigation pending against the insured (*Forward v. Continental Ins. Co.*, 142 N. Y. 382, 37 N. E. 615, 25 L. R. A. 637), is not an incumbrance within a clause declaring the policy void if the property was subject to chattel mortgage. But a trust deed of personal property executed to secure the payment of money is in effect a chattel mortgage (*Hunt v. Springfield Fire & Marine Ins. Co.*, 196 U. S. 47, 25 Sup. Ct. 179, 49 L. Ed. —).

The mortgage set up in *Fitchner v. Fidelity Mut. Fire Ass'n*, 103 Iowa, 276, 72 N. W. 530, reaffirming 68 N. W. 710, was given to a fictitious person, but was never delivered and did not secure any indebtedness. The court held, therefore, that it was not a violation of the condition that the policy shall be void if the property is incumbered, nor did it affect the question that the mortgage had been recorded. Generally it may be said that, if a mortgage or the note which it purports to secure is not delivered, it is not an incumbrance within the condition of the policy.

This is the principle governing *Phoenix Ins. Co. v. Overman*, 21 Ind. App. 516, 52 N. E. 771; *Clifton Coal Co. v. Scottish Union & National Ins. Co.*, 102 Iowa, 800, 71 N. W. 433; *Insurance Co. of North America v. Wicker*, 55 S. W. 740, 98 Tex. 390, affirming (Civ. App.) 54 S. W. 300.

In the *Overman* Case this was regarded as the rule, though the mortgage was recorded. In *Hutchins v. Cleveland Mut. Ins. Co.*, 11 Ohio St. 477, and *Packard v. Agawam Mut. Fire Ins. Co.*, 2 Gray (Mass.) 334, where the mortgage had not been recorded, the court held that, notwithstanding that fact, as the existence of the mortgage was material, in view of the lien of the company for assessments, the policy was avoided. On the other hand, in *Insurance Company of North America v. Bachler*, 44 Neb. 549, 62 N. W. 911, while it was conceded that the existence of an unrecorded mortgage is undoubtedly material, it was held that the mere fact of its existence did not of itself prevent the policy from taking effect.

A mortgage that has actually been paid and legally extinguished, though not discharged of record, is not an incumbrance that must be disclosed to the insurer.

This rule is supported by *Catron v. German Ins. Co.*, 67 Mo. App. 544; *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452, 29 Am. Rep. 184;

² See Cent. Dig. vol. 24, "Fraudulent Conveyances," col. 817, § 523.

Laird v. Littlefield, 53 N. Y. Supp. 1082, 34 App. Div. 43, affirmed without opinion, 164 N. Y. 597, 58 N. E. 1089; *Hawkes v. Dodge County Mut. Ins. Co.*, 11 Wis. 188.

The rule is also approved in *Smith v. Insurance Co.*, 60 Vt. 682, 15 Atl. 353, 1 L. R. A. 216, 6 Am. St. Rep. 144, where the insured warranted that there was no incumbrance on the property. It appeared that there was upon record an undischarged mortgage, with accrued interest for 16 years. The insured claimed that a presumption of payment applied, 15 years having elapsed since the date of the note and mortgage; but the court held that the 15 years did not begin to run until the maturity of the note, and that, as 15 years had not elapsed since that date, the presumption did not arise. But it appeared that the note had been secretly and voluntarily destroyed by the mortgagee with an intent to conceal the mortgage. There was, however, no discharge of record. The court held that a failure to discharge the mortgage on the record did not affect its character, and, if the mortgage debt had been paid, the undischarged mortgage was not an incumbrance. In *Lockwood v. Middlesex Mut. Assur. Co.*, 47 Conn. 555, it was said that an outstanding incumbrance, barred at law and in equity by the statute of limitations, is not an incumbrance within the condition. These cases are to be distinguished from *Warner v. Middlesex Mut. Assur. Co.*, 21 Conn. 444, as in that case, if payment had been made at all, it was not until after the law day had expired. In *Ring v. Windsor County Mut. Fire Ins. Co.*, 54 Vt. 434, it appeared that the insured had purchased the premises from A., giving back a mortgage. There was an old mortgage on the premises owned by B., which A. had agreed to pay. The application disclosed only the mortgage to A. The court held that in equity the B. mortgage was extinguished, so far as the insured was concerned, as he had a right to extinguish it by using a sufficient portion of the mortgage debt to A. to pay and cancel it. Therefore in equity plaintiff made a true statement when he said that his mortgage to A. was the only one in existence, since by canceling it he should also cancel the B. mortgage. In *Brennen v. Connecticut Fire Ins. Co.*, 99 Mo. App. 718, 74 S. W. 406, the property was covered by a chattel mortgage, and the agent advised insured that he could not make a policy on the property unless the mortgage was released. The cashier of the bank which owned the mortgage agreed to release the claim of the bank against the mortgaged property. The court held that, though the cashier had no authority to make such an agreement, yet, as his action would estop the bank

from enforcing the mortgage, the property was not so incumbered as to avoid the insurance.

Where the subject of the insurance was a glassworks, with all the apparatus, machinery, fixtures, and personal property, and there was a chattel mortgage on the personalty (*Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 24 S. E. 393, 53 Am. St. Rep. 846), it was incumbent on the company to show that the machinery mentioned in the mortgage had not, by its use in connection with the manufactory, lost its character as personalty, so as to be within the provision that, if the subject of insurance be personal property and incumbered by a chattel mortgage, the policy should be void. In *Fitzgerald v. Atlanta Home Ins. Co.*, 61 App. Div. 350, 70 N. Y. Supp. 552, it appeared that plaintiff mortgaged her brewery; the mortgage stipulating that all appurtenances, tools, machinery, etc., should be regarded as fixtures, and included in the mortgage. Subsequently she procured a policy of insurance on certain described property used in the brewery. The policy provided that it should be void if the subject of insurance be personal property and incumbered by a chattel mortgage. It was held that, since the statement in the mortgage that the apparatus should be considered fixtures did not conclude the insurance company from asserting their true character as personalty, the policy was avoided. If the policy is issued to joint owners, with the warranty that there was no incumbrance (*Denver Township Mut. Fire Ins. Co. v. Resor*, 95 Ill. App. 197), the existence of a mortgage executed by one of such owners, covering his interest, is a breach of the warranty, avoiding the policy. A mortgage placed by one who is not in fact the owner, though he claims to be, is not an incumbrance (*Farmers' Mut. Fire Ins. Co. v. Yetter*, 30 Ind. App. 187, 65 N. E. 762). In *Geib v. Enterprise Ins. Co.*, 10 Fed. Cas. 156, it was said that, if there has been a foreclosure and sale under a mortgage, it remains an incumbrance until the time for redemption had expired. In *Day v. Hawkeye Ins. Co.*, 72 Iowa, 597, 34 N. W. 435, the application was made February 23d, and disclosed the existence of a mortgage, and stated that no action had been begun to foreclose it. The policy was issued on March 3d. Between the date of the application and the issuance of the policy, an action to foreclose was begun. The court said, however, that the representation could refer only to the time when it was made, and not to the date when the policy was issued. If it was true when the application was made, the fact that foreclosure proceedings had been commenced before the policy was issued did

not avoid the contract. A condition that the policy shall be void if foreclosure proceedings be commenced by virtue of any mortgage refers only to proceedings begun after the issuance of the policy.

Coolidge v. Continental Ins. Co., 67 Vt. 14, 30 Atl. 798; *Chamberlain v. Insurance Company*, 51 Hun, 636, 3 N. Y. Supp. 701.

(d) Same—Liens.

An assessment levied by a mutual insurance company, though the company is given a lien for its security, is not an incumbrance (*Jackson v. Farmers' Mut. Fire Ins. Co.*, 5 Gray [Mass.] 52). Where the insured purchased certain goods and left them with auctioneers for sale, with an agreement that the first proceeds of the sale should be paid to the vendor, to a certain amount, and that, if the auctioneers advanced any money on the stock, they might retain possession of the goods as security (*Franklin Fire Ins. Co. v. Vaughan*, 92 U. S. 516, 23 L. Ed. 740), the court held that there was nothing in the agreement to justify the claim that the property was incumbered, in the absence of evidence that advances were made by the auctioneers. By the instrument claimed by the company to be an incumbrance, in *Continental Ins. Co. v. Vanlue*, 126 Ind. 410, 26 N. E. 119, 10 L. R. A. 843, the insured, as vendee of land, agreed to deliver to his vendor one-half of the net proceeds during his life. The contract also provided that, upon failure to perform, it should be foreclosed. The court regarded this as an engagement to perform a specific act under pain of foreclosure, and as such to create a lien on the land in the nature of a mortgage, within the provision of the policy as to incumbrances.

A mechanic's lien is an incumbrance.

Redmon v. Phoenix Fire Ins. Co., 51 Wis. 293, 8 N. W. 226, 37 Am. Rep. 830; *Smith v. St. Paul Fire & Marine Ins. Co.*, 106 Iowa, 225, 76 N. W. 676.

In *Wilbur v. Bowditch Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 446, a statement that the property was incumbered, when in fact it had been sold for the nonpayment of taxes, was regarded as a misrepresentation, avoiding the policy, though the right of redemption still remained in the insured. On the other hand, it was said, in *Hosford v. Hartford Fire Ins. Co.*, 127 U. S. 404, 8 Sup. Ct. 1202, 32 L. Ed. 198, that a warranty concerning incumbrances includes only such as are created by the act or with the consent of the insured, and not those created by law; that, consequently, delinquent taxes on the premises were not an incumbrance, though by the statute of the

state taxes were made a lien on the real estate taxed. An illegal tax is not an incumbrance (*Runkle v. Citizens' Ins. Co.* [C. C.] 6 Fed. 143).

A vendor's lien is by the weight of authority regarded as an incumbrance, within an inquiry or condition as to incumbrances.

Reference may be made to *Lowell v. Middlesex Mut. Fire Ins. Co.*, 8 Cush. (Mass.) 127; *Sprague v. Holland Purchase Ins. Co.*, 69 N. Y. 128; *Reynolds v. State Mut. Ins. Co.*, 2 Grant, Cas. (Pa.) 326; *Guinn v. Phoenix Ins. Co.* (Tex. Civ. App.) 31 S. W. 566.

The rule was applied in *Curlee v. Texas Home Fire Ins. Co.*, 31 Tex. Civ. App. 471, 73 S. W. 831, 986, where after a lien had been created on the land, a house was built thereon. The court held that, as soon as the house was built, it became in law a part of the realty, and the lien attached to it. On the other hand, in *Dohn v. Farmers' Joint Stock Ins. Co.*, 5 Lans. (N. Y.) 279, where there was a condition that the applicant should state whether the property was incumbered, the court said that a vendor's lien for purchase money was not such an incumbrance as was contemplated by the condition. So, in *Pennsylvania Fire Ins. Co. v. Hughes*, 108 Fed. 497, 47 C. C. A. 459, it was said that a vendor's lien is in no sense a chattel mortgage, within a condition that the policy should be void if the property be incumbered by chattel mortgage.

(e) Same—Judgments.

A judgment is an incumbrance that must be disclosed in response to inquiry, or to a condition in the policy.

Reference may be made to *Capital City Ins. Co. v. Autrey*, 105 Ala. 269, 17 South. 326, 53 Am. St. Rep. 121; *Bowman v. Franklin Fire Ins. Co.*, 40 Md. 620; *Columbia Ins. Co. v. Cooper*, 50 Pa. 331; *Flaherty v. Germania Ins. Co.*, 1 Wkly. Notes Cas. (Pa.) 352.

But a judgment against a member of a firm is not an incumbrance on partnership property insured, so as to require disclosure (*Miller v. Germania Fire Ins. Co.*, 34 Leg. Int. [Pa.] 339).

In some jurisdictions the rule has been qualified. For instance, in *Georgia Home Ins. Co. v. Schild*, 73 Miss. 128, 19 South. 94, where a policy contained a stipulation that it should be void if there be mortgage, bill of sale, or other lien on the property insured, the court held that the words "other lien" must be construed as other lien of the same nature as mortgages and bills of sale—that is, vol-

untary liens—and consequently that incumbrances do not include liens or claims, such as judgment liens, which are enforceable against the will of the insured.³ This qualification was, however, distinctly repudiated in *Capital City Ins. Co. v. Autrey*, 105 Ala. 269, 17 South. 326, 53 Am. St. Rep. 121, on the ground that a lien, though created by operation of law, may affect the interest of the insured as much as one created by contract of the parties; that such a lien is as potent as one created by contract to incite or induce the insured to destroy his property or to be less careful in its preservation. The qualification was also repudiated in *Bowman v. Franklin Fire Ins. Co.*, 40 Md. 620. In *Owen v. Farmers' Joint Stock Ins. Co.*, 57 Barb. (N. Y.) 518, where the inquiry was whether there were any incumbrances, and in the negotiations between the insured and the agent this inquiry was discussed only in its relation to mortgages, nothing being said about judgments, the court construed the inquiry as limited to mortgages or incumbrances creating a specific lien, and not as including judgments, which are general liens, and cannot affect the real estate until the personal property is exhausted. While this qualification was repudiated as a general rule in *Somerset Ins. Co. v. McAnally*, 46 Pa. 41, and it was said that the existence of a general judgment would vitiate the policy, yet, as the judgment in this case was distinctly limited to the proceeds of certain property not insured, it was held that it did not constitute an incumbrance, within the meaning of the inquiry calling for a disclosure of incumbrances.

In *City of Davenport v. Peoria Marine & Fire Ins. Co.*, 17 Iowa, 276, where the city was the insured, and it was warranted that there was no incumbrance on the property covered by the policy, it appeared that there were several judgments for money against the city in full force and unsatisfied. The court, however, in view of the statutory provision, exempting from execution public buildings owned by any city (the property insured being a hospital), decided that such judgments did not constitute an incumbrance on the property. In view of the Indiana statute relating to exemptions, it was held, in *Franklin Ins. Co. v. Feist*, 31 Ind. App. 390, 68 N. E. 188, that the effect of a judgment as an incumbrance within a condition in the policy cannot be avoided by a claim for exemption, unless the judgment arose out of an action on contract express or implied. The fact that the exemption had been waived was noted, in

³ See Code Supp. Iowa 1902, § 1743.

holding a judgment to be an incumbrance, in *Capital City Ins. Co. v. Autrey*, 105 Ala. 269, 17 South. 326, 53 Am. St. Rep. 121.

Analogous to the principle that a mortgage which has been paid is no longer an incumbrance, though not discharged of record, is the principle governing *Continental Insurance Co. v. Vanlue*, 126 Ind. 410, 26 N. E. 119, 10 L. R. A. 843. It appeared that the alleged incumbrance was a judgment entered in 1877. During that year the judgment creditor collected rents sufficient to pay the judgment. Satisfaction, however, was not entered until April, 1884; the policy being issued April, 1883. The court held that, if the judgment was originally a lien on the property, such lien was extinguished by the payment, and the fact that no satisfaction was entered of record did not affect the question.

The rule that, if a judgment has been paid, it is no longer an incumbrance, though not satisfied of record, is also asserted in *Lang v. Hawkeye Ins. Co.*, 74 Iowa, 673, 39 N. W. 86, and *Laird v. Littlefield*, 84 App. Div. 43, 53 N. Y. Supp. 1082, affirmed without opinion 58 N. E. 1089.

**20. EFFECT OF CONCEALMENT, MISREPRESENTATION, OR
BREACH OF WARRANTY AS TO SPECIAL CIRCUM-
STANCES AFFECTING THE RISK, AND
PRECAUTIONS AGAINST LOSS.**

- (a) Special circumstances affecting the risk.
- (b) Same—Use of appliances for heating and light.
- (c) Same—Keeping and use of hazardous articles.
- (d) Same—Proximity of dangerous premises.
- (e) Same—Character of property as an insurable risk.
- (f) Same—Previous fires and danger from incendiaries.
- (g) Precautions against loss.
- (h) Casualty insurance.
- (i) Questions of practice.

(a) Special circumstances affecting the risk.

In addition to the ordinary elements, such as condition or situation of property, state of the title, etc., entering into the determination of the nature and extent of the risk, there are various special facts and circumstances, one or more of which may be of importance in the particular risk. The statements made by the applicant as to these special circumstances may be warranties or representations. A failure to disclose them may be due to the ignorance of their importance or to an intent to deceive. Under general rules, the statements, if warranties,

avoid the policy, whether material or not. If the statements are representations, or if there is a failure to disclose, the effect of the untruth of the statements or the concealment depends upon the materiality of the fact and the intent of the assured.

That a person whose property is insured is a woman, and the fact not disclosed, is regarded as material.

Davis v. Aetna Insurance Company, 67 N. H. 335, 39 Atl. 902; *Mechanics' & Traders' Ins. Co. v. Floyd*, 49 S. W. 543, 20 Ky. Law Rep. 1538.

In *Freedman v. Fire Association*, 168 Pa. 249, 32 Atl. 39, a representation that insured, who was in fact a woman, was a successful business man, was regarded as material, so as to avoid the policy. So a warranty that the insured was a widow avoided the policy, where she was in fact an infant only three years of age (*Graham v. Fireman's Ins. Co.*, 87 N. Y. 69, 41 Am. Rep. 348, affirming 9 Daly, 341). In *Johnson v. Scottish Union & National Ins. Co.*, 93 Wis. 223, 67 N. W. 416, where the fact that the insured was a minor was not disclosed, the court held that the policy was not avoided on the ground of concealment, if the fact was not intentionally and fraudulently concealed. In *Pollard v. Fidelity Fire Ins. Co.*, 1 S. D. 570, 47 N. W. 1060, the court seems to have approved the principle that a policy taken out in an assumed or fictitious name would be void, under the condition that an omission to make known every fact material to the risk would avoid the contract. Insurance in the firm name by a person doing business under such name is not fatal (*Clement v. British-American Assur. Co.*, 141 Mass. 298, 5 N. E. 847); the ground of the decision being that the mistake as to the identity of the person with whom a contract is made does not necessarily avoid the contract. But where the policy was taken out in the name of B., who was in fact dead, the real owner doing business under such name (*Biggs v. United States Fire Ins. Co.* [La.] 12 Ins. Law J. [N. S.] 182), the fact was regarded as material, within a condition that the policy should be void if any material fact is concealed.

In *New York Bowery Fire Ins. Co. v. New York Fire Ins. Co.*, 17 Wend. (N. Y.) 359, which was an action on a policy of reinsurance, the fact that the original insurer, in applying for reinsurance, did not disclose that the character of the original insured was bad, was regarded as the concealment of a material fact. On the other hand, where there was no question of fraud or misrepresentation, the fact that insured had stated that he had learned that he "had a firebug" as a tenant, and would have to increase his insurance, and did so, was regarded

as immaterial (*Phoenix Ins. Co. v. McAtee* [Ind. App.] 70 N. E. 947). It was said, in *German Ins. Co. v. Hyman*, 34 Neb. 704, 52 N. W. 401, however, that it was not the duty of the insured, a married woman, to disclose facts tending to show that the business record of her husband was not good. Neither is it generally necessary for the insured to make disclosure as to his insolvency, such facts having nothing to do with the risk (*City Fire Ins. Co. v. Carrugi*, 41 Ga. 660). Where the charter of a mutual company provides that no person shall become a member who has taken benefit of the bankrupt act, as in *West Rockingham Mut. Fire Ins. Co. v. Sheets*, 26 Grat. (Va.) 854, the fact that one member of the insured firm had taken the benefit of the bankrupt law was not a violation of the condition. A representation that the business carried on in the building insured is profitable is, in view of its relation to moral hazard, regarded as material.

Fireman's Fund Ins. Co. v. McGreevy, 118 Fed. 415, 55 C. C. A. 543;
Ryan v. Springfield F. & M. Ins. Co., 46 Wis. 671, 1 N. W. 426.

In the absence of evidence to show that such a fact is material, a failure to voluntarily disclose the existence of litigation affecting the property will not avoid the policy (*Hill v. Lafayette Ins. Co.*, 2 Mich. 476). In *Erb v. German-American Ins. Co.*, 98 Iowa, 606, 67 N. W. 583, 40 L. R. A. 845, it was contended that there was a fatal concealment in the failure of the insured, who was a druggist, to disclose that he had no permit as a druggist, and that he sold liquors contrary to law. The court, however, seems to have ignored the fact of concealment, and considered the facts only as affecting the validity of the policy as a contract.

A misrepresentation as to the time the last inventory was taken was regarded (*Liverpool & London & Globe Ins. Co. v. Stern* [Tex. Civ. App.] 29 S. W. 678) as immaterial, in the absence of actual fraud. In *Ætna Ins. Co. v. Simmons*, 49 Neb. 811, 69 N. W. 125, false statements in an application for insurance on buildings and other personalty situated on land owned by the insured, as to the amount paid for the land and terms of sale, were said not to avoid the policy, as such statements did not relate to the property insured and were therefore immaterial.

Where an insurance company is entitled to be subrogated to the rights of the insured, a concealment of facts affecting or diminishing such right will not avoid the policy, in the absence of inquiry.

Reference may be made to *Kernochan v. New York Bowery Fire Ins. Co.*, 17 N. Y. 428, reversing 12 N. Y. Super. Ct. 1; *Phoenix Ins. Co. v. Erie & Western Transportation Co.*, 117 U. S. 812, 6 Sup. Ct. 730,

29 L. Ed. 873; *Jackson Co. v. Boylston Mut. Ins. Co.*, 139 Mass. 508, 2 N. E. 108, 52 Am. Rep. 728; *Pelzer Mfg. Co. v. Sun Fire Office of London*, 38 S. C. 218, 15 S. E. 562; *Pelzer Mfg. Co. v. St. Paul Fire & Marine Ins. Co. (C. C.)* 41 Fed. 271.

A policy on the use and occupancy of an elevator is not avoided by a failure to disclose an agreement with the proprietors of other elevators, by which all receipts, after paying operating expenses, are pooled and divided pro rata (*Buffalo Elevating Co. v. Prussian Nat. Ins. Co.*, 71 N. Y. Supp. 918, 64 App. Div. 182). Where a policy is on cotton presses in different localities, a representation that there were only 150 of such presses, and only a few of them were in couples, will avoid the policy, where substantially all are in couples, as the number of the presses and their proximity affects the risk (*Evans v. Columbia Fire Ins. Co.*, 81 N. Y. Supp. 933, 40 Misc. Rep. 316).

Though, in an application for insurance on a starch mill, it was represented that manufacturing was finished for the season (*Percival v. Maine M. M. Ins. Co.*, 33 Me. 242), the representation was not necessarily shown to be false by the fact that a quantity of starch was then in the drying room in process of being dried. Where the subject of a fire insurance risk was a vessel laid up in a harbor several hundred miles from the place where the insurance was effected, and it was not disclosed that a large number of barrels of oil had been jettisoned and poured over the sides of the vessel, thus greatly increasing the risk of fire, the policy was avoided (*Clarkson v. Western Assur. Co.*, 53 N. Y. Supp. 508, 33 App. Div. 23). The fact that machinery covered by the policy had been rebuilt, making it almost as good as new, rendered immaterial a false statement as to the length of time it had been in use (*Delaware Ins. Co. v. Harris*, 26 Tex. Civ. App. 537, 64 S. W. 867). A statement made voluntarily, and not in response to any inquiry, to the effect that the premises are well ventilated, is not material, so as to avoid the policy (*Garcelon v. Hampden Fire Ins. Co.*, 50 Me. 580).

(b) Same—Use of appliances for heating and light.

A misrepresentation to the effect that fireplaces in a house are secure must be shown to be material, to avoid the policy (*Kentucky & Louisville Mut. Ins. Co. v. Southard*, 8 B. Mon. [Ky.] 637). A representation that closed lamps were in use in a factory is not falsified by the fact that an open light is used to light up with (*Howard Fire Ins. Co. v. Bruner*, 23 Pa. 50). It was said, in *Clark v. Manufacturers' Ins. Co.*, 8 How. 235, 12 L. Ed. 1061, that, where no representations are made or questions asked, it is not the duty of the insured to disclose the use

of lamps in a picker room of a cotton factory, unless such use is unusual, and, if representations are made, their falsity avoids the policy.

(c) Same—Keeping and use of hazardous articles.

The use of the premises insured for the storage of articles prohibited by the policy is fatal to the contract (*Merwin v. State Fire Ins. Co.*, 72 N. Y. 603). If the statement as to whether the cotton or woolen waste or rags are kept in or near the property insured is regarded as an affirmative warranty (*Gould v. York County Mut. Fire Ins. Co.*, 47 Me. 403, 74 Am. Dec. 494), the falsity of the statement will, of course, avoid the policy. According to *Hynds v. Schenectady County Mut. Ins. Co.*, 16 Barb. (N. Y.) 119, the fact that a quantity of flax is stored in the building will not avoid the policy, if it was placed there temporarily. The storage of rags was evidently regarded, in *Elliott v. Hamilton Mut. Ins. Co.*, 13 Gray (Mass.) 139, as not necessarily material. On the other hand, oil and tallow are regarded as hazardous articles in *Richards v. Protection Ins. Co.*, 30 Me. 273. A negative answer to the question whether any inflammable articles are kept in or near the premises was held, in *Haley v. Dorchester Mut. Fire Ins. Co.*, 12 Gray (Mass.) 545, where the policy covered a furniture store, not to avoid the policy, because there was in the building sufficient varnish and oil to carry on the business. Where alcohol was mentioned among the hazardous articles (*Niagara Fire Ins. Co. v. DeGraff*, 12 Mich. 124), it was held that, as liquor could properly be included within the term "groceries," the presence of the alcohol did not avoid a policy covering groceries. So, in *Pittsburgh Ins. Co. v. Frazee*, 107 Pa. 521, where the policy covered merchandise usually kept in a country store, and provided that, except as otherwise expressed in the policy, gunpowder should not be kept on the premises, but stipulated that merchants accustomed to deal in such articles might keep for sale 25 pounds of powder in close tin cans, the court held that as defendants insuring merchandise usually kept in a country store, were bound to know that gunpowder was an article usually contained in such stock, the permission given to keep a specified amount did not alter the right, so that the keeping of a larger amount would vitiate the policy. The keeping of a small amount of fireworks in a metal lined chest is not material to the risk (*Atherton v. British America Assur. Co.*, 91 Me. 289, 39 Atl. 1006).

(d) Same—Proximity of dangerous premises.

It seems to be the principle asserted in *Cumberland Valley Mutual Protection Co. v. Schell*, 29 Pa. 31, that the insured need not, in the

absence of inquiry, disclose the existence of dangerous appliances or structures on the adjoining property, unless they are clearly material, so as to increase the risk. A false representation that the property was not exposed to the danger of forest fires was said, in *Chicago Mut. Fire Ins. Co. v. Bigelow*, 62 Ill. App. 200, to avoid the policy. Where there was a carpenter shop adjoining the insured premises (*Girard Fire & Marine Ins. Co. v. Stephenson*, 37 Pa. 293, 78 Am. Dec. 423), it was not a fraudulent concealment to omit to state that the shop was heated by stoves, if the use of stoves was necessary and customary in such places. It was said, in *Keith v. Globe Ins. Co.*, 52 Ill. 518, 4 Am. Rep. 634, where the policy was on cotton purchased in Mississippi, during the war, that it was not necessary to disclose that the soldiers guarding such property kept a fire for warmth, in view of the fact that the transaction occurred in the winter; nor was it necessary to disclose that the guards were in the habit of smoking, nor that the insured was personally very unpopular in the neighborhood, the facts being of such character that they should have been known to the insurer. The proximity of a railroad track is not necessarily material (*Davis v. Aetna Mut. Fire Ins. Co.*, 67 N. H. 335, 39 Atl. 902); and, in determining whether such proximity is material, regard should be had to whether it increased the physical hazard of fire only, and not whether it would be an ultimate money loss to the company. The duty resting on the insured to disclose the material facts relating to the risk was held, in *Orient Ins. Co. v. Peiser*, 91 Ill. App. 278, to impose on him the duty to disclose that there was a fire raging in the neighborhood of the insured building at the time he applied for an insurance.

(e) Same—Character of property as an insurable risk.

In *Chicago Mut. Fire Ins. Co. v. Bigelow*, 62 Ill. App. 200, the insured was asked whether any "board" companies had canceled their risks upon the property, and answered in the negative. While this was true, it was insisted that as no board company ever had risks on the property, and plaintiff knew it, his answer was misleading. The court said, however, that as the answer was true, if the insurer desired further information, inquiry should have been made. There was nothing in the question to inform the insured that the insurer cared whether any board company had ever had risks on the property or not. A negative answer to the question whether any company had canceled or refused a policy on the property (*Hawley v. Liverpool & London & Globe Ins. Co.*, 102 Cal. 651, 36 Pac. 926) is not a material misrepresentation, where it appears that in fact there is a canceled policy, and

that it was issued by a company that had retired from business, and on that account only had canceled the policy. In *Phoenix Ins. Co. v. Coffman*, 10 Tex. Civ. App. 631, 32 S. W. 810, the applicant answered in the negative a question whether insurance had been refused by other companies. It was held that such a question could not have reference to any insurance other than such as was being applied for. Consequently, if the insured had been refused insurance in a storm insurance company, it would be immaterial. For the same reason it was held that the question had no reference to companies which did not write insurance on property of the class covered by this policy. Where the answer is a warranty, as in *Morris v. Imperial Ins. Co.*, 106 Ga. 461, 32 S. E. 595, a statement that no insurance had been canceled or refused avoided the policy, irrespective of the intent of the insured.

In the early case of *Clason v. Smith*, 5 Fed. Cas. 990, the application was contained in a letter, requesting insurance at 15 per cent. premium, and stating that insured could get insurance at that rate in New York. Defendant refused to take the risk for less than 20 per cent. After some time the insurance was completed at that rate. The court held that, though the statement that insurance could be procured in New York at 15 per cent. premium was false, yet as it did not influence the insurer in taking the risk, as he had demanded 20 per cent., the falsity of the statement did not avoid the policy. Where the representation was that another company had approved the risk at a certain rate (*Standard Oil Co. v. Amazon Ins. Co.* 14 Hun [N. Y.] 619), the fact that the representation was untrue did not avoid the policy, in the absence of an intent to deceive. In *Mohr & Mohr Distilling Co. v. Ohio Ins. Co.* (C. C.) 13 Fed. 74, a representation that a risk was taken by other companies at 4 per cent. must be regarded as true, if a single policy had been taken on which the rate demanded was but 4 per cent., though on the face of the policy it appeared that 5 per cent. was the rate. In *Armour v. Trans-Atlantic Fire Ins. Co.*, 47 N. Y. Super. Ct. 352, a representation that the rate of insurance charged by underwriters in the city where the property was located was less than it really was, and that the amount of insurance on the buildings was greater than it really was, was regarded as material. Similarly, a statement that other companies, doing business in the city where the property was situated, had full lines on the building, was regarded as a material representation (*Fromherz v. Yankton Fire Ins. Co.*, 7 S. D. 187, 63 N. W. 784), especially in view of the further statement that the building was supplied with automatic sprinklers.

(f) Same—Previous fires and danger from incendiaries.

In some instances, the fact that there has been a fire on the premises and its cause have been regarded as important. In the leading case of *Bebec v. Hartford County Mut. Fire Ins. Co.*, 25 Conn. 51, 65 Am. Dec. 553, it appeared that prior to the application insured had discovered, in three different places in his house, fire the origin of which he could not explain. In applying for insurance, he reported these facts to the agent, but the agent did not make specific inquiries regarding them. The court said that it was not the insured's duty, after making a general statement, to go into minute details, about which the insurer manifests no interest and makes no inquiry. The general disclosure was sufficient. In *Parrish v. Rosewood Min. & Mill. Co.*, 140 Cal. 635, 74 Pac. 312, it appeared that the company had its calciner built partly on a slanting plank platform, the planking of which had been charred in some places, and the question whether the premises had ever been on fire was answered in the negative. This was a misrepresentation, which would avoid the policy. The inquiry in *Dolan v. Missouri Town Mut. Fire Ins. Co.*, 88 Mo. App. 666, was whether the insured had had previous losses by fire, and was answered in the negative; the answer being made a warranty. In fact, he had suffered loss at a time when he had no insurance, the result of fires in adjoining buildings. In view of the Missouri statute limiting the effect of untrue statements, it was held that the fact was not necessarily material, nor could it be said as a matter of law that there was a breach of the warranty.

Closely related to the question of previous fires is the apprehension of danger from incendiarism. In the leading case of *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452, 59 Am. Dec. 684, where the insured failed to disclose that the building insured had been on fire previous to the issuance of the policy, it was held that this did not avoid the policy, though it was suspected by the insured that the fire was of incendiary origin. If there was no proof of the fact, nor any particular state of facts on which the suspicion was based, it was not the duty of the insured to communicate mere suspicions. A different view seems to have been taken in *Roberts v. Ætna Ins. Co.*, 58 Cal. 83, where the court held that it could not be said that the fact that the premises were partly burned before the application was made, though in itself of trifling import, in no degree tended to shown that the insured had an apprehension of incendiarism.

The principle that previous threats or attempts to burn the building need not be disclosed, in the absence of inquiry, seems to have governed

Smith v. Home Ins. Co., 47 Hun (N. Y.) 30, German-American Ins. Co. v. Norris, 100 Ky. 29, 37 S. W. 267, 66 Am. St. Rep. 324, and Sanford v. Royal Ins. Co., 11 Wash. 653, 40 Pac. 609.

In the Sanford Case the facts that a clerk of the insured had trouble with a burglar, and that a neighboring storekeeper, who was financially embarrassed and whose stock had run down, had removed his household goods to a safe distance from the store, were regarded as circumstances merely frivolous and trivial. In *Curry v. Sun Fire Office*, 155 Pa. 467, 26 Atl. 658, the necessity of disclosure was regarded as dependent on whether the insured actually believed, or had reason to believe, that an incendiary attempt had been made. In *Fluch v. Lehigh Valley Ins. Co.*, 3 Wkly. Notes Cas. 433, the court said that the fact that threats had been made was not necessarily material, even though the property was subsequently destroyed by an incendiary fire.

On the other hand, in *North American Fire Ins. Co. v. Throop*, 22 Mich. 146, 7 Am. Rep. 638, where, shortly before the insurance, there had been a fire on the premises regarding which there was some suspicion that it was of incendiary origin, the court held that, as the attention of the insured was directed to the matter by proper inquiries, a failure to disclose the danger and apprehension it incited was a concealment of a material fact, which avoided the policy. So, in *Walden v. Louisiana Ins. Co.*, 12 La. 134, 32 Am. Dec. 116, where an incendiary attempt had been made to fire a building adjoining the house insured, and it appeared that this attempt had inspired the insured to take out a policy, the court held that the failure to disclose these facts was a concealment of material facts which avoided the policy, though the insured acted in good faith. That apprehensions of incendiarism are necessarily material was probably the principle governing *Whittle v. Farmville Ins. Co.*, 29 Fed. Cas. 1126.

The fact that no apprehension was incited in the mind of the insured by threats of burning does not affect the materiality of the fact (*Curry v. Commonwealth Ins. Co.*, 10 Pick. [Mass.] 535, 20 Am. Dec. 547). In *McBride v. Republic Fire Ins. Co.*, 30 Wis. 562, it was said that if there was any danger from incendiarism, fairly and reasonably to be apprehended and known to the insured, it was his duty to disclose it, but that the danger must be real and substantial, one that necessarily enhances the risk, and which a man of ordinary prudence would regard, and not mere idle talk or reports. In accord with this principle is *Thompson v. Liverpool & London & Globe Ins. Co.*, 23 Fed. Cas. 1060, where it was contended that the policy was avoided by reason of the concealment of certain threats of incendiarism made to the father of the

insured. The court held that, as the threat consisted of an anonymous letter received by insured's father more than two years before the fire and a long time before the policy was issued, it was not such a threat as must be disclosed. In *Home Ins. Co. v. Feyerabend*, 7 Kan. App. 231, 52 Pac. 899, the insured gave a negative answer to the question whether he had any fears that his property was in danger from incendiarism. It appeared that an attempt had been made to burn the property, which was well known to plaintiff. The court says, however, that the question does not call for any statement of the fact that such an attempt had been made, but merely for a disclosure if any fears were entertained as to incendiarism. Consequently there was no concealment which would avoid the policy, distinguishing the case from the *Throop Case*, in which the insured was especially asked whether an attempt had been made to burn the building.

(g) Precautions against loss.

As an important element in estimating the risk, it is often required of the insured that he should make a disclosure as to the precautions taken to avoid loss; that is, as to the precautions against fire and the appliances for extinguishing fires. Usually this phase of the question arises in relation to continuing warranties for the maintenance of proper precautions, but in a few cases affirmative representations and warranties are involved. Among other inquiries are those tending to elicit information as to whether a watchman is kept on the premises, and as to the disposal of ashes. A leading case is *Blumer v. Phoenix Ins. Co.*, 45 Wis. 622. The application was made December 3d, and contained the statement that one or two hands slept in the mill. Owing to a failure of insured to pay the premium, the policy was not delivered until December 28th. The statement was true when the application was made, but from and after December 25th no one slept in the mill. The court regarded this as an affirmative warranty, and, as it was not true on the 28th, when the policy was delivered, the policy was avoided; the court holding that the contract was not made until the 28th. Justice Taylor dissented, on the ground that the statement should refer only to the date on which it was made, and that as the policy was actually issued the next day, and purported to cover the risk from the date of the application, the fact that the statement became false after the policy was issued did not affect the contract. In *Bersche v. Globe Mut. Ins. Co.*, 31 Mo. 546, it was said that the mere fact that there was a false statement in the application regarding the keeping of a watchman on the premises did not render the policy

ab initio void, but merely voidable. In *Hartford Protection Co. v. Harmer*, 2 Ohio St. 452, 59 Am. Dec. 684, the policy contained a condition that applications for insurance must specify the construction and materials of the building, by whom occupied, and its condition in respect to contiguous buildings. It was also stipulated that a survey or description shall be taken and deemed a part of the policy and a warranty on the part of the insured. The court said that these two stipulations must be construed together, and that the warranty provided for in the second condition cannot be made more extensive, or cover more particulars than those set forth in the first condition. Consequently, answers to questions as to how ashes from fires are disposed of are not warranties, but representations, and therefore a statement that ashes are thrown out is not false, so as to avoid the policy, though in fact a few of the ashes are at certain times placed in a box within the building for certain specified purposes.

A representation that a cask of water and buckets are kept in each story, including the basement and attic, was regarded as prospective in *Jones Mfg. Co. v. Manufacturers' Mut. Fire Ins. Co.*, 8 Cush. (Mass.) 82, 54 Am. Dec. 742. In *McComber v. Granite Ins. Co.*, 15 N. Y. 495, the court seems to regard it as immaterial whether a statement that the building was provided with a force pump should be looked upon as affirmative or prospective. The court says that whether the pump was removed before or after the issuance of the policy is of little consequence, as the defendant did not in either case receive the protection for which he had contracted. A representation that a force pump is in process of construction does not constitute a warranty, but only an executory undertaking (*Howell v. Hartford Fire Ins. Co.*, 12 Fed. Cas. 700). A warranty that there is a good force pump on the premises, in condition for use and geared so that it can be put in operation from the outside of the building (*Sayles v. Northwestern Ins. Co.*, 21 Fed. Cas. 609), cannot be extended, so as to include a warranty that the power to operate the pump is of any particular kind or derived from any particular source. So, where it was represented that there was a force pump in the building supplied from the river, and it was contended that this was false, because it did not appear that there was any hose attached to the pump (*Peoria Marine & Fire Ins. Co. v. Lewis*, 18 Ill. 553), the court held that the representation that there is a force pump cannot by implication include a representation that there is a hose for use with the pump in case of fire. A representation that the building is fully equipped with automatic sprinklers was regarded as material in *Fromherz v. Yankton Fire Ins. Co.*, 7 S. D. 187, 63 N. W. 784.

(h) Casualty insurance.

In *Hey v. Guarantors' Liability Indemnity Co.*, 181 Pa. 220, 37 Atl. 402, 59 Am. St. Rep. 644, it was said that, in the absence of an express stipulation or inquiry, a failure to state that property insured against casualties was exposed to danger from floods does not affect the liability of the company, as it was presumed to know that the property, being situated near a river, was exposed to the natural perils due to its situation. Where a plate glass insurance policy contains no provision that the glass must be without hole or perforation when insured, the existence of a hole through a pane of glass does not render it uninsurable under such policy (*McMyler v. Union Casualty & Surety Co.* [Sup.] 84 N. Y. Supp. 170).

A policy insuring money packages against loss provided that the insured should have the same packed and sealed by two adults, one of whom should continue in control of the same until it was deposited in the post office. It was held in *Banco de Sonora v. Bankers' Mut. Casualty Co.* (Iowa) 95 N. W. 232, that a failure to comply with such condition could not be excused on the ground that it was not material to the risk. The policy also required that, before the risk should attach, a letter should be deposited in the post office, addressed to the insurer, describing the package. It was held that the deposit of a letter of advice in the mail box attached to a railroad station, at the place from which the money package was mailed, such box being under the sole custody of the local postmaster, constituted a sufficient deposit in a post office, within the requirements of the policy.

(i) Questions of practice.

A defense that there was a concealment of the existence of hazardous articles on the premises must be specially pleaded (*Theodore v. New Orleans Mut. Ins. Co.*, 28 La. Ann. 917). Where the answer pleaded a breach of warranty as to stovepipes running through the roof (*Dwelling House Ins. Co. v. Brewster*, 43 Neb. 528, 61 N. W. 746), a reply alleging that defendant waived that part of the application in relation to stovepipes, and denying each and every allegation in the answer, virtually admits the breach of warranty as pleaded. Where it was stated that in each room in the building casks of water were kept (*Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. [Mass.] 416, 59 Am. Dec. 192), evidence that the whole of a loft or story appropriated to a particular department was called one room by the custom of manufacturers was admissible.

The admissibility of evidence regarding a breach of warranty as to the manner of keeping ashes was considered in *Underhill v. Agawam*

Mut. Fire Ins. Co., 6 Cush. (Mass.) 440. The sufficiency of the evidence to show a disclosure of the proximity of dangerous premises was considered in *Knox v. Lycoming Fire Ins. Co.*, 50 Wis. 671, 7 N. W. 776, and *Knox v. People's Ins. Co.*, 50 Wis. 680, 7 N. W. 780.

The truth of the allegation that the insured kept merchandise and sale accounts is for the jury, where there was testimony to show that he kept such accounts before and after the application, but not at the time of the fire (*Landes v. Safety Mut. Fire Ins. Co.*, 190 Pa. 536, 42 Atl. 961).

21. EFFECT OF CONCEALMENT, MISREPRESENTATION, OR BREACH OF WARRANTY OR CONDITION AS TO PRIOR INSURANCE.

- (a) Statements as to prior insurance as representations or warranties.
- (b) Stipulations in the nature of conditions precedent.
- (c) Necessity of disclosure as to prior insurance.
- (d) Effect of false statement, concealment, or breach of condition as dependent on materiality.
- (e) Same—As dependent on knowledge and intent.
- (f) Same—As to other insurance maintained.
- (g) Breach of condition—Suspension of risk.
- (h) Construction and sufficiency of disclosure in general.
- (i) What constitutes prior insurance.
- (j) Same—Concurrent insurance.
- (k) Insurance on other interest.
- (l) Validity of prior policy.
- (m) Prior policy rendered void by policy in suit.
- (n) Voidable policy.
- (o) Cancellation, expiration, or surrender of prior policy.
- (p) Questions of practice—Pleading.
- (q) Same—Evidence.
- (r) Same—Trial and review.

(a) Statements as to prior insurance as representations or warranties.

While a contract of insurance is one of indemnity, it is not considered desirable that in the case of total loss the insured shall be fully indemnified. It is generally regarded best for the insurer and the insured that a part of the risk shall be carried by the latter, in order that he may have an incentive to take all possible precautions for the care and preservation of his property. For this reason information as to the amount of insurance already in force on property is regarded as of the

utmost importance in determining the nature and extent of the risk to be assumed. It is obvious that statements as to prior insurance are governed by the rule which applies to statements in general. If such statements are made a warranty, they cannot be deviated from in the smallest particular, whether material or immaterial. On the other hand, if they are mere representations, the insured is not answerable, unless they differ in material respects from the truth. It is said, in *Commonwealth Mut. Fire Ins. Co. v. Huntzinger*, 98 Pa. 41, that, where the application is by the terms of the policy made a part thereof, it is immaterial whether the insured, in making the statement as to other insurance, acted in good or bad faith, or whether he believed the facts warranted to be true or not.

In support of the proposition that warranties must be literally complied with, it is sufficient to cite *Holloway v. Dwelling House Ins. Co.*, 48 Mo. App. 1; *Zinck v. Phoenix Ins. Co.*, 60 Iowa, 266, 14 N. W. 792; *Phoenix Ins. Co. v. Benton*, 87 Ind. 132.

But it may be said, on authority of *Morotock Ins. Co. v. Fostoria Novelty Co.*, 94 Va. 361, 26 S. E. 850, that a statement as to other insurance, even if made a warranty, is merely an affirmative one, and is not a condition precedent.

(b) Stipulations in the nature of conditions precedent.

In many instances the policy contains a provision to the effect that it shall be void if the insured has or afterwards makes any other insurance on the property described, or any part thereof, without the consent of the insurer, written or printed on the policy. Such a stipulation or condition is regarded as valid and enforceable; but, as indicated in subdivision (n), some authorities hold that, where the condition is general and without qualifying words, it applies only to valid and enforceable insurance. To obviate this the condition is often qualified by making it apply to all other insurance, irrespective of whether it is valid or invalid. The condition thus qualified is valid, according to *Phoenix Ins. Co. v. Lamar*, 106 Ind. 513, 7 N. E. 241, 55 Am. Rep. 764, and *Phoenix Ins. Co. v. Copeland*, 90 Ala. 386, 8 South. 48; but in *Gee v. Insurance Co.*, 55 N. H. 65, 20 Am. Rep. 171, the validity of the condition is seriously questioned.

If the charter and by-laws of a mutual insurance company require consent to prior insurance, or the express mentioning of such insurance in the policy, and such charter and by-laws are made a part of the policy, the insured is bound by the provisions of the

charter and by-laws, the same as if they were express stipulations in the policy.

Such is the rule laid down in *Liscom v. Boston Mut. Fire Ins. Co.*, 9 Metc. (Mass.) 205; *Barrett v. Union Mut. Fire Ins. Co.*, 7 Cush. (Mass.) 175; and *Blanchard v. Atlantic Mut. Fire Ins. Co.*, 33 N. H. 2.

But in *Uhler v. Farmers' American Fire Ins. Co.*, 4 Leg. Gaz. (Pa.) 354, a stipulation in a mutual policy that, if any member "insure" in another company, his or her policy shall be considered sunk, was held to apply only to subsequent insurance. In some states the standard policy prescribed by statute contains a provision that it shall be void if the insured has other insurance on the property without the consent in writing or in print of the insurer.¹

Where, however, a policy which embraces a condition avoiding it for other insurance also contains a stipulation to the effect that "other insurance is permitted," such stipulation refers to and covers prior as well as subsequent insurance, according to *Blake v. Exchange Mut. Ins. Co.*, 12 Gray (Mass.) 265.

A similar doctrine is asserted in *Frederick County Mut. Fire Ins. Co. v. Deford*, 38 Md. 404, and *Kimball v. Howard Fire Ins. Co.*, 8 Gray (Mass.) 33.

So, if a policy contains an average or coinsurance clause limiting the insurer's liability to its proportion of a certain per cent. of the value of the property insured, this impliedly permits other insurance, not exceeding the per cent. specified (*Nestler v. Germania Fire Ins. Co.* [Sup.] 91 N. Y. Supp. 29, affirming 44 Misc. Rep. 97, 89 N. Y. Supp. 782). Likewise a written or printed clause in the policy permitting other insurance in a certain amount, or allowing the property to be insured to the extent of a certain per cent. of its value, will render the condition against other insurance inoperative as to other insurance not in excess of the amount permitted.

Such is the doctrine of *Benedict v. Ocean Ins. Co.*, 1 Daly (N. Y.) 8; *Strauss v. Phenix Ins. Co.*, 9 Colo. App. 386, 48 Pac. 822; *Georgia Home Ins. Co. v. Campbell*, 102 Ga. 106, 29 S. E. 148; *Philbrook v. New England Mut. Fire Ins. Co.*, 37 Me. 137.

But it is obvious that, if there is other insurance in excess of the amount permitted, the condition against other insurance is violated

¹ See *Freeman's Supp. Me.* 1885-1895, p. 14, c. 18), *Rev. St. Me.* c. 49, § 4, and *Rev. St. Wis.* 1898, § 1941-46.

(*Allen v. German-American Ins. Co.*, 123 N. Y. 6, 25 N. E. 309, affirming 50 Hun, 605, 3 N. Y. Supp. 170). In *Palatine Ins. Co. v. Ewing*, 92 Fed. 111, 34 C. C. A. 236, it is said that the stipulation permitting insurance to a certain per cent. of the value of the property refers to and includes insurance existing at the date of the policy. And in *Funk v. Iowa Business Men's Mut. Fire Ins. Ass'n*, 103 Iowa, 660, 72 N. W. 774, it was held that the time when the insurance must not exceed the percentage allowed was the date of the policy, not the time of loss. A provision in a policy that, in case other insurance should be permitted, and the additional insurance be not valid, it should be held an election on the part of the insured to cancel the policy, and that the same should be void, referred to insurance procured subsequent to the issuance of the policy (*Gurnett v. Atlas Mut. Ins. Co.* [Iowa] 100 N. W. 542).

In some instances there is inserted in the policy a provision for concurrent insurance in a specified amount. Such a provision appears to be regarded as a condition precedent in some cases.

New Jersey Rubber Co. v. Commercial Union Assur. Co., 64 N. J. Law, 580, 46 Atl. 777, affirming 84 N. J. Law, 51, 44 Atl. 848; *Denny v. Conway Stock & Mut. Fire Ins. Co.*, 18 Gray (Mass.) 492; *Union National Bank v. German Ins. Co.*, 71 Fed. 478, 18 C. C. A. 208.

But in *O'Leary v. German-American Ins. Co.*, 100 Iowa, 390, 69 N. W. 686, it is said that a condition limiting the total insurance to a certain per cent. of the cash value of the property and to concurrent insurance is neither a representation nor a warranty as to the amount of insurance. In Indiana there is a statute² prohibiting a requirement that insured take out or maintain a larger amount of insurance than that expressed in the policy, except where a reduction in the rate is made a consideration for such clause, and in cases of railroad and marine insurance.

(c) Necessity of disclosure as to prior insurance.

Where a policy contains a condition that it shall be void if there is other insurance on the property of which the insurer has no notice, and to which its consent has not been given in print or writing, the policy will be invalid if the existence of other insurance is not disclosed.

Reference may be made to the following cases: *Independent School District of Doon v. Fidelity Ins. Co.*, 118 Iowa, 65, 84 N. W. 956;

² *Horner's Ann. St.* 1901, §§ 3774y, *Laws* 1901, p. 580; *Burns' Ann. St.* 3774z (*Laws* 1895, p. 137, as amended 1901, §§ 4859a, 4859b).

Bigelow v. Granite State Fire Ins. Co., 94 Me. 39, 46 Atl. 808; *Sweeting v. Mutual Fire Ins. Co.*, 88 Md. 63, 34 Atl. 826, 32 L. R. A. 570; *Western Assurance Co. v. Mason*, 5 Ill. App. 141; *Gale v. Insurance Co.*, 41 N. H. 176; *Diver v. London & L. Fire Ins. Co.*, 9 N. Y. St. Rep. 482; *Stacey v. Franklin Fire Ins. Co.*, 2 Watts & S. (Pa.) 506; *New York Bowery Fire Ins. Co. v. New York Fire Ins. Co.*, 17 Wend. (N. Y.) 359, per Bronson, J.

Where policies are procured from different companies to take effect at the same time (*Manhattan Ins. Co. v. Stein*, 5 Bush [Ky.] 652), it is necessary in each case to disclose the existence of the other policy, though they may be regarded as simultaneous. But in *Cutler v. Royal Ins. Co.*, 70 Conn. 566, 40 Atl. 529, 41 L. R. A. 159, it was held that the facts regarding a prior application to another company for insurance did not need to be disclosed, where the insured had reason to believe that no policy would be issued on such application. However, a subsequent acceptance of the policy applied for, was considered a violation of the condition in the policy sued on. Likewise no disclosure is necessary (*Magoun v. Firemen's Fund Ins. Co.*, 86 Minn. 486, 91 N. W. 5, 91 Am. St. Rep. 370), if the policy is delivered with notice of the other insurance. In *Dolan v. Missouri Town Mut. Fire Ins. Co.*, 88 Mo. App. 666, it was held that, where the policy provided that the property should be insured for a certain per cent. of its value, it was not necessary to disclose other insurance not in excess of this amount. It is obvious that no disclosure is necessary where, as in *Agricultural Ins. Co. v. Bemiller*, 70 Md. 400, 17 Atl. 380, the policy contains no condition against other insurance, but instead provides for a ratable distribution if there is such insurance.

(d) Effect of false statement, concealment, or breach of condition as dependent on materiality.

The effect on a policy of a concealment or misrepresentation as to other insurance is in most cases dependent on the materiality of the matter concealed or misrepresented, and it is generally regarded material for the insurer to know the existence of other insurance. As said in *Phoenix Ins. Co. v. Benton*, 87 Ind. 132, the greater the insurance be on a building, the less will be the inducement to use care and diligence in preventing loss. Thus, if a building were insured for more than it and its contents were worth, it would conduce to the interest of the insured to let it burn. The greater this interest is made, the more hazardous will be the risk. This reasoning clearly indicates what appears to be a general rule that a concealment or mis-

representation as to other insurance in a substantial amount is material.

Such is the rule laid down in *Barrett v. Union Mut. Fire Ins. Co.*, 7 Cush. (Mass.) 175; *Blanchard v. Atlantic Mut. Fire Ins. Co.*, 88 N. H. 9; *Dolan v. Missouri Town Mut. Fire Ins. Co.*, 88 Mo. App. 666.

In *Dolan v. Missouri Town Mut. Fire Ins. Co.*, 88 Mo. App. 666, it was held that a statute³ which provides that a warranty as to an immaterial matter shall be regarded as a representation does not apply to a warranty that insured had no other insurance, when it appears that he had such insurance in a substantial amount. Though the rule is as stated, it is no doubt true that, as said in *Tyler v. Aetna Fire Ins. Co.*, 12 Wend. (N. Y.) 507, a failure to disclose the existence of other insurance on the property is not such a concealment as will be considered conclusively material, so as to bar a recovery without respect to the nature of the other insurance or the interest covered thereby. Where there is no answer to a question in regard to other insurance, there is, of course, no representation (*Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345, 15 Am. Rep. 612).

From what has been said it naturally follows that in general a concealment or false statement as to other insurance will avoid a policy.

This principle is supported by *Sweeting v. Mutual Fire Ins. Co.*, 83 Md. 63, 34 Atl. 826, 32 L. R. A. 570; *Sitler v. Spring Garden Mut. Fire Ins. Co.*, 14 York Leg. Rec. 158; *Western Assur. Co. v. Mason*, 5 Ill. App. 141; *Leavitt v. Western Marine & Fire Ins. Co.*, 7 Rob. (La.) 351; *Gale v. Insurance Co.*, 41 N. H. 176; *Bigler v. New York Central Ins. Co.*, 20 Barb. (N. Y.) 635; *Jackson v. Massachusetts Mut. Fire Ins. Co.*, 23 Pick. (Mass.) 418, 34 Am. Dec. 69.

Likewise a breach of a condition against prior insurance will avoid a policy.

Such is the doctrine of *Koolstra v. Rockford Ins. Co.*, 122 Mich. 626, 81 N. W. 568; *Thomas v. Builders' Mut. Fire Ins. Co.*, 119 Mass. 121, 20 Am. Rep. 317; *Bigelow v. Granite State Fire Ins. Co.*, 46 Atl. 808, 94 Me. 89; *Friemansdorf v. Watertown Ins. Co.* (C. C.) 1 Fed. 68; *Georgia Home Ins. Co. v. Rosenfield*, 95 Fed. 858, 37 C. C. A. 96; *Diver v. London & L. Fire Ins. Co.*, 9 N. Y. St. Rep. 482; *Independent School District of Doon v. Fidelity Ins. Co.*, 118 Iowa, 65, 84 N. W. 956; *Marshall v. Insurance Co. of North America*, 10 Pa. Co. Ct. R. 87; *Bigelow v. Granite State Fire Ins. Co.*, 94 Me. 39, 46 Atl. 808; *Sisk v. Citizens' Ins. Co.*, 16 Ind. App. 565, 45 N. E. 804.

³ Laws Mo. 1897, §§ 1, 2.

However, in *Turner v. Meridan Fire Ins. Co.* (C. C.) 16 Fed. 454, it was held that a breach of the condition merely rendered the policy voidable.

A policy containing a union mortgage clause, or its equivalent, will not be avoided as to the mortgagee by a prior insurance obtained by the mortgagor.

Hastings v. Westchester Fire Ins. Co., 73 N. Y. 141, affirming 12 Hun (N. Y.) 416; *Magoun v. Firemen's Fund Ins. Co.*, 86 Minn. 486, 91 N. W. 5, 91 Am. St. Rep. 870.

But a policy merely made payable to a mortgagee is avoided as to him, as well as to the mortgagor.

Blanchard v. Atlantic Fire Ins. Co., 88 N. H. 9; *Friemansdorf v. Wattertown Ins. Co.* (C. C.) 1 Fed. 68; *Guinn v. Phoenix Ins. Co.* (Tex. Civ. App.) 31 S. W. 566.

In *Davis Lumber Co. v. Hartford Fire Ins. Co.*, 95 Wis. 226, 70 N. W. 84, 37 L. R. A. 131, it is indicated that the acceptance of benefits under prior policies will invalidate subsequent insurance, though insured had no knowledge of the agreement made by the agent who procured the prior policies which prohibited further insurance.

(c) Same—As dependent on knowledge and intent.

Where a statement as to prior insurance is made a warranty, it is immaterial that insured at the time thought that an existing policy was invalid, and that he therefore considered he had no other insurance. Such is the principle stated in *Zinck v. Phoenix Ins. Co.*, 60 Iowa, 266, 14 N. W. 792; and according to *Commonwealth v. Huntzinger*, 98 Pa. 41, a similar rule governs where the insured is uncertain as to the correctness of the statement, which is made a warranty by the policy. Likewise, since a misrepresentation or concealment as to other insurance is generally regarded material, it is unimportant that a misrepresentation or concealment was unintentional or due to a mistake.

Such is the rule in *Landers v. Cooper*, 115 N. Y. 279, 22 N. E. 212, 5 L. R. A. 638, 12 Am. St. Rep. 801; *Phoenix Ins. Co. v. Boulden*, 96 Ala. 609, 11 South. 774; *Armour v. Transatlantic Fire Ins. Co.*, 90 N. Y. 450; *Wilson v. Queen Ins. Co. of Liverpool & London* (C. C.) 5 Fed. 674.

But in *Bridgewater Iron Co. v. Enterprise Ins. Co.*, 134 Mass. 433, it was held that a policy would not be avoided because insured had failed to disclose an existing policy, when he stated his honest belief

as to the amount of other insurance. It is obvious that insured is not liable for a failure to disclose insurance taken out by others and of which he has no knowledge.

Reference may be made to *Nichols v. Fayette Mut. Fire Ins. Co.*, 1 Allen (Mass.) 63; *Doran v. Franklin Fire Ins. Co.*, 86 N. Y. 635; *Rowley v. Empire Ins. Co.*, 36 N. Y. 550, 4 Abb. Dec. (N. Y.) 181; *Cowart v. Capital City Ins. Co.*, 114 Ala. 356, 22 South. 574.

In the Cowart Case it was further held that the fact that insured made proof of loss under the prior policy did not annul the policy in suit.

(f) Same—As to other insurance maintained.

Where a policy permits other insurance and provides for the apportionment of a possible loss on the whole amount of insurance maintained, a misrepresentation as to the amount of other insurance is material and will avoid the policy (*Armour v. Transatlantic Fire Ins. Co.*, 90 N. Y. 450; s. c. 47 N. Y. Super. Ct. 352). Similarly it was held, in *McMahon v. Portsmouth Mut. Fire Ins. Co.*, 22 N. H. 15, that a representation as to the amount of other insurance was material. But where, as in *Morotock Ins. Co. v. Fostoria Novelty Co.*, 94 Va. 361, 26 S. E. 850, the insurer is by the terms of the policy only liable for the actual cash value, the amount of other insurance is immaterial. In the McMahon Case the fact that insured had placed a different value on the property when taking out the other insurance was regarded as immaterial. Likewise it was, in the absence of a different showing, considered immaterial that the other policy was special, while the one in suit was general, as the latter provided for an apportionment of the loss based on the whole amount of other insurance maintained. So it was held, in *Harrington v. Fitchburg Mut. Fire Ins. Co.*, 124 Mass. 126, that a policy was not avoided by other insurance in excess of the percentage permitted, where such excess was due to a bona fide overvaluation.

(g) Breach of condition—Suspension of risk.

A policy containing a condition making it void if there is other insurance on the property is, according to *Germania Fire Ins. Co. v. Klewer*, 129 Ill. 599, 22 N. E. 489, merely suspended by a prior policy until such insurance expires, if that will occur during the time for which the second policy was issued. In other words, the second policy attaches and becomes operative on the expiration of the prior one. And a similar view was taken in *New England Fire & Marine Ins. Co. v. Schettler*,

38 Ill. 166, where it was held that a subsequent policy became effective on the forfeiture of a prior policy. But in *Reed v. Equitable Fire & Marine Ins. Co.*, 17 R. I. 785, 24 Atl. 833, 18 L. R. A. 496, it was said to be immaterial whether or not the prior policy had expired before the loss. If the policy in suit was invalid at its issue, it was invalid altogether.

(h) Construction and sufficiency of disclosure in general.

Where the policy merely requires a notice of other insurance, it appears that a verbal notice is sufficient (*McEwen v. Montgomery County Mut. Ins. Co.*, 5 Hill [N. Y.] 101), and a notice to a general agent is sufficient (*Sexton v. Montgomery County Mut. Ins. Co.*, 9 Barb. [N. Y.] 191). But in *Madison Ins. Co. v. Fellowes*, 1 Disn. (Ohio) 217, it is indicated that mere notice of prior insurance is insufficient, where an indorsement of other insurance is required. In such case there must be an indorsement of a prior policy, though a mere notice of a subsequent one would be sufficient. And a similar view seems to be taken in *Stacey v. Franklin Fire Ins. Co.*, 2 Watts & S. (Pa.) 506. However, in the *Stacey Case* the court appears to regard as sufficient a notice to the insurer's agent and a request that the indorsement be made, though the agent neglects to make the indorsement. Hence it follows that, as indicated in *Landers v. Cooper*, 115 N. Y. 279, 22 N. E. 212, 5 L. R. A. 638, 12 Am. St. Rep. 801, a notice of prior insurance to the insurer or its agent is sufficient, even though the condition in the policy requires indorsement of, or a written consent to, other insurance. But in the *Landers Case* a mistake of the insurer's agent as to the time when an existing policy would expire was not considered sufficient notice, though the prior one had also been written by the agent. The policy involved in *Union Ins. Co. v. Murphy*, 2 Del. Co. Rep. 510, required notice of existing insurance. It was held that, as no particular form of notice was prescribed, a notice from another insurance agent of a prior policy procured by him was a sufficient compliance with the condition.

Where the application contains a question as to other insurance, it is, according to *Lebanon Ins. Co. v. Kepler*, 106 Pa. 28, sufficient if the answer is substantially correct, though indefinite. It is there said that, where an ambiguity is patent, the insurers should ask for specific information if desired. But the fact that an agent writing a policy prohibiting other insurance, in reporting the same to the insurer, made the following statement: "\$—— total concurrent insurance permitted.

* * * Additional insurance, \$———. * * * Are the policies concurrent? Yes"—did not convey to the insurer information that other policies of insurance on the property were in existence (*Philadelphia Underwriters' Ins. Co. v. Bigelow* [Fla.] 37 South. 210). In *Liscom v. Boston Mut. Fire Ins. Co.*, 9 Metc. (Mass.) 205, by-laws requiring indorsement of other insurance were considered complied with by an indorsement of other insurance which in fact covered additional property. It was held that the insured could not be injured by this indorsement, as it amounted to an overstatement of the existing insurance. Likewise, in *Ames v. New York Ins. Co.*, 14 N. Y. 253, an indorsement by an agent of other insurance on a renewal policy made out by him on an unsigned application which he had filled out was regarded as a sufficient compliance with a condition which, it seems, required that existing insurance be noted on the application, or indorsed on the policy, or otherwise approved by the insurer's secretary.

(1) What constitutes prior insurance.

In *Frederick County Mut. Ins. Co. v. Deford*, 38 Md. 404, it was said that though there was a statement in the application that there was no other insurance, and this was made a warranty, it did not necessarily follow that the insured violated the warranty by taking out a policy in another company on the same day, as the latter policy might in fact have been issued later in the day. But in *United Firemen's Ins. Co. v. Thomas*, 92 Fed. 127, 34 C. C. A. 240, 47 L. R. A. 450, a condition against existing and subsequent insurance was held to be violated by the delivery of other policies on the same day. This case was distinguished from that of *Washington Fire Ins. Co. v. Davison*, 30 Md. 91, in which a contrary conclusion was reached, on the ground that in the latter case it appeared that the insurer had knowledge of the execution of the other policies. Where a prior policy covers only a building, it will not vitiate subsequent insurance on the contents thereof, according to *Sunderlin v. Aetna Ins. Co.*, 18 Hun (N. Y.) 522. Likewise it was held, in *Russell v. Fidelity Ins. Co.*, 84 Iowa, 93, 50 N. W. 546, that a policy on a barn located on a certain section and grain and hay therein was not, in the absence of a definite showing, avoided by a prior policy on grain and hay in buildings or stacks on a specified number of acres in the same section, as the two policies might cover entirely different property. But if the prior insurance is on the same class of property as that covered by the subsequent policy, the latter is violated, though the two policies only in part cover the same property (*West-*

chester Fire Ins. Co. v. Storm, 6 Tex. Civ. App. 390, 25 S. W. 318).

According to *Phoenix Ins. Co. v. Hague* (Tex. Civ. App.) 34 S. W. 654, a policy issued for a longer period than requested, but never delivered, was not other insurance with reference to a policy executed after the expiration of the time for which the prior insurance had been requested, especially since insured had made no claims under the first policy. Likewise it was held, in *Hubbard v. Hartford Ins. Co.*, 33 Iowa, 325, 11 Am. Rep. 125, that a policy executed during the time intervening between the date of the application for and the actual delivery of another policy, bearing date of the application, did not constitute prior insurance as to such other policy. But, of course, the latter policy constituted prior insurance as to the former.

An agreement by vendees with their vendor that he may procure insurance at their expense on a half interest purchased by them to secure the amount they owe does not constitute other insurance as to a subsequent policy on the whole property procured by the vendor, according to *Burbank v. Rockingham Mut. Fire Ins. Co.*, 24 N. H. 550, 57 Am. Dec. 300. And in *Nelson v. Atlanta Home Ins. Co.*, 120 N. C. 302, 27 S. E. 38, it was said that a policy sent to insured without his procurement, and which he did not intend to accept, did not constitute other insurance, though after loss he filed proofs with the company issuing it.

(j) Same—Concurrent insurance.

As has been stated in subdivision (f), there is often a statement, warranty, or provision as to the insurance maintained or a condition permitting or requiring concurrent insurance. In such cases it becomes important to determine what is concurrent insurance. In *Union National Bank v. German Ins. Co.*, 71 Fed. 473, 18 C. C. A. 203, it was held that a policy providing for a certain amount of concurrent insurance was avoided by existing insurance in excess of that amount, though part of it covered only a portion of the property. Similarly it was held, in *Peoria Marine & Fire Ins. Co. v. Lewis*, 18 Ill. 553, that a policy on a starch factory was concurrent with one on the factory and machinery and fixtures thereof, as it was considered that the term "starch factory" substantially included the fixtures necessary to the process of manufacture. And in *Washburn-Halligan Coffee Co. v. Merchants' B. M. F. Ins. Co.*, 110 Iowa, 423, 81 N. W. 707, 80 Am. St. Rep. 311, it was said that the phrase "concurrent insurance" included policies covering additional property. But where, as in *New Jersey Rubber Co. v. Commercial Union Assur. Co.*, 64 N. J. Law, 580,

46 Atl. 777, affirming 64 N. J. Law, 51, 44 Atl. 848, the concurrent insurance is also required to be proportionate, this is not complied with by other insurance covering only some of the items and not distributed among them in the same proportion as in the insurance under the policy in suit. However, according to *Caraher v. American Cent. Ins. Co.*, 63 Hun, 82, 17 N. Y. Supp. 858, a condition permitting insurance concurrent in form is not violated by the fact that a concurrent policy is made payable to another "as his interest may appear."

(k) Insurance on other interest.

In the leading case of *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90, it is said that to constitute double insurance both policies must be upon the same insurable interest, either in the name of the owner of that interest or in the name of some other person for his benefit. Consequently a policy is not avoided by prior insurance taken out by others than insured and on a different interest, as such prior insurance does not constitute other insurance within the meaning of the usual condition of the policy in regard thereto.

This principle is supported by *Sibley v. Prescott Ins. Co.*, 57 Mich. 14, 23 N. W. 478; *California Ins. Co. v. Union Compress Co.*, 183 U. S. 387, 10 Sup. Ct. 365, 38 L. Ed. 730; *Traders' Ins. Co. v. Pacaud*, 150 Ill. 245, 87 N. E. 460, 41 Am. St. Rep. 355; *McMaster v. Insurance Company of North America*, 55 N. Y. 222, 14 Am. Rep. 239; *McMaster v. Insurance Company of North America*, 64 Barb. (N. Y.) 536; *Copeland v. Phoenix Ins. Co.*, 96 Ala. 615, 11 South. 746, 38 Am. St. Rep. 134; *Magoun v. Firemen's Fund Ins. Co.*, 86 Minn. 486, 91 N. W. 5, 91 Am. St. Rep. 370; *Hastings v. Westchester Fire Ins. Co.*, 73 N. Y. 141, affirming 12 Hun (N. Y.) 416.

The rule stated applies to insurance effected by a mortgagor or mortgagee, or a vendor or vendee, on his individual interest.

Reference may be made to *Rowley v. Empire Ins. Co.*, 86 N. Y. 550, 4 Abb. Dec. (N. Y.) 131; *Sprague v. Holland Purchase Ins. Co.*, 69 N. Y. 128; *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90, affirming 12 Wend. (N. Y.) 507; *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410.

Where a policy is obtained by a mortgagee for his benefit, this will not avoid a subsequent policy taken out by the owner without the knowledge of the other insurance, though such insurance is in his name.

Such is the rule in *Nichols v. Fayette Mut. Fire Ins. Co.*, 1 Allen (Mass.) 63; *Cowart v. Capital City Ins. Co.*, 114 Ala. 356, 22 South. 574; *Doran v. Franklin Fire Ins. Co.*, 86 N. Y. 635.

Similarly a policy issued to a mortgagee, but in the name of the mortgagor, is not violated by a prior policy executed to the mortgagor of which the mortgagee had no knowledge.

Such is the principle of *Westchester Fire Ins. Co. v. Foster*, 90 Ill. 121, and *Carpenter v. Continental Ins. Co.*, 61 Mich. 635, 28 N. W. 749.

But in *Jackson v. Massachusetts Mut. Fire Ins. Co.*, 23 Pick. (Mass.) 418, 34 Am. Dec. 69, it is said that, if an insurance by a mortgagee is in truth an insurance for the mortgagor, it is vitiated by a prior policy taken out by the mortgagor. It is obvious that, as said in *Guinn v. Phoenix Ins. Co.* (Tex. Civ. App.) 31 S. W. 566, a policy taken out by a mortgagor for the benefit of a mortgagee constitutes prior insurance to a subsequent policy obtained by the mortgagor.

Insurance assigned to another is other insurance with reference to subsequent policies taken out by the assignor.

Carpenter v. Providence Washington Ins. Co., 16 Pet. 495, 10 L. Ed. 1044, and *Neve v. Columbia Ins. Co.*, 2 McMul. 220.

Similarly it was held, in *Barrett v. Union Mut. Fire Ins. Co.*, 7 Cush. (Mass.) 175, that an assignee of a policy could not recover if the assignor had other insurance, even though he had no knowledge of the prior policy.

It was held, in *Horridge v. Dwelling House Ins. Co.*, 75 Iowa, 374, 39 N. W. 648, that insurance taken out separately by one of two joint owners on the property avoided a subsequent policy issued to the owners jointly. But in *Pitney v. Glens Falls Ins. Co.*, 61 Barb. (N. Y.) 335, it was held that a policy issued to the joint owners was not avoided by a prior policy on the interest of one of them. In analogy with the rule stated, it may be said, on authority of *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6, that insurance on the interest of a joint owner is other insurance in reference to a subsequent policy on his undivided interest in the same property. In *State Ins. Co. v. New Hampshire Trust Co.*, 47 Neb. 62, 66 N. W. 9, 1106, it was held that insurance obtained by a grantor after having parted with title is not other insurance as to a policy issued to the grantee.

(1) **Validity of prior policy.**

Where the condition against other insurance embraces other existing insurance, whether valid or invalid, it appears that in some jurisdictions a policy valid on its face, though in fact invalid, will avoid the subsequent insurance. This doctrine is asserted in *Gee v. Cheshire County*

Mut. Fire Ins. Co., 55 N. H. 65, 20 Am. Rep. 171. The rule governing in such jurisdictions is, in *Phenix Ins. Co. v. Lamar*, 106 Ind. 513, 7 N. E. 241, 55 Am. Rep. 764, stated as follows: "If the prohibited policy is in and of itself invalid and void, so that it in fact constitutes no contract of insurance, it will not affect the validity of the contract under which the claim for indemnity is made. But if, to avoid such prohibited policy, it requires the production of facts extraneous to the policy, it will be within the condition, and, unless consented to, will render voidable his claim." This rule is in *Phoenix Ins. Co. v. Copeland*, 90 Ala. 386, 8 South. 48, modified so as to bring within the condition only such invalid insurance as the insured believes is valid. This is no doubt the more reasonable doctrine, as it in effect makes the validity of the second policy depend on the extent of the moral hazard assumed. This is increased if the insured believes that an existing undisclosed policy is valid, though it is not so in fact. However, in *Wolpert v. Northern Assur. Co.*, 44 W. Va. 734, 29 S. E. 1024, and *Stevens v. Citizens' Ins. Co.*, 69 Iowa, 658, 29 N. W. 769, the rule is laid down that a policy void in fact will not avoid a subsequent one, though the latter contains a condition against other existing insurance, whether valid or invalid.

(m) Prior policy rendered void by policy in suit.

Where by the terms of an existing policy it is forfeited by the execution of other insurance, such policy is not in some jurisdictions regarded as prior insurance which will avoid a subsequent policy; the first policy becoming null and void on the execution of the second.

This is the doctrine of *Emery v. Mutual City & Village Ins. Co.*, 51 Mich. 469, 16 N. W. 816, 47 Am. Rep. 590, and *Hayes v. Milford Fire Ins. Co.*, 170 Mass. 492, 49 N. E. 754.

A similar principle is also stated in *Landers v. Watertown Fire Ins. Co.*, 19 Hun (N. Y.) 174, though it is not passed on by the Court of Appeals in the subsequent appeal reported in 86 N. Y. 414, 40 Am. Rep. 554. However, a contrary doctrine appears to find support in *Gee v. Cheshire County Mut. Fire Ins. Co.*, 55 N. H. 65, 20 Am. Rep. 171, and *Reed v. Equitable Fire & Marine Ins. Co.*, 17 R. I. 785, 24 Atl. 833, 18 L. R. A. 496, by which it is doubted that the first policy would be the one rendered invalid. In the *Gee Case* it is said that it would be straining the point to hold that the first policy did not survive the execution of the second one.

(n) Voidable policy.

There appears to be a difference of opinion among the authorities as to the effect of a general condition against prior insurance. In *New England Fire & Marine Ins. Co. v. Schettler*, 38 Ill. 166, and *Jackson v. Farmers' Mut. Fire Ins. Co.*, 5 Gray (Mass.) 52, it was held that the condition was not broken by policies which had been forfeited by breach of certain of their conditions. And in *Sweeting v. Mutual Fire Ins. Co.*, 83 Md. 63, 34 Atl. 826, 32 L. R. A. 570, it appears to be held that other insurance means only binding and enforceable insurance. But it was held in *Landers v. Watertown Fire Ins. Co.*, 86 N. Y. 414, 40 Am. Rep. 554, that a condition as to prior insurance was not broken by an existing policy which was voidable because of a breach of the condition against the vacancy or increase of risk, though the forfeiture had not been declared. This doctrine that the condition is broken by a voidable policy is also supported by *American Ins. Co. v. Replogle*, 114 Ind. 1, 15 N. E. 810, and is adhered to on a second appeal, reported as *Replogle v. American Ins. Co.*, 132 Ind. 360, 31 N. E. 947. But in *Forbush v. Western Massachusetts Ins. Co.*, 4 Gray (Mass.) 337, it was held that a statement as to the amount of existing insurance was not false because the prior insurance was voidable.

(o) Cancellation, expiration, or surrender of prior policy.

It is obvious that, as held in *German Ins. Co. v. Hayden*, 21 Colo. 127, 40 Pac. 453, 52 Am. St. Rep. 206, a policy which has lapsed or been canceled before application is made for other insurance does not constitute prior insurance. And in *Continental Ins. Co. v. Horton*, 28 Mich. 173, it was held that it was sufficient if the prior policy was canceled before acceptance of the subsequent one. But an actual cancellation is necessary, according to *Zimmerman v. Home Ins. Co.*, 77 Iowa, 685, 42 N. W. 462, even though the failure to cancel a prior policy is due to an unwillingness of the insurer to do so. However, the cancellation need not actually take place before the delivery of the second policy. According to *Atlantic Mut. Fire Ins. Co. v. Goodall*, 29 N. H. 182, the second policy will not be avoided if it is not to take effect until the actual cancellation of the prior insurance. The general principle stated makes it important in many cases to determine whether or not there was a cancellation of the policy. Thus it was held, in *Train v. Holland Purchase Ins. Co.*, 62 N. Y. 598, that, where an existing policy has been surrendered to the insurance agent before the issuing of a second policy, there is no other insurance as to the last one, even though the first

policy has not been defaced or actually returned to the insurer, and the latter has refused to return any part of the premium. But in *Johnson v. North British & Mercantile Ins. Co.*, 66 Ohio St. 6, 63 N. E. 610, it was said that a cancellation of a policy by an insurance agent without the knowledge and consent of the insured was insufficient; and this was held to be true, even though the insured, after loss, elected to sue on the second policy, which was issued by the same agent and to take the place of the first one. Similarly it was, in *Gardner v. Standard Ins. Co.*, 58 Mo. App. 611, considered insufficient that an agent acting for insured had notified him of the cancellation of a policy and the writing of a second one to take its place, and that insured had assented to this, since he had not actually surrendered the first policy before loss. So, in *Kooistra v. Rockford Ins. Co.*, 122 Mich. 626, 81 N. W. 568, a surrender of a policy by an agent who had acted for insured in taking it out was regarded insufficient to constitute cancellation. And in *East Texas Fire Ins. Co. v. Flippen*, 4 Tex. Civ. App. 576, 23 S. W. 550, a mere offer by the insurer to return the premium was not considered sufficient.

(p) Questions of practice—Pleading.

Where it is claimed that an insurance is void because of the prior policy, the plea should allege that the person taking out such prior insurance had an insurable interest (*Copeland v. Phoenix Ins. Co.*, 96 Ala. 615, 11 South. 746, 38 Am. St. Rep. 134). A breach of warranty as to other insurance must be pleaded to be available (*Smith v. Home Ins. Co.*, 47 Hun [N. Y.] 30; *Weed v. Schenectady Ins. Co.*, 7 Lans. [N. Y.] 453). But in Illinois it appears that a general denial is sufficient (*Western Assur. Co. v. Mason*, 5 Ill. App. 141). Where the defense is based on a condition limiting the total insurance to a certain per cent. of the value of the property, it must be averred that the overinsurance was obtained fraudulently or with knowledge that there would be overinsurance (*O'Leary v. German-American Ins. Co.*, 100 Iowa, 390, 69 N. W. 686).

(q) Same—Evidence.

The insurer has the burden of proving a breach of warranty as to other insurance.

Morotock Ins. Co. v. Fostoria Novelty Co., 94 Va. 361, 26 S. E. 850; *Nelson v. Atlanta Home Ins. Co.*, 120 N. C. 302, 27 S. E. 83.

This places on the insurer the onus of showing with reasonable clearness that the policies were on the same property, or on a part of it (*Russell v. Fidelity Ins. Co.*, 84 Iowa, 93, 50 N. W. 546).

The insured's concealment of the fact of his having insurance on his property in no way tends to show fraud. *German-American Ins. Co. v. Paul*, 2 Ind. T. 625, 53 S. W. 442. Where evidence has been offered by the insurer to show that the property insured by both policies was the same, an affidavit appended to the proof of loss under the other insurance is admissible in rebuttal. *Fire Association of Philadelphia v. McNerney* (Tex. Civ. App.) 54 S. W. 1053. Parol evidence is inadmissible to show an intention of the parties to issue a policy, though there was knowledge of prior insurance. *Barrett v. Union Mut. Fire Ins. Co.*, 7 Cush. (Mass.) 175. The acts and declarations subsequent to loss by one who it was claimed had conspired with insured to secure double insurance by means of separate policies is admissible. *Fire Association of Philadelphia v. McNerney* (Tex. Civ. App.) 54 S. W. 1053.

(x) **Same—Trial and review.**

A refusal to charge as to the effect of prior insurance is proper, where the policy makes no provision avoiding it for such reason, but provides for a ratable distribution of loss, and where the application is not in evidence and the insurer refused to produce it on notice (*Agricultural Ins. Co. v. Bemiller*, 70 Md. 400, 17 Atl. 380). Where any doubt exists as to the materiality of a misrepresentation as to other insurance, it is a question of fact for the jury (*Armour v. Transatlantic Fire Ins. Co.*, 90 N. Y. 450). Where a statement as to other insurance is undoubtedly material, it is a question of law for the court (*Dolan v. Missouri Town Mut. Fire Ins. Co.*, 88 Mo. App. 666). If the evidence is conflicting as to whether the insurer's agent was notified of prior insurance, this is a question for the jury (*Magoun v. Firemen's Fund Ins. Co.*, 86 Minn. 486, 91 N. W. 5, 91 Am. St. Rep. 370).

A breach of warranty as to other insurance cannot be relied on for the first time on appeal. *Denny v. Conway Stock & Mut. Fire Ins. Co.*, 13 Gray (Mass.) 492. Where no objection is made at the trial to a reply which averred knowledge of prior insurance on the part of the insurer and also contained a general denial, a verdict for insured will not on this account be disturbed on appeal. *Sun Fire Office v. Ayerst*, 37 Neb. 184, 55 N. W. 635.

**22. EFFECT OF MISREPRESENTATION, BREACH OF WARRANTY,
OR CONCEALMENT AS DEPENDENT ON RELATION
TO CAUSE OF LOSS.**

- (a) Cause of loss related to fact misrepresented or concealed.
- (b) Cause of loss not related to fact misrepresented or concealed.
- (c) Statutory provisions.

(a) Cause of loss related to fact misrepresented or concealed.

In a few cases the relation of the fact misrepresented or concealed to the cause of loss has been considered as an important element in determining the effect of misrepresentation or concealment to avoid the policy. It would seem to be elementary that, where the fact concealed or misrepresented is directly related to the cause of loss, it must be regarded as *ipso facto* material, and the policy will be avoided. This was the fact in the leading case of *Burritt v. Saratoga County Mutual Fire Ins. Co.*, 5 Hill (N. Y.) 188, 40 Am. Dec. 345, where the fire which destroyed the insured building originated in another building situated within ten rods of the insured property. The existence of such other building was not disclosed in answer to the inquiries; the insured disclosing only five other buildings, and thus misleading the insurer.

On the other hand, the duty to disclose adjacent risks was regarded, in *Dennison v. Thomaston Mutual Ins. Co.*, 20 Me. 125, 37 Am. Dec. 42, as dependent to some extent on the insured's knowledge of the probability of danger therefrom, and it was held that, even though the fire originated in such undisclosed exposure, this did not conclusively show the fact of its existence to be so material as that an innocent failure to disclose would avoid the policy. In *Armenia Ins. Co. v. Paul*, 91 Pa. 520, 36 Am. Rep. 676, where the buildings were situated within nine feet of a railroad track, and the fire might have originated from a locomotive, the proximity of the railroad track was not communicated, the application merely disclosing that the property was situated on the line of the railroad at the junction, and near the depot. The court held that this was a sufficient warning to the company that the location was one of danger.

(b) Cause of loss not related to fact misrepresented or concealed.

Where the cause of loss is not connected with the matters misrepresented or concealed, the decisions are by no means uniform,

though the weight of authority is that the effect is not necessarily dependent on such relation. In the early case of *Ely v. Hallett*, 2 Caines (N. Y.) 57, it was said that a concealment is to be considered, not with reference to the event, but to its effect at the time of making the contract. So, also, it seems to be well established that a breach of the implied warranty of seaworthiness avoids the policy, though the loss arose from another cause wholly unconnected with the seaworthiness of the vessel.

This rule is announced in *Starbuck v. New England Marine Ins. Co.*, 19 Pick. (Mass.) 198; *Van Vliet v. Greenwich Ins. Co. of the City of New York*, 14 Daly (N. Y.) 496; *Merchants' Ins. Co. v. Morrison*, 62 Ill. 242, 14 Am. Rep. 98.

A different doctrine seems to have been asserted in *Seaman v. Enterprise Fire & Marine Ins. Co. (C. C.)* 21 Fed. 778, but it is not in accord with the weight of authority.

The rule that a breach of warranty avoids the policy, though relating to a matter not connected with the cause of loss, has also been asserted in *Ludlow v. Union Ins. Co.*, 2 Serg. & R. (Pa.) 119, where there was a warranty of neutrality; *Price v. Depeau*, 1 Brev. (S. C.) 452, 2 Am. Dec. 680, where there was a warranty as to proper documentation; *Golcochea v. Louisiana State Ins. Co.*, 6 Mart. N. S. (La.) 51, 17 Am. Dec. 175, where there was a warranty against engaging in illicit trade; and *Hazard v. New England Marine Ins. Co.*, 11 Fed. Cas. 984, where it was represented that the vessel had been newly coppered.

So, too, it was said, in *Howell v. Cincinnati Ins. Co.*, 7 Ohio, 276, pt. 1, that a misrepresentation or concealment will avoid the policy, though the loss was in no way connected with the fact misrepresented or concealed.

The strict rule thus asserted in marine insurance has also been applied in some jurisdictions to fire policies, and it may be regarded as established by authority that a breach of warranty in a policy of fire insurance will avoid the policy, though the loss is not produced or contributed to by the breach.

This rule is supported by *Jennings v. Chenango County Mutual Ins. Co.*, 2 Denio (N. Y.) 75; *Mead v. Northwestern Ins. Co.*, 7 N. Y. 530; *First National Bank v. Insurance Co. of North America*, 50 N. Y. 45; *Cogswell v. Chubb*, 58 N. E. 1124, 157 N. Y. 709; *Wilkins v. Germania Fire Ins. Co.*, 57 Iowa, 529, 10 N. W. 916.

Though the rule laid down in the New York cases cited above seems to have been modified in *Gates v. Madison County Mutual*

Ins. Co., 2 N. Y. 43, and *Burleigh v. Gebhard Fire Ins. Co.*, 90 N. Y. 220, these last cases must, perhaps, be regarded as affected by the particular circumstances of the case and the language of the warranty. However that may be, in *Howard Fire & Marine Ins. Co. v. Cornick*, 24 Ill. 455, where the misrepresentation related, not to the goods insured, but to the building containing them, stress was laid on the fact that the misrepresentation related to matters in no way connected with the cause of loss. Similarly, in *Landes v. Safety Mutual Fire Ins. Co.*, 190 Pa. 536, 42 Atl. 961, where the building was represented as a brick building, the fact that there was also a frame addition was regarded as immaterial, as the fire did not originate in or extend to such addition. In *Fluch v. Lehigh Valley Ins. Co.*, 3 Wkly. Notes Cas. (Pa.) 433, where the insured failed to disclose threats of incendiarism, and the building insured was in fact destroyed by an incendiary fire, it was held to be a question for the jury whether there was a suppression of material facts.

In this connection *German Ins. Co. v. Fairbank*, 82 Neb. 750, 49 N. W. 711, 29 Am. St. Rep. 459, is of interest. The policy covered horses and cattle. It was held that a mortgage on the horses did not affect the insurance on the cattle, especially in view of the fact that the loss of the cattle was due to tornado, which was one of the perils insured against. The general doctrine of relation of ground of avoidance to the cause of loss may be compared with the rules in relation to entire and divisible contracts.¹

(c) Statutory provisions.

A Maine statute² provided that a misdescription or false statement as to the value of or title to the property insured should not prevent recovery, unless the difference between the property as described and as it really existed contributed to the loss. This statute was applied in *Thayer v. Providence Ins. Co.*, 70 Me. 531, where the false statement related to the value of the insured property, and in *Gilman v. Dwelling House Ins. Co.*, 81 Me. 488, 17 Atl. 544, and *Atherton v. British America Assur. Co.*, 91 Me. 289, 39 Atl. 1006, where the true state of the title was not disclosed. The New Hampshire statute,³ containing provisions similar to the statute of Maine, was applied in *Tuck v. Hartford Fire Ins. Co.*, 56 N. H. 326, and

¹ See post, p. 1894.

² Rev. St. 1883, c. 49, § 20. The provision is not carried into the Revised Statutes of 1903.

³ Gen. St. c. 157, § 2 (Pub. St. 1901, c. 170, § 2).

Leach v. Republic Fire Ins. Co., 58 N. H. 245, where there was a failure to truly describe the title.

An Iowa statute⁴ declares that the violation of any condition rendering a policy void before loss shall not defeat recovery, if it is made to appear that the omission to observe the condition did not contribute to the loss. It has been held that where a policy insuring articles to be sent by mail provided that no risk should attach until a letter of advice should be sent the insurer by the deposit of such letter in a post office, and the insured mailed the letter by depositing it in a mail box, the statute would not preclude the insurer from asserting that the risk did not attach, as the statute has no application to a condition precedent to the contract of insurance. (*Banco de Sonora v. Bankers' Mut. Casualty Co.*, 100 N. W. 532.)

A statute similar in substance to those mentioned exists in California.⁵

⁴ Code Iowa 1897, § 1743.

⁵ Civ. Code Cal. § 2872.

XI. FORFEITURE OF CONTRACT FOR BREACH OF PROMISSORY REPRESENTATIONS OR WAR- RANTIES OR CONDITIONS SUBSEQUENT —INSURANCE OF PROPERTY.

1. Nature of continuing or promissory warranties and representations and of conditions subsequent.
 - (a) Scope of discussion.
 - (b) Definition and general characteristics.
 - (c) What constitutes a promissory or continuing warranty.
 - (d) Same—Statements in futuro.
 - (e) Same—Statements in present and by way of description.
 - (f) Same—Qualification of rule.
 - (g) Same—Statements or stipulations made part of the policy.
 - (h) Continuing or promissory representations.
 - (i) Statements as to future acts or omissions as declarations of intention only.
 - (j) Covenants or conditions subsequent.
2. Effect of breach of continuing or promissory warranties and representations or of conditions subsequent.
 - (a) Construction of provisions creating forfeitures.
 - (b) What constitutes breach of warranty or condition.
 - (c) Same—Strict or substantial compliance.
 - (d) Effect of breach in general.
 - (e) Effect as dependent on materiality.
 - (f) Effect as dependent on increase of risk.
 - (g) Same—What constitutes increase of risk.
 - (h) Effect as dependent on knowledge and intent of insured.
 - (i) Same—Responsibility of insured for acts of third persons.
 - (j) Effect of breach as to part of property insured.
 - (k) Statutory provisions.
 - (l) Reinstatement of forfeited policy.
3. Pleading and practice relating to breach of promissory warranty or condition.
 - (a) Pleading—General rules.
 - (b) Same—Sufficiency of declaration or complaint.
 - (c) Same—Sufficiency of plea or answer.
 - (d) Same—Sufficiency and effect of reply.
 - (e) Evidence—Presumptions and burden of proof.
 - (f) Same—Admissibility and sufficiency.
 - (g) Questions for court or jury.
 - (h) Trial and review.
4. Persons affected by forfeiture.
 - (a) In general.
 - (b) Rights of mortgagee.
 - (c) Loss payable to mortgagee as interest may appear.

4. Persons affected by forfeiture—(Cont'd).
 - (d) Rights of mortgagee under "union mortgage clause."
 - (e) Same—Notice by mortgagee.
 - (f) Persons claiming under mortgagee.
 - (g) Assignee of policy.
 - (h) Same—Assignment as creation of new contract.
 - (i) Same—Cases regarded as asserting a contrary doctrine.
 - (j) Same—Assignment as collateral security.
5. Necessity and sufficiency of proceedings to give effect to forfeiture.
 - (a) Breach as rendering policy void or only voidable.
 - (b) Same—New York.
 - (c) Same—Pennsylvania.
 - (d) Same—Iowa.
 - (e) Same—Wisconsin.
 - (f) Same—Other states.
 - (g) Sufficiency of proceedings declaring forfeiture.
6. Grounds of forfeiture of marine policies in general.
 - (a) General principles.
 - (b) Matters relating to the risk in general.
 - (c) Additional insurance.
 - (d) Matters relating to title and interest.
 - (e) Sailing, voyage, and navigation of vessel.
 - (f) Maintenance of seaworthiness.
 - (g) Same—What constitutes seaworthiness.
 - (h) Same—Competency of officers and sufficiency of crew.
 - (i) Same—Employment of pilot.
 - (j) Nature and stowage of cargo.
 - (k) Same—Overloading.
 - (l) Nationality or neutrality of vessel or cargo.
 - (m) Questions of practice.
7. Deviation or other change of voyage.
 - (a) General principles.
 - (b) Intent to deviate—Noninception and abandonment of voyage.
 - (c) Time policies.
 - (d) Preparation—Trial trip.
 - (e) Other voyage and change in method of conducting voyage.
 - (f) Change in order or omission of specified ports—Touching at ports not specified.
 - (g) Delay in general.
 - (h) Trading, selling, or taking cargo—Transshipment of cargo.
 - (i) Taking prizes.
 - (j) Agency.
 - (k) Necessity which will excuse deviation.
 - (l) Usage.
 - (m) Deviation to save life or property.
8. Illegality of voyage as ground of forfeiture.
 - (a) In general.
 - (b) Illicit or prohibited trade.
 - (c) Same—License.

8. Illegality of voyage as ground of forfeiture—(Cont'd).
 - (d) Breach of neutrality laws.
 - (e) Noncompliance with governmental regulations.
 - (f) Violation of embargo or nonintercourse act.
9. Change in general condition and location of the property insured.
 - (a) Change in condition in general.
 - (b) Repairs, alterations, and additions.
 - (c) Same—"Builder's risk."
 - (d) Same—Increase of risk.
 - (e) Same—Person making alterations.
 - (f) Falling of building.
 - (g) Erection of building on adjacent premises.
 - (h) Same—Increase of risk.
 - (i) Change in condition or use of adjacent premises.
 - (j) Violation of "clear-space clause."
 - (k) Change in location of personal property insured.
 - (l) Same—Consent to removal of property.
 - (m) Same—Effect of removal.
 - (n) Same—Increase of risk.
10. Change in use or occupancy of insured premises or premises containing personal property insured.
 - (a) Scope of discussion.
 - (b) Nature of statements or conditions as to occupancy or use of building.
 - (c) What constitutes a change of occupants.
 - (d) What constitutes a change in use.
 - (e) Same—Usual and customary use.
 - (f) Same—Actual and permanent change.
 - (g) Effect of change of occupants.
 - (h) Effect of change in use.
 - (i) Same—As dependent on increase of risk.
 - (j) Same—What constitutes increase of risk.
 - (k) Same—Acts of third persons and changes not under control of insured.
 - (l) Same—Temporary change in use and relation to cause of loss.
 - (m) Illegal use of property insured.
 - (n) Operation of mill or factory at night.
 - (o) Suspension of business carried on within the building.
 - (p) Same—Extent and cause of suspension of business.
 - (q) Questions of practice.
11. Vacancy of premises as ground of forfeiture.
 - (a) In general.
 - (b) Construction of condition.
 - (c) Notice of vacancy and consent thereto in general.
 - (d) What constitutes breach of condition in general.
 - (e) What constitutes vacancy or nonoccupancy—General principles.
 - (f) Same—Dwellings.
 - (g) Same—Buildings other than dwellings.
 - (h) Temporary absence of occupant.

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- 11. Vacancy of premises as ground of forfeiture—(Cont'd).**
 - (l) Temporary vacancy incident to change of tenants.
 - (j) Vacancy pending preparation for occupancy or repair of the building.
 - (k) Effect of breach of condition.
 - (l) Same—As dependent on increase of risk.
 - (m) Same—As dependent on knowledge and good faith of insured.
 - (n) Questions of practice.
 - (o) Same—Evidence.
 - (p) Same—Questions for jury.
- 12. Keeping and use of prohibited articles as ground of forfeiture.**
 - (a) In general.
 - (b) Construction of condition.
 - (c) Same—As to articles prohibited.
 - (d) Permits and effect thereof.
 - (e) What constitutes a breach of condition.
 - (f) Same—Temporary or incidental keeping or use.
 - (g) Same—Prohibited articles as part of stock in trade.
 - (h) Same—Articles necessarily or customarily used in business.
 - (i) Effect of breach of condition.
 - (j) Same—As dependent on increase of risk.
 - (k) Same—As dependent on relation to time and cause of loss.
 - (l) Same—Acts of third persons.
 - (m) Questions of practice.
- 13. Forfeiture by reason of change of title, interest, or possession in general.**
 - (a) Nature and construction of conditions.
 - (b) Effect of change in general.
 - (c) What constitutes sufficient notice of change.
 - (d) Acquiring additional title or interest.
 - (e) Change of possession.
 - (f) Same—Seizure under judicial decree.
- 14. Forfeiture by reason of voluntary change of title or interest.**
 - (a) Transfers between owners.
 - (b) Partnership transactions in general.
 - (c) Conveyance to wife.
 - (d) Transfer of part interest.
 - (e) Contract for sale.
 - (f) Incumbrance of property.
 - (g) Defeasible conveyance.
 - (h) Invalid conveyances and transfers in fraud of creditors.
 - (i) Sale—Retaining lien or taking mortgage for purchase money.
 - (j) Lease of property.
 - (k) Policy on stock in trade.
- 15. Forfeiture by reason of involuntary change of title or interest.**
 - (a) Assignment for creditors and proceedings in insolvency or bankruptcy.
 - (b) Devolution of property by death of insured.
 - (c) Levy of execution, attachment, or other process.
 - (d) Effect of judgment and judicial sale.

15. Forfeiture by reason of involuntary change of title or interest—(Cont'd).
 - (e) Partition.
 - (f) Foreclosure of mortgage or sale under power therein.
 - (g) "Commencement of foreclosure proceedings" and "notice of sale."
 - (h) Premises becoming involved in litigation.
16. Subsequent incumbrance of property insured as ground of forfeiture.
 - (a) Nature and validity of condition.
 - (b) Construction of condition in general.
 - (c) Same—Voluntary or involuntary incumbrance.
 - (d) What constitutes an incumbrance.
 - (e) Same—Judgments.
 - (f) Notice of and consent to incumbrances.
 - (g) What constitutes a breach of condition.
 - (h) Same—Invalid and inoperative incumbrances.
 - (i) Same—Renewal of mortgage or lien.
 - (j) Effect of breach of condition.
 - (k) Same—As dependent on increase of risk.
17. Special circumstances and conditions affecting the risk.
 - (a) In general.
 - (b) Method of heating building.
 - (c) Same—Use of heat in manufacturing.
 - (d) Method of lighting premises.
 - (e) Use of steam engine on the premises.
 - (f) Miscellaneous conditions or circumstances.
 - (g) Insurance against accidental discharge of automatic sprinkler.
 - (h) Agreements impairing insurer's right of subrogation.
18. Failure to comply with conditions as to precautions against fire as ground of forfeiture.
 - (a) Nature and construction of statements and conditions in general.
 - (b) Notice of sickness of animal insured.
 - (c) Method of disposing of ashes.
 - (d) Appliances for extinguishing fires—Water supply.
 - (e) Same—Force pump.
 - (f) Same—Maintaining automatic sprinkler.
 - (g) Employment of watchman.
 - (h) Same—What is a sufficient compliance with condition or statement.
 - (i) Same—Time during which watch must be kept.
 - (j) Same—Necessity that watchman should be on or near premises.
 - (k) Same—Temporary absence.
 - (l) Same—Sleeping while on duty.
 - (m) Same—Negligence of watchman.
 - (n) Same—Effect of breach of condition.
19. Breach of "iron-safe clause" as ground of forfeiture.
 - (a) Nature and purpose of "iron-safe clause."
 - (b) Same—Construction as a warranty.
 - (c) What constitutes compliance with condition in general.
 - (d) Taking and keeping inventory.
 - (e) Keeping books of account.
 - (f) Keeping books and papers in fireproof safe.
 - (g) Effect of breach of condition.

20. Violation of condition as to other insurance as ground of forfeiture.
 - (a) Nature and construction of condition in general.
 - (b) Effect of breach of condition.
 - (c) Same—Knowledge and good faith of insured.
 - (d) Same—Increase of risk.
 - (e) Same—Termination of additional insurance.
 - (f) Sufficiency of notice of additional insurance.
 - (g) Sufficiency of consent to additional insurance.
 - (h) What constitutes other insurance in general.
 - (i) Identity of subject-matter.
 - (j) Same—Commingleing insured goods with goods otherwise insured.
 - (k) Insurance of separate interests.
 - (l) Same—Interests of mortgagor and mortgagee.
 - (m) Renewal of existing insurance in same or other company.
 - (n) Assignment of policy to person holding other insurance.
 - (o) Void or inoperative policies.
 - (p) Same—Estoppel of insured to assert invalidity.
 - (q) Insurance in excess of stipulated amount.
 - (r) Concurrent insurance.
 - (s) Necessity of maintaining other insurance to amount stipulated.
21. Unauthorized assignment of policy as ground of forfeiture.
 - (a) Restrictions on assignment in general.
 - (b) Consent to assignment.
 - (c) What is a breach of condition.
 - (d) Same—Assignment or pledge as collateral security.
 - (e) Effect of breach of condition.
22. Nonpayment of premiums or assessments as ground of forfeiture.
 - (a) Default as ground of forfeiture in general.
 - (b) Same—Mutual companies.
 - (c) Absolute forfeiture or suspension of risk.
 - (d) Proceedings to effect forfeiture—Notice.
 - (e) Same—Mutual companies.
 - (f) Excuses for nonpayment.
 - (g) Rights of insured after default.
23. Suspension of risk and relation of ground of forfeiture to cause of loss.
 - (a) Scope of discussion.
 - (b) Suspension of risk by temporary breach of warranty or condition.
 - (c) Same—Construction of particular conditions.
 - (d) Same—Vacancy of premises.
 - (e) Same—Change of title or incumbering property.
 - (f) Same—Taking out additional insurance.
 - (g) Same—Failure to pay premium.
 - (h) Effect of breach of condition as dependent on relation to cause of loss.
 - (i) Same—Statutory provisions.
24. Effect of breach of warranty or condition as to part of property insured—Entire and divisible contracts.
 - (a) General principles.
 - (b) Insurance on separate classes of property separately valued.

24. Effect of breach of warranty or condition as to part of property insured—
Entire and divisible contracts—(Cont'd).

- (c) Same—New York.
- (d) Same—Kansas.
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- (j) Same—Policy covering real and personal property.
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- (s) Divisibility of contract dependent on divisibility of risk.
- (t) Same—The Indiana rule.
- (u) Same—Wisconsin.
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- (w) Same—Application of the rule in other states.
- (x) Conclusion.

1. NATURE OF CONTINUING OR PROMISSORY WARRANTIES
AND REPRESENTATIONS AND OF CON-
DITIONS SUBSEQUENT.

- (a) Scope of discussion.
- (b) Definition and general characteristics.
- (c) What constitutes a promissory or continuing warranty.
- (d) Same—Statements in futuro.
- (e) Same—Statements in præsenti and by way of description.
- (f) Same—Qualification of rule.
- (g) Same—Statements or stipulations made part of the policy.
- (h) Continuing or promissory representations.
- (i) Statements as to future acts or omissions as declarations of intention only.
- (j) Covenants or conditions subsequent.

(a) Scope of discussion.

The distinguishing characteristics of warranties and representations have been considered in a preceding brief,¹ and attention was there called to the general division into affirmative and promissory warranties or representations. In the present brief it is intended

¹ See ante, p. 1128.

to discuss the nature and characteristics of promissory, or, as they are sometimes called, continuing, representations and warranties.

(b) Definition and general characteristics.

As has already been pointed out in the general discussion, when the statements or stipulations refer to existing facts, to the conditions on which the contract is entered into, they are defined as affirmative representations or warranties. If, however, the statement is as to the existence or nonexistence of some future condition of the property, or the stipulation is that something shall or shall not be done by the insured, such statements and stipulations, since they relate to the future, are defined as promissory representations or warranties.

Reference may be made to *O'Neil v. Buffalo Fire Ins. Co.*, 8 N. Y. 122; *Cady v. Imperial Ins. Co.*, 4 Fed. Cas. 984; *Germania Fire Ins. Co. v. Deckard*, 8 Ind. App. 361, 28 N. E. 868; *McKenzie v. Scottish Union & National Ins. Co.*, 112 Cal. 548, 44 Pac. 922; *Cowan v. Phenix Ins. Co.*, 78 Cal. 181, 20 Pac. 408; *Goldman v. North British Mercantile Ins. Co.*, 48 La. Ann. 223, 19 South. 132; *Virginia Fire & Marine Ins. Co. v. Buck*, 88 Va. 522, 18 S. E. 973; *Maupin v. Scottish Union & National Ins. Co.*, 53 W. Va. 557, 45 S. E. 1003; *James v. Lycoming Ins. Co.*, 18 Fed. Cas. 309; *Houghton v. Manufacturers' Mut. Fire Ins. Co.*, 8 Metc. (Mass.) 114, 41 Am. Dec. 489; *Bilbrough v. Metropolis Ins. Co.*, 12 N. Y. Super. Ct. 587; *Aetna Ins. Co. v. Norman*, 12 Ind. App. 652, 40 N. E. 1116.

A statement or stipulation which relates to both the present and the future condition of the property may, of course, be both an affirmative and a promissory warranty (*Ramer v. Insurance Co.*, 70 Mo. App. 47) or representation (*Clark v. Manufacturers' Ins. Co.*, 5 Fed. Cas. 889).

Though stipulations relating to future acts have been designated in Pennsylvania cases as promissory warranties (*Cumberland Valley Mutual Protection Co. v. Douglas*, 58 Pa. 419, 98 Am. Dec. 298), the courts of that state have taken the position that technically a warranty can relate only to an existing fact, and that, so far as the stipulations relate to future acts or conditions, they must be regarded as covenants or conditions.

Lycoming Ins. Co. v. Mitchell, 48 Pa. 367; *Appeal of Fame Insurance Co.*, 83 Pa. 396.

The reasoning of these cases seems to be that the strict rules enforced in the case of warranties cannot be applied to statements

or stipulations which are executory in character. The distinction is, however, of little value in view of the relaxation of such rules in the case of promissory warranties, as shown by the principle that substantial compliance is sufficient and by the doctrine of suspension of risk.

It has been pointed out that in a few instances, where obviously material to the risk, affirmative warranties may be implied, as in the case of seaworthiness. The same doctrine has been applied in relation to promissory warranties.

Oady v. Imperial Insurance Co., 4 Fed. Cas. 984; *James v. Lycoming Ins. Co.*, 18 Fed. Cas. 309.

Thus it has been held in Delaware that in each contract or policy of insurance against fire there is an implied promise or undertaking on the part of the insured that he will not, after the making of the policy, alter or change the premises so as to increase the risk.

Lattomus v. Farmers' Mut. Fire Ins. Co., 8 Houst. (Del.) 404; *Hoffecker v. Newcastle County Mutual Ins. Co.*, 5 Houst. (Del.) 101. See, also, *Elstner v. Insurance Co.*, 1 Disn. 412, 12 Ohio Dec. 708.

So there is an implied warranty to maintain seaworthiness of a vessel.

Howard v. Orient Ins. Co., 25 N. Y. Super. Ct. 539; *Lapene v. Sun Mut. Ins. Co.*, 8 La. Ann. 1, 58 Am. Dec. 668.

On the other hand, it has been said that a warranty which is totally inconsistent with the express stipulations of the policy cannot with any propriety be implied (*Gray v. Sims*, 10 Fed. Cas. 1039). And in other well-considered opinions the doctrine that a promissory warranty can be implied has been repudiated.

Blumer v. Phoenix Ins. Co., 45 Wis. 622 (dissenting opinion); *Cumberland Valley Mutual Protection Co. v. Douglas*, 58 Pa. 419, 98 Am. Dec. 298.

A distinction must be drawn between promissory warranties and exceptions of risks, or limitations of the risk as to place of loss, or limitations of liability. Thus, if the property is "warranted free from capture," it is an agreement that capture is not one of the perils insured against, and is therefore an excepted risk, rather than a promissory warranty (*Dole v. New England Mut. Marine Ins. Co.*, 7 Fed. Cas. 837). So, where the policy contains a clause giving permission to navigate certain rivers and their tributaries, ex-

cepting tributaries named (*Greenleaf v. St. Louis Ins. Co.*, 37 Mo. 25), the clause does not amount to a warranty against navigating the excepted rivers, but is merely a limitation on the place of loss, and suspends the risk while the vessel is so employed. On the other hand, in other well-considered cases, a clause prohibiting a vessel from certain specified waters and ports has been regarded as a promissory warranty that the vessel shall not enter those waters or ports.

Such is the doctrine of *Cobb v. Limerock Fire & Marine Ins. Co.*, 58 Me. 328; *Odiorne v. New England Mut. Marine Ins. Co.*, 101 Mass. 551, 3 Am. Rep. 401; *Lovett v. China Mut. Ins. Co.*, 54 N. E. 388, 174 Mass. 108.

A warranty against illicit trade may be either a technical warranty or an exception of risk (*Goicoechea v. Louisiana State Ins. Co.*, 6 Mart. N. S. [La.] 51, 17 Am. Dec. 175). So a provision that if the building, or any part thereof, fall, except as the result of fire, the insurance on such building or its contents shall immediately cease, may be regarded as an exception to the risk (*Orient Insurance Company v. Leonard*, 120 Fed. 808, 57 C. C. A. 176), or as a condition subsequent (*Western Assurance Co. v. J. H. Mohlman Co.*, 83 Fed. 811, 28 C. C. A. 157, 40 L. R. A. 561). In *Westfall v. Hudson River Fire Ins. Co.*, 9 N. Y. Super. Ct. 490, a provision prohibiting the keeping or use of certain hazardous articles was regarded as an exception of risk; but the Court of Appeals (12 N. Y. 289) took the view that it was a promissory warranty.

Provisions of the policy are construed as exceptions of risks, rather than warranties or conditions, in *Grant v. Lexington Fire, Life & Marine Ins. Co.*, 5 Ind. 23, 61 Am. Dec. 74; *Stocker v. Merrimack Marine & Fire Ins. Co.*, 6 Mass. 220; *Burlington Ins. Co. v. Rivers*, 9 Tex. Civ. App. 177, 28 S. W. 453.

(c) What constitutes a promissory or continuing warranty.

Though no particular words are needed to constitute a continuing warranty (*Odiorne v. New England Mutual Marine Ins. Co.*, 101 Mass. 551, 3 Am. Rep. 401), the courts will not give to a statement the force of a continuing warranty, unless from the language used and the nature of the risk it is evident that it was so intended and understood by the parties.

Collins v. Merchants' & Bankers' Mut. Ins. Co., 95 Iowa, 540, 64 N. W. 602, 58 Am. St. Rep. 438; *Baker v. German Fire Ins. Co.*, 124 Ind. 490, 24 N. E. 1041.

This is in accord with the general rule that provisions, the effect of which, if strictly construed, would be to forfeit the policy, will not be so construed if any other construction is justifiable.

Reference may be made to *North Berwick Co. v. New England Fire & Marine Ins. Co.*, 52 Me. 336; *Thwing v. Great Western Ins. Co.*, 103 Mass. 401, 4 Am. Rep. 567; *Connecticut Fire Ins. Co. v. Jeary*, 60 Neb. 338, 83 N. W. 78, 51 L. R. A. 698; *New York Belting & Packing Co. v. Washington Fire Ins. Co.*, 23 N. Y. Super. Ct. 428; *Merchants' Insurance Co. v. Story*, 13 Tex. Civ. App. 124, 35 S. W. 68; *Wakefield v. Orient Ins. Co.*, 50 Wis. 532, 7 N. W. 647.

If by the terms of the contract the statements are clearly declared to be promissory warranties, the court must accord them that character (*Germier v. Springfield Fire & Marine Ins. Co.*, 109 La. 341, 33 South. 361). Thus, where the policy provided that it should be void "if the hazard be increased by any means within the control or knowledge of the insured," and the statements in the application in relation to exposure were to be "construed as forming a continuing warranty," there was a continuing warranty against the erection of a building near to the one insured, which increased the risk within the knowledge of the insured, though it was not within his control (*Straker v. Phenix Ins. Co.*, 101 Wis. 418, 77 N. W. 752). But courts will not construe a warranty as promissory and continuing, if any other reasonable construction can be given (*Virginia Fire & Marine Ins. Co. v. Buck*, 88 Va. 517, 13 S. E. 973). So, where the policy provides that it shall be suspended while certain prohibited articles are kept or stored on the premises, and is indorsed with a permit "to keep one barrel of benzine or turpentine in tin cans," the indorsement is not a warranty, but is a permission that is to be substantially complied with (*Maryland Fire Ins. Co. v. Whiteford*, 31 Md. 219, 100 Am. Rep. 45).

(d) Same—Statements in futuro.

In accord with the definition of a promissory warranty is the rule that, where the statement is in futuro, or stipulates for an act to be performed or omitted at some subsequent time, such statement or stipulation is a continuing or promissory warranty.

Reference may be made to *Cedar Rapids Ins. Co. v. Shimp*, 16 Ill. App. 248; *Aurora Fire Ins. Co. v. Eddy*, 49 Ill. 106; *Indiana Farmers' Live Stock Ins. Co. v. Byrnett*, 9 Ind. App. 443, 36 N. E. 779; *Snyder v. Firemen's Fund Ins. Co.*, 78 Iowa, 146, 42 N. W. 630; *Jones Mfg. Co. v. Manufacturers' Mut. Fire Ins. Co.*, 8 Cush. (Mass.) 82, 54 Am. Dec. 742; *Keith v. Quincy Mut. Fire Ins. Co.*, 10 Allen (Mass.)

228; *Hutchinson v. Western Ins. Co.*, 21 Mo. 97, 64 Am. Dec. 218; *New York Belting & Packing Co. v. Washington Fire Ins. Co.*, 23 N. Y. Super. Ct. 428; *Sun Mut. Ins. Co. v. Texarkana Foundry & Machine Co.*, 15 S. W. 34, 4 Willson, Civ. Cas. Ct. App. § 31; *Rosenthal Clothing & Dry Goods Co. v. Scottish Union & National Ins. Co. (W. Va.)* 46 S. E. 1021; *Copp v. German-American Ins. Co.*, 51 Wis. 637, 8 N. W. 127; *Kircher v. Milwaukee Mechanics' Mut. Ins. Co.*, 74 Wis. 470, 43 N. W. 487, 5 L. R. A. 779; *Straker v. Phenix Ins. Co.*, 101 Wis. 418, 77 N. W. 752.

Provisions of the policy requiring insured within 60 days to put in certain attachments and appliances as precaution against fire and to facilitate the extinguishment of fire are promissory warranties, to be performed after the policy has commenced to run (*Manufacturers' & Merchants' Mutual Ins. Co. v. Armstrong*, 45 Ill. App. 217). But a promise in regard to the future, which is not clearly made a warranty, can be regarded as a representation only (*King Brick Mfg. Co. v. Phoenix Ins. Co.*, 164 Mass. 291, 41 N. E. 277). In a leading case (*Catlin v. Springfield Fire Ins. Co.*, 5 Fed. Cas. 310) a recital in the policy that the dwelling house insured was "to be hereafter occupied as a tavern" was regarded, not as a promissory warranty, but merely as a permit that it might be so occupied. A recital that a building is "to be occupied by a tenant" is not necessarily a promissory warranty that the building shall be so occupied. It may fairly be regarded as a reservation of the right to put a tenant into the building. (*Hough v. City Fire Ins. Co.*, 29 Conn. 10, 76 Am. Dec. 581.)

Other examples of continuing or promissory warranties may be found in *Pettit v. German Ins. Co. (C. C.)* 98 Fed. 800; *Western Assur. Co. v. Althelmer Bros.*, 58 Ark. 565, 25 S. W. 1067; *Cowan v. Phenix Ins. Co.*, 78 Cal. 181, 20 Pac. 408; *North American Fire Ins. Co. v. Zaenger*, 63 Ill. 464; *Traders' Ins. Co. v. Catlin*, 59 Ill. App. 162, affirmed in 163 Ill. 256, 45 N. E. 255, 35 L. R. A. 595; *Crocker v. People's Mut. Fire Ins. Co.*, 8 Cush. (Mass.) 79; *Poor v. Humboldt Ins. Co.*, 125 Mass. 274, 28 Am. Rep. 228; *Thackery Mining & Smelting Co. v. American Fire Ins. Co.*, 62 Mo. App. 293; *Connecticut Fire Ins. Co. v. Jeary*, 83 N. W. 78, 60 Neb. 338, 51 L. R. A. 698; *Mead v. Northwestern Ins. Co.*, 7 N. Y. 530; *Couch v. Farmers' Fire Ins. Co.*, 72 N. Y. Supp. 95, 64 App. Div. 867.

(e) Same—Statements in present and by way of description.

It is difficult to reconcile the decisions as to what may or may not constitute a continuing warranty. The difficulty is well stated in the important case of *Albion Lead Works v. Williamsburg City Fire Ins. Co. (C. C.)* 2 Fed. 479, where the court said that there is

great objection to construing statements as continuing warranties, when they are conventional or made up of words which do not purport a future warrant, because, if the attention of the assured had been called to them as continuing covenants, they might have been qualified. When an underwriter asks the particulars of a risk, he probably takes for granted that things will remain as they are; but when the courts are asked to convert this impression into a covenant, and make words in the present tense operate as a stipulation for the future, there is difficulty, and the authorities are doubtful and divided.

It may be laid down as a rule established by the weight of authority that statements in the present tense, obviously referring to the existing condition of the premises, will not be construed as continuing warranties that such condition will not be changed.

This rule is asserted in *Hosford v. Germania Fire Ins. Co.*, 127 U. S. 899, 8 Sup. Ct. 1199, 32 L. Ed. 196; *Hartford Fire Ins. Co. v. Smith*, 8 Colo. 422; *State Ins. Co. v. Taylor*, 14 Colo. 499, 24 Pac. 333, 20 Am. St. Rep. 281; *New England Fire & Marine Ins. Co. v. Wetmore*, 32 Ill. 221; *Schmidt v. Peoria Marine & Fire Ins. Co.*, 41 Ill. 295; *Aurora Fire Ins. Co. v. Eddy*, 55 Ill. 213; *Firemen's Ins. Co. v. Appleton Paper & Pulp Co.*, 161 Ill. 9, 43 N. E. 713; *Evans v. Queen Ins. Co.*, 5 Ind. App. 198, 31 N. E. 843; *Baker v. Ger. Fire Ins. Co.*, 124 Ind. 490, 24 N. E. 1041; *German Ins. Co. v. Russell*, 65 Kan. 373, 69 Pac. 845, 58 L. R. A. 234; *Imperial Fire Ins. Co. v. Kiernan*, 83 Ky. 468; *German Insurance Company v. Hart*, 16 Ky. Law Rep. 344; *Gould v. York County Mut. Fire Ins. Co.*, 47 Me. 403, 74 Am. Dec. 494; *Herrick v. Union Mutual Fire Ins. Co.*, 48 Me. 558, 77 Am. Dec. 244; *Blood v. Howard Fire Ins. Co.*, 12 Cush. (Mass.) 472; *Liverpool, London & Globe Ins. Co. v. McGuire*, 52 Miss. 227; *Pabst Brewing Co. v. Union Ins. Co.*, 68 Mo. App. 663; *Boardman v. New Hampshire Mutual Fire Ins. Co.*, 20 N. H. 551; *O'Neil v. Buffalo Fire Ins. Co.*, 3 N. Y. 122; *Gates v. Madison County Mutual Ins. Co.*, 5 N. Y. 469, 55 Am. Dec. 860; *Smith v. Mechanics' & Traders' Fire Ins. Co.*, 32 N. Y. 399; *Driscoll v. German-American Ins. Co.*, 74 Hun, 153, 26 N. Y. Supp. 646; *Wynne v. Liverpool & London & Globe Ins. Co.*, 71 N. O. 121; *Merchants' Ins. Co. v. Frick*, 2 Am. Law Rec. 836, 5 Ohio Dec. 47; *Frisbie v. Fayette Mut. Ins. Co.*, 27 Pa. 325; *Gilliat v. Pawtucket Mut. Fire Ins. Co.*, 8 R. I. 282, 91 Am. Dec. 229; *Virginia Fire & Marine Ins. Co. v. Buck*, 83 Va. 517, 13 S. E. 973.

The rule is well illustrated in those cases where there is a statement as to existing and a promise as to future conditions, as where a building insured is described as "occupied for stores below, the upper portion to remain unoccupied during the continuance of the

policy." The first clause of the description is a statement in *præ-senti* and can be construed only as an affirmative warranty. The second clause is clearly a promissory warranty.

Stout v. City Fire Ins. Co., 12 Iowa, 371, 79 Am. Dec. 539. See, also, *New York Belting & Packing Co. v. Washington Fire Ins. Co.*, 23 N. Y. Super. Ct. 428.

In accordance with the foregoing rule, it may also be stated that in general a continuing warranty cannot be based on statements which are mere matters of description.

The rule is supported by *Hartford Fire Ins. Co. v. Smith*, 8 Colo. 422; *State Ins. Co. v. Taylor*, 14 Colo. 490, 24 Pac. 333, 20 Am. St. Rep. 281; *Billings v. Tolland County Mut. Fire Ins. Co.*, 20 Conn. 139, 50 Am. Dec. 277; *New England Fire & Marine Ins. Co. v. Wetmore*, 82 Ill. 221; *Burlington Insurance Company v. Brockway*, 138 Ill. 644, 28 N. E. 799, affirming 39 Ill. App. 43; *Baker v. German Fire Ins. Co.*, 124 Ind. 490, 24 N. E. 1041; *Harris v. Phoenix Ins. Co.*, 85 Iowa, 238, 52 N. W. 128; *German Ins. Co. v. Russell*, 65 Kan. 373, 69 Pac. 345, 58 L. R. A. 234; *Imperial Fire Ins. Co. v. Kiernan*, 83 Ky. 468; *German Insurance Co. v. Hart*, 16 Ky. Law Rep. 344; *Joyce v. Maine Ins. Co.*, 45 Me. 168, 71 Am. Dec. 536; *United States Fire & Mar. Ins. Co. v. Kimberly*, 34 Md. 224, 6 Am. Rep. 325; *Blood v. Howard Fire Ins. Co.*, 12 Cush. (Mass.) 472; *Pabst Brewing Co. v. Union Ins. Co.*, 63 Mo. App. 663; *Boardman v. New Hampshire Mutual Fire Ins. Co.*, 20 N. H. 551; *O'Neil v. Buffalo Fire Ins. Co.*, 3 N. Y. 122; *Gates v. Madison County Mut. Ins. Co.*, 5 N. Y. 469, 55 Am. Dec. 860; *Smith v. Mechanics' & Traders' Fire Ins. Co.*, 32 N. Y. 399; *Whitney v. Black River Ins. Co.*, 9 Hun (N. Y.) 87; *Driscoll v. German-American Ins. Co.*, 74 Hun, 153, 26 N. Y. Supp. 646; *Merchants' Ins. Co. v. Frick*, 2 Am. Law Rec. 336, 5 Ohio Dec. 47; *Cumberland Valley Mut. Protection Co. v. Schell*, 29 Pa. 31; *Cumberland Valley Mut. Protection Co. v. Douglas*, 58 Pa. 419, 98 Am. Dec. 298; *East Texas Fire Ins. Co. v. Kempner*, 12 Tex. Civ. App. 533, 34 S. W. 393; *Bryan v. Peabody Ins. Co.*, 8 W. Va. 605.

(2) Same—Qualification of rule.

While the rules just discussed are undoubtedly supported by the weight of authority, there are numerous well-considered cases which apparently take the opposite view. In view of a qualification of the rule which is recognized in some of the cases, where statements in *præ-senti* are held not to be continuing warranties, it cannot be said that the general rule is denied, even in those cases where such statements are held to be continuing warranties. Thus, in *Frisbie v. Fayette Mutual Ins. Co.*, 27 Pa. 325, a leading case in support of the rule that statements in *præ-senti* cannot be construed as continuing warranties, the court nevertheless recognizes the

qualifying principle that, if the statement relates to a fact which is obviously material to the risk, such as precautions taken to prevent a loss, it may fairly be treated as a warranty. This modification was also recognized by Justice Taylor, in his dissenting opinion in *Blumer v. Phoenix Ins. Co.*, 45 Wis. 633, in which the court held that a statement in the present tense relative to the presence of a watchman was a continuing warranty.

Reference may also be made to *Baker v. German Fire Ins. Co.*, 124 Ind. 490, 24 N. E. 1041; *Baker v. Central Ins. Co.*, 8 Ohio Dec. 478; *Ripley v. Aetna Ins. Co.*, 80 N. Y. 186, 86 Am. Dec. 862.

Whether statements in present were continuing warranties was questioned in *Sayles v. Northwestern Ins. Co.*, 21 Fed. Cas. 609; *Wall v. East River Mut. Ins. Co.*, 7 N. Y. 370.

In view of this qualification it may fairly be presumed that the cases in which matters of description are regarded as continuing warranties are decided on the theory that such matters are material to the risk.

Reference may be made to *Wood v. Hartford Fire Ins. Co.*, 18 Conn. 533, 85 Am. Dec. 92; *Richards v. Protection Ins. Co.*, 80 Me. 278; *Deweese v. Manhattan Ins. Co.*, 35 N. J. Law, 866; *Dougherty v. Greenwich Ins. Co.*, 42 Atl. 485, 64 N. J. Law, 716; *Sarsfield v. Metropolitan Ins. Co.*, 42 How. Prac. (N. Y.) 97; *Eltner v. Insurance Co.*, 1 Dian. 412, 12 Ohio Dec. 703; *Hoxsie v. Providence Mut. Fire Ins. Co.*, 6 R. I. 517; *Sun Ins. Co. v. Texarkana Foundry & Machine Works*, 3 Willson, Civ. Cas. Ct. App. § 320; *Wustum v. City Fire Ins. Co.*, 15 Wis. 138.

The description of the place where personal property is insured, as set forth in the policy, has also been regarded as a warranty that it will remain there.

Harris v. Royal Canadian Ins. Co., 53 Iowa, 236, 5 N. W. 124; *Bahr v. National Fire Ins. Co.*, 80 Hun, 309, 29 N. Y. Supp. 1031; *Phoenix Fire Ins. Co. v. Vorhis*, 1 O. C. D. 180.

But in *Noyes v. Northwestern National Ins. Co.*, 64 Wis. 415, 25 N. W. 419, 54 Am. Rep. 631, the court, while recognizing the rule that the location of the property designated in the policy is an essential element of the risk, and usually a continuing warranty, held that, where an article of wearing apparel is insured "contained in" a certain building, this does not constitute a continuing warranty that it shall always be kept in such building. It is only a warranty that the place designated shall be the usual place of de-

posit when the article is not in use elsewhere. If burned when in such use, it is still covered by the policy, and the insurer is liable. So, where the ordinary use of the property requires it to be moved from place to place, the words defining the situation of the property mean only that the place described was their place of deposit when not absent therefrom for temporary purposes incident to their ordinary use, and constitute a warranty to the extent that the place designated should continue to be their place of deposit when not in such use (*London & Lancaster Fire Ins. Co. v. Graves*, 4 Ky. Law Rep. 706).

On the other hand, statements as to the location of personal property have been held not to be continuing warranties.

Everett v. Continental Ins. Co., 21 Minn. 76; *Haws v. Fire Ass'n*, 114 Pa. 431, 7 Atl. 159; *Western & Atlantic Pipe Lines v. Home Ins. Co.*, 145 Pa. 346, 22 Atl. 685, 27 Am. St. Rep. 708.

As was said in the Pipe Line Case, where the insurance was on oil while contained in a certain tank described as in a designated location, this was not a continuing warranty, so that the policy would be forfeited if the tank was moved by a flood; that, giving it the broadest possible construction, there was no more than an implied warranty that the insured would not voluntarily move the tank.

(g) Same—Statements or stipulations made part of the policy.

In accordance with the general rule as to warranties is the principle that an oral statement cannot be construed as a continuing warranty (*Albion Lead Works v. Williamsburg City Fire Ins. Co.* [C. C.] 2 Fed. 479). On the contrary, it may be regarded as a fundamental principle that, to constitute a continuing warranty, the statement or stipulation must appear on the face of the policy, or by appropriate reference be made a part thereof.

The rule is asserted in *Andrews v. Essex Fire & Marine Ins. Co.*, 1 Fed. Cas. 885; *Nicoll v. American Ins. Co.*, 18 Fed. Cas. 231; *Citizens' Ins. Co. v. Hoffman*, 128 Ind. 370, 27 N. E. 745; *Stebbins v. Globe Ins. Co.*, 2 N. Y. Super. Ct. 675; *City of New York v. Brooklyn Fire Ins. Co.*, 41 Barb. (N. Y.) 231, affirmed 8 Abb. Dec. 251; *Id.*, *43 N. Y. 465; *Georgia Home Ins. Co. v. McKinley*, 14 Tex. Civ. App. 7, 37 S. W. 606; *Cassa Marittima v. Phenix Ins. Co.*, 59 Hun, 361, 12 N. Y. Supp. 811; *Hart v. Niagara Fire Ins. Co. of State of New York*, 9 Wash. 620, 38 Pac. 213, 27 L. R. A. 86.

Thus an indorsement on the back of a policy, providing that, when any alteration is to be made, the insured shall make an application to the secretary, who shall examine the property and certify whether the hazard be increased or not, such indorsement, not being referred to in the policy and not itself providing for forfeiture as a result of failure to comply therewith, will not be considered as anything more than directory (*Planters' Mut. Ins. Co. v. Rowland*, 66 Md. 236, 7 Atl. 257). And where the action is on an oral contract, the policy having been prepared, but never delivered, a continuing warranty cannot be based on statements that would have been contained in the policy, had it been issued (*Clarkson v. Western Assur. Co.*, 92 Hun, 527, 37 N. Y. Supp. 53).

Conversely, it may be laid down as an established rule that, where the policy refers to the application or statements and declares them to be a part of the policy, such statements, if referring to future acts or conditions, are continuing warranties.

The rule is supported by *Albion Lead Works v. Williamsburg City Fire Ins. Co.* (O. C.) 2 Fed. 479; *Lozano v. Palatine Ins. Co.*, 78 Fed. 278, 24 C. C. A. 85; *Mechanics' Ins. Co. v. Thompson*, 57 Ark. 279, 21 S. W. 468; *Southern Ins. Co. v. White*, 58 Ark. 277, 24 S. W. 425; *Glendale Woolen Co. v. Protection Ins. Co.*, 21 Conn. 19, 54 Am. Dec. 309; *Southern Fire Ins. Co. v. Knight*, 111 Ga. 622, 36 S. E. 821, 52 L. R. A. 70, 78 Am. St. Rep. 216; *First Nat. Bank v. Insurance Co. of North America*, 50 N. Y. 45; *Miller v. Germania Fire Ins. Co.*, 34 Leg. Int. (Pa.) 339; *Power v. City Fire Ins. Co.*, 8 Phila. (Pa.) 566, 2 Leg. Op. 167; *Wilson v. Hampden Fire Ins. Co.*, 4 R. I. 159; *Blumer v. Phoenix Ins. Co.*, 45 Wis. 622.

Mere reference to the application or survey is not sufficient. It must be so referred to as to make it a part of the policy (*First Nat. Bank v. Insurance Co. of North America*, 50 N. Y. 45). The reference must also be certain, clearly showing an intent to make the particular statement a warranty (*Phoenix Assurance Co. v. Munger Improved Cotton Machine Mfg. Co.*, 92 Tex. 297, 49 S. W. 222). So, where the recital was that the applicant "warrants that the above is a just, full, and true exposition of the facts and circumstances in regard to the property, * * * and the same is understood as incorporated in and forming a part of the policy as a continuing warranty" (*McGannon v. Millers' National Ins. Co.*, 171 Mo. 143, 71 S. W. 160, 94 Am. St. Rep. 778), such recital refers to facts as to title, use, incumbrances, etc., but cannot be extended to a promise to do a future act, so as to make it a continuing war-

ranty. And statements in a survey referred to as being in the office of another company cannot be regarded as continuing warranties (*Sheldon v. Hartford Fire Ins. Co.*, 22 Conn. 235, 58 Am. Dec. 420). But a condition which makes the application, plan, survey, or description a part of the contract, and a warranty so long as the policy is kept in force, fitly describes a continuing warranty (*Albion Lead Works v. Williamsburg City Fire Ins. Co.* [C. C.] 2 Fed. 479). And where the recital was, "Reference being had to the application for a more particular description and forming part of this policy," the omission of the word "as" between "and" and "forming" did not render the reference insufficient (*Egan v. Mutual Ins. Co.*, 5 Denio [N. Y.] 326).

By-laws of mutual insurance companies may fairly be regarded as part of the contract, so as to be continuing warranties.

Hygum v. Aetna Ins. Co., 11 Iowa, 21; *Douville v. Farmers' Mut. Fire Ins. Co.*, 118 Mich. 158, 71 N. W. 517.

So, too, proposals and conditions attached to the policy form a part of the contract, and have the same force and effect as if contained in the body of the policy (*Duncan v. Sun Fire Ins. Co.*, 6 Wend. [N. Y.] 488, 22 Am. Dec. 539). Thus, where a policy is made by using a form printed on the half of an entire sheet of paper, and on the other half sheet there is a printed statement, commencing thus, "Conditions of insurance," but no express reference to this is made in the policy, such conditions would nevertheless be regarded, *prima facie*, as part of the contract of insurance (*Roberts v. Chenango County Mut. Ins. Co.*, 3 Hill [N. Y.] 501). Where a condition is contained on a separate slip pasted on the policy in proper sequence, and reciting that it is "attached to and forming a part of policy No. ———," the number of the policy being inserted, such condition becomes a promissory warranty.

This rule is supported by *Kelley-Goodfellow Shoe Co. v. Liberty Ins. Co.*, 8 Tex. Civ. App. 227, 28 S. W. 1027; *American Fire Ins. Co. v. First Nat. Bank* (Tex. Civ. App.) 30 S. W. 384; *Allred v. Hartford Fire Ins. Co.* (Tex. Civ. App.) 37 S. W. 95; *City Drug Store v. Scottish Union & National Ins. Co.* (Tex. Civ. App.) 44 S. W. 21; *Couch & Gilliland v. Home Protection Fire Ins. Co.* (Tex. Civ. App.) 73 S. W. 1077. It is also the principle governing *Goldman v. North British Mercantile Ins. Co.*, 48 La. Ann. 223, 19 South. 132.

But where the slip containing the condition is attached to the policy in such a manner that it appears to be inserted in the middle of a sen-

tence containing the promises on the part of the insurer, to which it does not relate, and, when read in connection with the context, is devoid of meaning, it cannot be regarded as a promissory warranty (*Goddard v. East Texas Fire Ins. Co.*, 67 Tex. 69, 1 S. W. 906, 60 Am. Rep. 1).

(h) Continuing or promissory representations.

A leading case involving the nature of promissory representations, and one that has provoked considerable discussion, is *Alston v. Mechanics' Mutual Ins. Co.*, 4 Hill (N. Y.) 329, reversing 1 Hill, 510. The case has been construed as laying down the principle that there cannot be a promissory representation. Chancellor Walworth, who wrote the opinion, does, indeed, seem to question the existence of such representations. As in their very nature representations are not a part of the contract, but merely incidental and collateral thereto, he regards it as hardly possible to suppose that there can be in the law of insurance a promissory representation, rendering the contract void for the nonperformance of a stipulation in the nature of a collateral executory agreement, which the parties did not think proper to make a part of the written contract. He does not find such a principle sustained by the earlier writers, nor mentioned in the decisions of the courts. The case has been criticised in *Bilbrough v. Metropolis Ins. Co.*, 12 N. Y. Super. Ct. 587, where the reasoning of the chancellor is regarded as refuted by Mr. Justice Duer in his work on "Insurance,"² and as overruled by *Murdock v. Chenango County Mutual Ins. Co.*, 2 N. Y. 210. In view of the point at issue in the *Alston Case*, it is extremely doubtful if the remarks of the chancellor can be interpreted as broadly stating that a promissory representation cannot exist. It is to be noted that the representation which it was contended was promissory in its nature was oral, and there was some conflict as to the precise terms of the promise. As was said by Senator Bockee, who wrote a concurring opinion, the precise question before the court was, not whether a promissory representation may exist, but whether parol evidence of such representation can be given, where, if the representation had been included in the policy, it would be a warranty. The case must therefore be regarded as deciding nothing more than that a promissory representation cannot be based on a mere oral statement.

² Duer on Insurance, vol. 2, p. 749.

That this is the true interpretation of the Alston Case is apparent from various facts. The rule that verbal representations executory in their nature cannot be relied on as part of the contract had already been asserted in New York (*New York Gaslight Co. v. Mechanics' Fire Ins. Co.*, 2 N. Y. Super. Ct. 125), and in Massachusetts (*Whitney v. Haven*, 13 Mass. 172). In a leading case (*Bryant v. Ocean Ins. Co.*, 22 Pick. [Mass.] 200) the Massachusetts court had laid down the rule that evidence of oral executory representations was not admissible; that such representations were at best statements of intention only. In *Murdock v. Chenango County Mutual Ins. Co.*, 2 N. Y. 210, relied on in the *Bilbrough Case* as overruling the *Alston Case*, Strong, J., expressed the opinion that there was no such thing as a promissory representation; that the term involved a contradiction. But he and the rest of the court held that the statement in that case was not a representation, since it was made a part of the contract, and thus became an express agreement. He thus distinguishes the case from the *Alston Case*, where the promise was verbal and in no way referred to in the policy. Moreover, in the *Bilbrough Case* the statement was in the written application, which was properly referred to as forming a part of the policy. We are therefore justified in regarding the *Alston Case* as asserting no broader rule than that a promissory representation cannot be based on a mere oral statement. That this is the rule is also the opinion of Mr. May.* Mr. Joyce, in his recent work, calls attention to the question whether a representation not expressly or impliedly embodied in the contract can be promissory, but concludes that no certain rule can be deduced.⁴

The rule is also asserted in *Albion Lead Works v. Williamsburg City Fire Ins. Co.* (C. C.) 2 Fed. 479; *Kimball v. Aetna Ins. Co.*, 9 Allen (Mass.) 540, 85 Am. Dec. 786; *City of New York v. Brooklyn Fire Ins. Co.*, 41 Barb. (N. Y.) 231, affirmed 3 Abb. Dec. 251; *Id.*, *43 N. Y. 465; *Travis v. Peabody Ins. Co.*, 28 W. Va. 583.

A promise in regard to the future, which is not clearly made a warranty, is a representation only, and not a warranty (*King Brick Mfg. Co. v. Phoenix Ins. Co.*, 164 Mass. 291, 41 N. E. 277). So, if the recitals in the application, though made a part of the policy, are also referred to as representations, they will be regarded as

* See May on Insurance, vol. 1, § 182. nould on Marine Insurance, vol. 1, p.

⁴ Joyce on Insurance, vol. 2, §§ 1917-502, § 191.
1920. For the English doctrine, see Ar-

continuing representations only (*Houghton v. Manufacturers' Mut. Fire Ins. Co.*, 8 Metc. [Mass.] 114, 41 Am. Dec. 489). Recitals not made a part of the policy are, of course, under the general rule, representations only.

Andrews v. Essex Fire & Mar. Ins. Co., 1 Fed. Cas. 885; *Georgia Home Ins. Co. v. McKinley*, 14 Tex. Civ. App. 7, 37 S. W. 606.

Representations may, of course, be both affirmative and promissory, as where they state an existing fact and a future intent (*Clark v. Manufacturers' Ins. Co.*, 5 Fed. Cas. 889).

(1) Statements as to future acts or omissions as declarations of intention only.

In some cases the theory on which the courts have refused to construe statements as continuing warranties or representations is that the statements are at best declarations of intention only. Thus a statement that the building insured is occupied as a dwelling house, "but to be hereafter occupied as a tavern," is not a warranty that the house shall during the continuance of the risk be occupied as a tavern, but merely a declaration of intent or a reservation of privilege (*Catlin v. Springfield Fire Ins. Co.*, 5 Fed. Cas. 310). Similarly, express statements as to future acts have been said not to be even promissory representations, but declarations of intention (*Alston v. Mechanics' Mutual Ins. Co.*, 4 Hill [N. Y.] 329).

The principle has also been asserted in *Hough v. City Fire Ins. Co.*, 29 Conn. 10, 76 Am. Dec. 581; *Herrick v. Union Mut. Fire Ins. Co.*, 48 Me. 538, 77 Am. Dec. 244; *Augusta Ins. & Bank Co. v. Abbott*, 12 Md. 348; *Allegre's Adm'rs v. Maryland Ins. Co.*, 2 Gill & J. (Md.) 159, 20 Am. Dec. 424; *Bryant v. Ocean Ins. Co.*, 22 Pick. (Mass.) 200.

On the other hand, a statement in an application, which was referred to as part of the policy, to the effect that "a stone chimney will be built," was regarded as an express agreement in the nature of a warranty, and not a mere declaration of intention (*Murdock v. Chenango County Mut. Ins. Co.*, 2 N. Y. 210). It has, too, been held that language in a policy which imports an intent to do or omit an act which materially affects the risk, its extent, or nature, is to be treated as involving an engagement to do or omit such act. If the insured would reserve a right to change his intention, he must make the reservation in explicit language. In other words, an expression of intent is, in effect, a promissory warranty or a promis-

sory representation, which must be complied with (*Bilbrough v. Metropolis Ins. Co.*, 12 N. Y. Super. Ct. 587).⁵

In this connection it may be of interest to consult *Calbreath v. Gracy*, 4 Fed. Cas. 1080, *Clark v. Protection Ins. Co.*, 5 Fed. Cas. 909, and *Houston v. New England Ins. Co.*, 5 Pick. (Mass.) 89, where concealment of intention was involved.

(j) *Covenants or conditions subsequent.*

Promissory warranties are sometimes regarded as in the nature of conditions subsequent.

Cady v. Imperial Ins. Co., 4 Fed. Cas. 984; *James v. Lycoming Ins. Co.*, 13 Fed. Cas. 809; *McNutt v. Virginia Fire & Marine Ins. Co.* (Tenn. Ch.) 45 S. W. 61; *Tillis v. Liverpool & London & Globe Ins. Co.* (Fla.) 35 South. 171.

Generally, however, the provision in the policy takes the form of a covenant or a condition declaring the policy shall be void on the occurrence of certain events. Thus a provision that the insurance shall cease "if the building or any part thereof fall, except as the result of fire," is regarded as a condition subsequent (*Western Assurance Co. v. J. H. Mohlman Co.*, 83 Fed. 811, 28 C. C. A. 157, 40 L. R. A. 561). So, too, is a stipulation that the policy shall be void if the assured have the property incumbered without notice (*Kister v. Lebanon Mut. Ins. Co.*, 128 Pa. 553, 18 Atl. 447, 15 Am. St. Rep. 696, 5 L. R. A. 646).

Other examples of conditions subsequent will be found in *Georgia Home Ins. Co. v. Allen*, 24 South. 399, 119 Ala. 486; *Lattomus v. Farmers' Mutual Fire Ins. Co.*, 3 Houst. (Del.) 404; *Home Ins. Co. v. Boyd*, 49 N. E. 285, 19 Ind. App. 173; *Viele v. Germania Ins. Co.*, 26 Iowa, 9, 96 Am. Dec. 83; *Ashworth v. Builders' Mut. Fire Ins. Co.*, 112 Mass. 422, 17 Am. Rep. 117; *N. & M. Friedman Co. v. Atlas Assur. Co.*, 94 N. W. 757, 133 Mich. 212; *McFarland v. St. Paul Fire & Marine Ins. Co.*, 46 Minn. 519, 49 N. W. 253; *Card v. Phoenix Ins. Co.*, 4 Mo. App. 424; *Shepherd v. Union Mut. Fire Ins. Co.*, 38 N. H. 232; *Chamberlain v. Insurance Co. of North America*, 51 Hun, 636, 3 N. Y. Supp. 701; *Little v. Eureka Ins. Co.*, 5 Ohio Dec. 235, 4 Am. Law Rec. 223; *Steinmetz v. Franklin Ins. Co.*, 6 Phila. (Pa.) 21; *Kingman v. Lancashire Ins. Co.*, 54 S. C. 599, 32 S. E. 762.

⁵ See Rev. Civ. Code S. D. 1908, § 1856, and Rev. Codes N. D. 1899, § 4508, where it is provided that a statement in a policy which imports that it is intended to do or not to do a thing which materially affects the risk is a warranty.

A distinction must be drawn between conditions subsequent and exceptions of risk. A provision in the policy that the insured will not be liable under the policy for loss or damage caused by certain causes enumerated is not a condition subsequent, but a clause of exemption (*Jones v. Howard Ins. Co.*, 117 N. Y. 103, 22 N. E. 578).

Generally speaking, conditions must be a part of the policy to be effective.

East v. New Orleans Ins. Ass'n, 76 Miss. 697, 28 South. 691; *Kensington Nat. Bank v. Yerkes*, 86 Pa. 227.

But in voyage policies there is an implied condition against deviation, though ordinarily that is not the case in time policies (*Audenreid v. Mercantile Mut. Ins. Co.*, 60 N. Y. 482, 19 Am. Rep. 204). So, where there is permission to use a stove in a certain portion of the building, a condition that no other stove shall be used will be implied (*Daniels v. Equitable Fire Ins. Co.*, 48 Conn. 105). A condition will not, however, be implied from the existence of a particular custom of the trade or locality (*Williamson v. New Orleans Ins. Co.*, 84 Ala. 106, 4 South. 36).

Though the language of the condition is usually such as to indicate that it refers to the future, the condition that the policy shall become void unless consent in writing is indorsed thereon, "if the assured is not the sole and unconditional owner of the property," has been held to refer only to future changes in the title, and not to the character of the title at the time the policy was issued.

Hoose v. Prescott Ins. Co., 84 Mich. 309, 47 N. W. 587, 11 L. R. A. 840; *Hall v. Niagara Fire Ins. Co.*, 93 Mich. 184, 53 N. W. 727, 18 L. R. A. 135, 32 Am. St. Rep. 497.

Conditions in a contract of insurance, limiting the liability of the insurer, will not be extended by implication, so as to include cases not clearly or reasonably within the words as ordinarily used and understood (*Rann v. Home Ins. Co.*, 59 N. Y. 387). Thus a statement that a machine is designed for burning hard coal is not a covenant that it shall not be otherwise used (*Tillou v. Kingston Mut. Ins. Co.*, 7 Barb. [N. Y.] 570).

**2. EFFECT OF BREACH OF CONTINUING OR PROMISSORY
WARRANTIES AND REPRESENTATIONS OR
OF CONDITIONS SUBSEQUENT.**

- (a) Construction of provisions creating forfeitures.
- (b) What constitutes breach of warranty or condition.
- (c) Same—Strict or substantial compliance.
- (d) Effect of breach in general.
- (e) Effect as dependent on materiality.
- (f) Effect as dependent on increase of risk.
- (g) Same—What constitutes increase of risk.
- (h) Effect as dependent on knowledge and intent of insured.
- (i) Same—Responsibility of insured for acts of third persons.
- (j) Effect of breach as to part of property insured.
- (k) Statutory provisions.
- (l) Reinstatement of forfeited policy.

(a) Construction of provisions creating forfeitures.

In determining the effect which a breach of a promissory warranty or a failure to comply with the terms of a promissory representation or a condition subsequent will have upon the contract of insurance, the courts are inclined to apply to the fullest extent the rules applicable in the case of contracts generally. Indeed, the general rule that provisions intended to create a forfeiture are to be strictly construed, so as to avoid a forfeiture, is regarded as especially applicable where contracts of insurance are involved.

Reference to the following cases is deemed sufficient: *James v. Lycoming Ins. Co.*, 18 Fed. Cas. 309; *Kelley v. Home Ins. Co.*, 14 Fed. Cas. 243; *Nicoll v. American Ins. Co.*, 18 Fed. Cas. 231; *Turner v. Meridan Fire Ins. Co.* (C. C.) 16 Fed. 459; *Small v. Westchester Fire Ins. Co.* (C. C.) 51 Fed. 789; *Summerfield v. Phoenix Assur. Co.* (C. C.) 65 Fed. 292; *Gunther v. Liverpool & London Globe Ins. Co.* (C. C.) 85 Fed. 846; *Palatine Ins. Co. v. Ewing*, 92 Fed. 111, 34 C. C. A. 236; *Liverpool & London & Globe Ins. Co. v. Kearney*, 94 Fed. 314, 36 C. C. A. 265; *Burnett v. Eufaula Ins. Co.*, 46 Ala. 11, 7 Am. Rep. 581; *Tubb v. Liverpool & London & Globe Ins. Co.*, 106 Ala. 651, 17 South. 615; *Arkansas Fire Ins. Co. v. Wilson*, 55 S. W. 933, 67 Ark. 553, 48 L. R. A. 510, 77 Am. St. Rep. 129; *Tillis v. Liverpool & London & Globe Ins. Co.* (Fla.) 35 South. 171; *Continental Ins. Co. v. Vanlue*, 126 Ind. 410, 28 N. E. 119, 10 L. R. A. 843; *North Berwick Co. v. New England Fire & Marine Ins. Co.*, 52 Me. 336; *Trabue v. Dwelling House Ins. Co.*, 121 Mo. 75, 25 S. W. 848, 23 L. R. A. 719, 42 Am. St. Rep. 523; *Connecticut Fire Ins. Co. v. Jeary*, 60 Neb. 338, 83 N. W. 78, 51 L. R. A. 698; *Wakefield v. Orient Ins. Co.*, 50 Wis. 532, 7 N. W. 647.

That this rule is not opposed to general principles is apparent when it is remembered that even promissory warranties are generally regarded as in the nature of conditions subsequent which are strictly construed to avoid a forfeiture.¹

Equally applicable is the rule that where, by the terms of the printed portions of the policy, a forfeiture is created, it will not, nevertheless, be given effect if the written portion indicates a contrary intent.

The rule is applied in *Gunther v. Liverpool & London & Globe Ins. Co.* (C. C.) 34 Fed. 501; *Scottish Union & National Ins. Co. v. Hagan*, 102 Fed. 919, 43 C. C. A. 55; *Yoch v. Home Mut. Ins. Co.*, 111 Cal. 508, 44 Pac. 189, 34 L. R. A. 857; *Maril v. Connecticut Fire Ins. Co.*, 95 Ga. 604, 23 S. E. 463, 30 L. R. A. 885, 51 Am. St. Rep. 102; *Harper v. Albany Mut. Ins. Co.*, 17 N. Y. 194; *Bryant v. Poughkeepsie Mut. Ins. Co.*, Id. 200, affirming 21 Barb. 154; *Hall v. Insurance Co.*, 58 N. Y. 292, 17 Am. Rep. 255; *Barnum v. Merchants' Fire Ins. Co.*, 97 N. Y. 188; *Carrigan v. Lycoming Fire Ins. Co.*, 53 Vt. 418, 38 Am. Rep. 687; *Faust v. American Fire Ins. Co.*, 91 Wis. 158, 64 N. W. 888, 30 L. R. A. 783, 51 Am. St. Rep. 876; *Thorne v. Aetna Ins. Co.*, 102 Wis. 593, 78 N. W. 920.

The foregoing principles do not, however, affect the general rule that contracts of insurance are to be construed as other contracts. All parts of the contract are to be taken together, and such meaning shall be given to them as will carry out and effectuate to the fullest extent the intention of the parties. No portion of the policy will receive such a construction as will tend to defeat the obvious general purpose of the parties entering into the contract.

Crane v. City Ins. Co. (C. C.) 3 Fed. 558; *German Ins. Co. v. Hayden*, 21 Colo. 127, 40 Pac. 453, 52 Am. St. Rep. 206; *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64, 34 Am. Rep. 106; *Continental Ins. Co. v. Kyle*, 124 Ind. 132, 24 N. E. 727, 9 L. R. A. 81, 19 Am. St. Rep. 77; *Bole v. New Hampshire Fire Ins. Co.*, 159 Pa. 53, 28 Atl. 205.

The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made; and though, where two constructions are permissible, the one will be followed which is most favorable to the insured, yet the contract must be construed according to the ordinary sense and meanings of the terms used. If the insured cannot bring himself within the conditions of the policy, he is not entitled to

¹ As to conditions subsequent in deeds, see Cent. Dig. vol. 16, "Deeds," cols. 637, 638, § 488.

recover for the loss (*Imperial Fire Ins. Co. v. Coos Co.*, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231).

Since a warranty cannot be extended by construction, the forfeiture of a policy for a breach of promissory warranty or condition will not be permitted beyond the extent expressly provided for in the contract.

United States Fire & Mar. Ins. Co. v. Kimberly, 34 Md. 224, 6 Am. Rep. 325; *Thwing v. Great Western Ins. Co.*, 103 Mass. 401, 4 Am. Rep. 567; *Merchants' Ins. Co. v. Story*, 13 Tex. Civ. App. 124, 35 S. W. 68.

(b) What constitutes breach of warranty or condition.

The fundamental difference between affirmative and promissory warranties is shown where it is attempted to define what shall constitute a breach of such warranties. A breach of an affirmative warranty consists in the falsehood of the affirmation when made, while the breach of a promissory warranty, which is in its nature executory, consists in the nonperformance of the stipulation (*Cowan v. Phenix Ins. Co.*, 78 Cal. 181, 20 Pac. 408). In determining what constitutes a breach of promissory warranty or condition subsequent, the scope of the warranty or condition is of course an important factor. So, where a policy covering a stave mill contained warranties as to certain precautions against fire, they were held to apply only in view of the usual mode of conducting such business, and, as it was customary to shut down stave mills at certain times of the year, the warranty would not impose on insured the duty of continuing its operation at all times, contrary to the usual custom (*May v. Buckeye Mut. Ins. Co.*, 25 Wis. 291, 3 Am. Rep. 76).

Since promissory warranties and conditions subsequent refer only to matters subsequent to the issuance of the policy, a breach cannot be predicated on facts existing at the time the policy is issued.

Orient Ins. Co. v. Burrus, 23 Ky. Law Rep. 656, 63 S. W. 453; *Uhler v. Farmers' Am. Ins. Co.*, 4 Leg. Gaz. (Pa.) 354; *Hackett v. Philadelphia Underwriters*, 79 Mo. App. 16.

And when a policy is issued with knowledge that a continuing warranty or condition is not complied with, a temporary compliance does not revive the warranty or condition so that the subsequent noncompliance will constitute a breach (*Bennett v. Agricultural Ins. Co.*, 106 N. Y. 243, 12 N. E. 609).

In view of the general rule applied in marine insurance in relation to deviation, it may be stated as a principle that mere intention

not to comply with a condition does not constitute a breach of such condition.

Marine Ins. Co. v. Tucker, 3 Cranch, 357, 2 L. Ed. 466; *Maryland Ins. Co. v. Woods*, 10 U. S. 29, 3 L. Ed. 143; *Coffin v. Newburyport Marine Ins. Co.*, 9 Mass. 436; *Snow v. Columbian Ins. Co.*, 48 N. Y. 624, 8 Am. Rep. 578; *Arnold v. Pacific Mut. Ins. Co.*, 78 N. Y. 7; *Winter v. Delaware Ins. Co.*, 30 Pa. 334.

In accordance with the foregoing is the principle that an attempted noncompliance with a condition will not constitute a breach if in fact it was not accomplished (*Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6).

If the condition is in the form of an agreement to do a certain act, the question whether there is a breach depends on whether a reasonable time has elapsed within which to carry out the intent thus indicated (*Murdock v. Chenango County Mut. Ins. Co.*, 2 N. Y. 210). A similar rule was asserted in *Lindsey v. Union Mut. Fire Ins. Co.*, 3 R. I. 157, where the building insured was to be moved a short distance, but the loss occurred before the removal took place.

(c) Same—Strict or substantial compliance.

The courts are not agreed as to the extent to which a promissory warranty must be complied with. In a number of well-considered cases it has been stated as a general principle that a warranty is a condition precedent and must be strictly complied with. Though the warranty is not an affirmative, but a promissory, warranty, the law does not make any difference between the two where the warranty is expressed on the face of the instrument.

This principle governed *Calbreath v. Gracy*, 4 Fed. Cas. 1030; *Petit v. German Ins. Co. (C. C.)* 98 Fed. 800; *Bulkley v. Derby Fishing Co.*, 1 Conn. 572; *Viele v. Germania Ins. Co.*, 26 Iowa, 9, 96 Am. Dec. 83; *Hutchinson v. Western Ins. Co.*, 21 Mo. 97, 64 Am. Dec. 218; *Buffalo Steam Engine Works v. Sun Mut. Ins. Co.*, 17 N. Y. 401.

In view of the fact that the courts of a single jurisdiction do not always agree as to the necessity of strict compliance, we are perhaps justified in assuming that, whenever strict compliance has been required, the warranty or stipulation has been regarded as a condition precedent.

The rule that strict compliance is necessary is also asserted in *Sayles v. Northwestern Ins. Co.*, 21 Fed. Cas. 609; *McKenzie v. Scottish*

Union & National Ins. Co., 112 Cal. 548, 44 Pac. 922; Grant v. Lexington Fire & Life Ins. Co., 5 Ind. 23, 61 Am. Dec. 74; McLoon v. Commercial Mut. Ins. Co., 100 Mass. 472, 1 Am. Rep. 129; Odiorne v. New England Mut. Marine Ins. Co., 101 Mass. 551, 3 Am. Rep. 401; Ashworth v. Builders' Mut. Fire Ins. Co., 112 Mass. 422, 17 Am. Rep. 117; Poor v. Humboldt Ins. Co., 125 Mass. 274, 28 Am. Rep. 228; Lovett v. China Mut. Ins. Co., 54 N. E. 838, 174 Mass. 108; First Nat. Bank v. Insurance Co. of North America, 50 N. Y. 45; Ryan v. Providence Washington Ins. Co., 79 N. Y. Supp. 460, 79 App. Div. 816.

On the other hand, the weight of reasoning and authority is that promissory warranties are in the nature of conditions subsequent, substantial compliance with which is sufficient. A leading case is Cady v. Imperial Ins. Co., 4 Fed. Cas. 984, where the court, after calling attention to the strict rules applied in the case of affirmative warranties, says: "Somewhat different rules are to be applied to the executory stipulations in the policy which are sometimes denominated 'promissory warranties,' as such stipulations are rather to be regarded as having the legal effect of representations than of warranties as understood in the law of marine insurance, though partaking in some measure of the character of both. They are like representations in requiring that the facts shall be true and correct, and, so far as they are executory, that they shall be substantially performed, but not like warranties in requiring an exact and literal compliance. It is enough, therefore, if these statements relied on as the basis of the contract are made in good faith and without intent to deceive; that they are substantially true and correct as to existing circumstances, and substantially complied with so far as they are executory and regard the future."

This principle is approved in James v. Lycoming Ins. Co., 13 Fed. Cas. 309; Western Assurance Co. v. Redding, 68 Fed. 708, 15 C. C. A. 619; Liverpool & London & Globe Ins. Co. v. Kearney, 94 Fed. 314, 36 C. C. A. 265, affirming 46 S. W. 414, 2 Ind. T. 67; Sheldon v. Hartford Fire Ins. Co., 22 Conn. 235, 58 Am. Dec. 420; London & Lancashire Fire Ins. Co. v. Gertelsen, 106 Ky. 815, 51 S. W. 617; Williams v. New England Mut. Fire Ins. Co., 31 Me. 219; McGannon v. Michigan Millers' Mut. Fire Ins. Co., 127 Mich. 636, 87 N. W. 61, 54 L. R. A. 739, 89 Am. St. Rep. 501; Hanover Fire Ins. Co. v. Gustin, 40 Neb. 828, 59 N. W. 375; Frisbie v. Fayette Mut. Ins. Co., 27 Pa. 325; Palatine Ins. Co. v. Brown (Tex. Civ. App.) 34 S. W. 462; Phoenix Assur. Co. of London v. Stenson (Tex. Civ. App.) 79 S. W. 866.

That conditions subsequent need be only substantially complied with is asserted in James v. Lycoming Ins. Co., 13 Fed. Cas. 309; Bankhead

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v. Des Moines Ins. Co., 70 Iowa, 387, 30 N. W. 740; *McNutt v. Virginia Fire & Marine Ins. Co.* (Tenn. Ch. App.) 45 S. W. 61.

In Illinois the rule was laid down in a leading case (*Aurora Fire Ins. Co. v. Eddy*, 49 Ill. 106) that substantial compliance with promissory warranties relating to precautions against fire was sufficient, though, as applied to the iron-safe clause, a different view has been taken by the Appellate Court.

Farmers' Fire Ins. Co. v. Bates, 60 Ill. App. 39; *German Ins. Co. of Freeport, Ill. v. Same*, 60 Ill. App. 43.

In Indiana, notwithstanding the *Grant Case*, 5 Ind. 23, 61 Am. Dec. 74, the courts have, in recent cases, approved the rule that substantial compliance is sufficient.

Indiana Farmers' Live Stock Ins. Co. v. Rundell, 7 Ind. App. 426, 84 N. E. 588; *Phoenix Ins. Co. v. Benton*, 87 Ind. 132.

In the Massachusetts cases cited above as supporting the rule that strict compliance is necessary, it appears that the particular warranties were express stipulations on which the very existence of the risk was made to depend. Such cases cannot, therefore, be regarded as overruling those earlier cases in which it was held that a substantial compliance with a promissory warranty is all that is required.

Underhill v. Agawam Mut. Fire Ins. Co., 6 Cush. (Mass.) 440; *Crocker v. People's Mut. Fire Ins. Co.*, 8 Cush. (Mass.) 79; *Parker v. Bridgeport Ins. Co.*, 10 Gray (Mass.) 302.

The supreme court of Pennsylvania regards a substantial compliance with a condition subsequent as sufficient (*Fame Insurance Co.'s Appeal*, 83 Pa. 396), though recognizing the rule that strict compliance is necessary where the condition is in the nature of an absolute promise in reference to the risk.

Farmers' & Mechanics' Ins. Co. v. Simmons, 30 Pa. 299; *McClure v. Watertown Fire Ins. Co.*, 90 Pa. 277, 35 Am. Rep. 656.

So, in Wisconsin, the rule that substantial compliance is sufficient is supported by abundant authority.

Blumer v. Phoenix Ins. Co., 45 Wis. 622, on rehearing 48 Wis. 535, 4 N. W. 674, 33 Am. Rep. 830; *Copp v. German-American Ins. Co.*, 51 Wis. 637, 8 N. W. 127; *Kircher v. Milwaukee Mechanics' Mut. Ins. Co.*, 74 Wis. 470, 43 N. W. 487, 5 L. R. A. 779.

The rule thus laid down cannot be regarded as overruled by *Johnston v. Northwestern Live Stock Ins. Co.*, 107 Wis. 337, 83 N. W. 641, where it was said that a promissory warranty to telegraph a live stock insurance company at once, in case of the sickness of a horse insured, must be strictly fulfilled. The point really decided was that failure to comply with a warranty is not excused by the fact that a compliance would have been useless or immaterial.

In accord with the general principle that substantial compliance is sufficient is the rule announced in some cases that a mere temporary change of condition is not such a noncompliance as will constitute a breach of warranty or condition subsequent.

Reference may be made to *Albion Lead Works v. Williamsburg City Fire Ins. Co.* (C. C.) 2 Fed. 479; *King Brick Mfg. Co. v. Phoenix Ins. Co.*, 164 Mass. 291, 41 N. E. 277; *Crete Farmers' Mut. Township Ins. Co. v. Miller*, 70 Ill. App. 599; *Lapene v. Sun Ins. Co.*, 8 La. Ann. 1, 58 Am. Dec. 668; *Organ v. Hibernia Fire Ins. Co.*, 3 Mo. App. 576; *Lyons v. Providence Washington Ins. Co.*, 14 R. I. 109, 51 Am. Rep. 364, reversing 13 R. I. 847, 48 Am. Rep. 32; *Phoenix Assur. Co. of London v. Munger Improved Cotton Mach. Mfg. Co.* (Tex. Civ. App.) 49 S. W. 271.

From the general rules applicable in the case of affirmative representations, it follows naturally that, so far as promissory representations are concerned, substantial compliance is all that is required.

Reference may be made to *Lunt v. Boston Marine Ins. Co.* (C. C.) 6 Fed. 562; *Houghton v. Manufacturers' Mut. Fire Ins. Co.*, 8 Metc. (Mass.) 114, 41 Am. Dec. 489; *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416, 59 Am. Dec. 192; *King Brick Mfg. Co. v. Phoenix Ins. Co.*, 164 Mass. 291, 41 N. E. 277; *Murray v. Alsop*, 8 Johns. Cas. (N. Y.) 47; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567.

Where the policy prohibited the keeping of certain hazardous articles on the premises (*Maryland Fire Ins. Co. v. Whiteford*, 31 Md. 219, 100 Am. Rep. 45), an indorsement thereon that a certain amount of such articles might be kept must be substantially complied with.

That substantial compliance which is sufficient in the case of promissory warranties or representations may be defined as the adoption of such precautions or the performance of acts which, though not exactly as stated in the application, will nevertheless accomplish the same purpose, and may reasonably be considered as

equally or more efficacious (*Houghton v. Manufacturers' Mut. Fire Ins. Co.*, 8 Metc. [Mass.] 114, 41 Am. Dec. 489).

(d) Effect of breach in general.

Though the effect of a breach of a promissory warranty or condition subsequent is practically the same as the breach of an affirmative warranty, there is a distinction when viewed in a strictly legal aspect. Theoretically a breach of an affirmative warranty prevents the risk from attaching, and, strictly speaking, the policy never becomes an existing contract. On the other hand, the breach of a promissory warranty or condition in no way affects the policy prior thereto, but operates only to terminate the contract from the time of the breach.

Clark v. Manufacturers' Ins. Co., 5 Fed. Cas. 889; *Indiana Farmers' Live Stock Ins. Co. v. Byrnett*, 9 Ind. App. 448, 86 N. E. 779; *Maupin v. Scottish Union & National Ins. Co.*, 53 W. Va. 557, 45 S. E. 1003.

It is, of course, an elementary principle, that the breach of a promissory warranty, representation, or condition subsequent will forfeit the policy.

It is deemed sufficient to refer to *Southern Ins. Co. v. White*, 58 Ark. 277, 24 S. W. 425; *Glendale Woolen Co. v. Protection Ins. Co.*, 21 Conn. 19, 54 Am. Dec. 309; *Whitney v. Ocean Ins. Co.*, 14 La. 485, 33 Am. Dec. 595; *Smith v. Saratoga County Mut. Fire Ins. Co.*, 3 Hill (N. Y.) 508; *Wilson v. Hampden Fire Ins. Co.*, 4 R. I. 159.

In accord with the principle already adverted to, that a warranty will not be extended by construction or forfeiture permitted beyond the extent provided for in the contract, it has been held in some cases that the noncompliance with the terms of a warranty or condition will not terminate the policy unless forfeiture is expressly provided for in the contract.

Arkansas Ins. Co. v. Bostick, 27 Ark. 539; *Sanford v. California Farmers' Mut. Fire Ins. Ass'n*, 63 Cal. 547; *Howard v. Ky. & L. Mut. Ins. Co.*, 18 B. Mon. (Ky.) 282; *Tiefenthal v. Citizens' Mut. F. Ins. Co.*, 53 Mich. 306, 19 N. W. 9; *Queen Ins. Co. v. Excelstior Milling Co.* (Kan. Sup.) 76 Pac. 423.

So, resolutions passed by the board of directors of a mutual company suspending policies under certain conditions cannot affect the rights of a policy holder whose contract was made long prior there-

to, and who had no knowledge or notice of the passage of such resolution (*Martin v. Mutual Fire Ins. Co.*, 45 Md. 51).

But the implication that a clause providing for the termination of the contract in certain contingencies is not to be enforced, which sometimes arises when an existing fact is at variance with such clause, does not arise when the clause has express relation to the future. Thus, where a policy on a manufacturing establishment provided that it should be void if the establishment ceased operation, the fact that the person insured was in the habit of closing the factory during the dull season, or that there was a general custom of manufacturers in the same business to do so, of which custom the insurance agent had knowledge, could not affect the plain provision of the policy (*Stone v. Howard Ins. Co.*, 153 Mass. 475, 27 N. E. 6, 11 L. R. A. 771). So, it has been said that the effect of a breach of warranty is in no way dependent on the cause to which the non-compliance is attributable (*Calbreath v. Gracy*, 4 Fed. Cas. 1030).

Forfeiture cannot be predicated on noncompliance with a condition that is in the nature of an exception of risk, rather than a promissory warranty or condition subsequent, such as a clause reciting that the insurer will not be liable for loss or damage caused by the use of certain prohibited articles (*Jones v. Howard Ins. Co.*, 117 N. Y. 103, 22 N. E. 578), or warranting the insurers free from damage or loss arising from illicit trade (*Goicoechea v. Louisiana State Ins. Co.*, 6 Mart. N. S. [La.] 51, 17 Am. Dec. 175).

(e) Effect as dependent on materiality.

The principle that a warranty must be complied with, irrespective of the materiality of the fact warranted, is also applied in the case of promissory warranties, and it may be stated as an established rule that, if a statement or promise relating to the future amounts to a warranty, the question of its materiality is eliminated, and the only concern of the court, in the absence of statutory provisions to the contrary, is to determine whether there has been a compliance or noncompliance with the promise.

The rule is asserted in *Calbreath v. Gracy*, 4 Fed. Cas. 1030; *Hearn v. Equitable Safety Ins. Co.*, 11 Fed. Cas. 965; *Southern Ins. Co. v. Parker*, 61 Ark. 207, 32 S. W. 507; *Scottish Union & Nat. Ins. Co. v. Stubbs*, 98 Ga. 754, 27 S. E. 180; *Ætna Ins. Co. v. Norman*, 12 Ind. App. 652, 40 N. E. 1116; *Germier v. Springfield Fire & Marine Ins. Co.*, 33 South. 361, 109 La. 341; *Burgess v. Equitable Marine Ins. Co.*, 126 Mass. 70, 30 Am. Rep. 654; *Duncan v. Sun*

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Fire Ins. Co., 6 Wend. (N. Y.) 488, 22 Am. Dec. 539; Mead v. Northwestern Ins. Co., 7 N. Y. 580; Ripley v. Aetna Ins. Co., 30 N. Y. 136, 86 Am. Dec. 362; Cogswell v. Chubb, 1 App. Div. 93, 36 N. Y. Supp. 1076.

The same rule has been applied in the case of conditions subsequent or stipulations in the nature of conditions.

Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231; Lozano v. Palatine Ins. Co., 78 Fed. 278, 24 C. C. A. 85.

As in the case of affirmative warranties, the effect of a breach of a promissory warranty may be qualified by the recitals of the policy. Thus, where the policy contains the additional provision that the statements were true "so far as material to the risk," a failure to comply with a promissory warranty will not forfeit the policy unless the act warranted was material to the risk.

Waterbury v. Dakota Fire & Marine Ins. Co., 6 Dak. 468, 48 N. W. 697; Redman v. Hartford Fire Ins. Co., 47 Wis. 89, 1 N. W. 393, 32 Am. Rep. 751.

The strict rule has also been modified by adopting the principle that a condition will not be construed as a promissory warranty if it relates to an immaterial matter, and any other construction is possible (Kister v. Lebanon Mut. Ins. Co., 128 Pa. 553, 18 Atl. 447, 5 L. R. A. 646, 15 Am. St. Rep. 696).

Reference may also be made, in this connection, to the dissenting opinion in Blumer v. Phoenix Ins. Co., 45 Wis. 633, where it was said that a warranty will not be considered as a continuing warranty unless it is material to the risk, nor will a fact be presumed to be material to the risk unless specific inquiry is made concerning it.

As in the case of affirmative representations, promissory representations must be material to the risk in order that a breach thereof shall work a forfeiture.

Hearn v. Equitable Safety Ins. Co., 11 Fed. Cas. 965; Sheldon v. Hartford Fire Ins. Co., 22 Conn. 235, 58 Am. Dec. 420; Aetna Ins. Co. v. Norman, 12 Ind. App. 652, 40 N. E. 1116.

The materiality of a statement does not, however, depend entirely on the contingency of injury resulting from a failure to make it good (Miller v. Western Farmers' Mut. Ins. Co., 1 Handy [Ohio]

208), but upon the same elements as in the case of affirmative warranties and representations.²

(2) Effect as dependent on increase of risk.

One of the questions involved in the determination of the materiality of an affirmative representation or warranty is whether, if the fact were different, there would be an increase of the risk. So, too, whether the rule of strict compliance prevails, or the rule of substantial compliance, it must be determined whether the variance between actual and the asserted or promised condition is material. In determining whether the variance is material, the best test is whether the change from the fact said to exist, or the condition promised to be maintained, is such as to increase the risk (*Nicoll v. American Ins. Co.*, 18 Fed. Cas. 231). Generally speaking, it may be regarded as elementary that where the risk is increased by the change the policy will be forfeited.

Viele v. Germania Ins. Co., 26 Iowa, 9, 96 Am. Dec. 83; *Martin v. Capital Ins. Co.*, 85 Iowa, 643, 52 N. W. 534; *Franklin Fire Ins. Co. v. Findlay*, 6 Whart. (Pa.) 483, 37 Am. Dec. 430; *Boatwright v. Aetna Ins. Co.*, 1 Strob. (S. C.) 281.

Conversely, it has been laid down in other cases that, in the absence of a special condition declaring the policy void in the event of certain changes taking place, an increase of risk is necessary before forfeiture can be predicated on such change.

Hoffecker v. New Castle County Mutual Ins. Co., 4 Houst. (Del.) 306; *Herrick v. Union Mut. Fire Ins. Co.*, 48 Me. 558, 77 Am. Dec. 244; *Driscoll v. German-American Ins. Co.*, 74 Hun, 153, 26 N. Y. Supp. 646; *Moriarty v. United States Fire Ins. Co.*, 19 Tex. Civ. App. 669, 49 S. W. 132.

So, too, it has been held that, even where the policy contains a clause prohibiting certain changes in the subject of the insurance, noncompliance with such provisions will not result in forfeiture unless the change increases the risk.

Miller v. Oswego & Onondago Ins. Co., 18 Hun (N. Y.) 526; *Russell v. Cedar Rapids Ins. Co.*, 71 Iowa, 69, 32 N. W. 95.

This principle has been applied even where the policy expressly provided that it should be void if the risk be increased, and it has been held that conditions specially prohibited would not forfeit the policy unless the risk was increased (*Russell v. Cedar Rapids Ins.*

² See ante, p. 1154.

Co., 78 Iowa, 216, 42 N. W. 654, 4 L. R. A. 538). In *Sexton v. Hawkeye Ins. Co.*, 69 Iowa, 99, 28 N. W. 462, the court went so far as to intimate that if a condition required the performance of acts which did not affect the hazard, or the nonperformance of which could not work the insurer any prejudice, the courts would not regard it. Similarly it has been held that a mere temporary change will not effect a forfeiture, but that there must be an actual increase of risk (*Fireman's Ins. Co. v. Cecil*, 12 Ky. Law Rep. 259). The change must be of a permanent nature (*Adair v. Southern Mut. Ins. Co.*, 107 Ga. 297, 33 S. E. 78, 45 L. R. A. 204, 73 Am. St. Rep. 122).

But the doctrine of these cases cannot be regarded as in accordance with the weight of authority. On the contrary, the true rule seems to be that, where the performance of an act or the existence of a condition is expressly required or prohibited by the policy, the noncompliance with such requirement or prohibition will forfeit the policy, whether there is an increase of risk or not.

Dover Glass Works Co. v. American Fire Ins. Co., 29 Atl. 1089, 1 Marv. (Del.) 32, 65 Am. St. Rep. 264; *Phoenix Ins. Co. v. Lawrence*, 4 Metc. (Ky.) 9, 81 Am. Dec. 521; *Burgess v. Equitable Marine Ins. Co.*, 126 Mass. 70, 30 Am. Rep. 654; *Gasner v. Metropolitan Ins. Co.*, 13 Minn. 483 (Gil. 447); *Newport Imp. Co. v. Home Ins. Co.*, 163 N. Y. 237, 57 N. E. 475.

Of course, if the clause especially refers to an increase of the risk as an element in determining the effect of noncompliance therewith, an increase of risk must ordinarily accompany the change to forfeit the policy.

Walradt v. Phoenix Ins. Co., 136 N. Y. 375, 32 N. E. 1063, 32 Am. St. Rep. 752; *Hawkes v. Dodge County Mut. Ins. Co.*, 11 Wis. 188; *Eddy v. Hawkeye Ins. Co.*, 70 Iowa, 472, 30 N. W. 808, 59 Am. Rep. 444

Policies generally contain a clause to the effect that changes in the condition of the subject of the insurance which increase the risk shall render the contract void. As pointed out in a leading case (*Houghton v. Manufacturers' Mut. Fire Ins. Co.*, 8 Metc. [Mass.] 114, 41 Am. Dec. 489), this is a stipulation and condition which must be substantially complied with. It binds the insured not only not to make any alterations or changes in the structure or use of the property, but also prohibits the introduction of any practice, custom, or mode of conducting business which would materi-

ally increase the risk, and prohibits the discontinuance of any precaution represented in the application to be adopted and practiced with a view to diminish the risk. Therefore, so far as the representations set forth usages and practices observed as to the mode of conducting the business and precautions against fire, it is a stipulation that such modes of conducting business shall be substantially observed, and such precautions substantially continued to be taken.

Reference may also be made to *Viele v. Germania Ins. Co.*, 28 Iowa, 9, 96 Am. Dec. 83; *Janvrin v. Rockingham Farmers' Mut. Fire Ins. Co.*, 70 N. H. 85, 46 Atl. 686.

Under such a condition, a change which does not increase the risk will not invalidate the insurance.

Parker v. Arctic Fire Ins. Co., 59 N. Y. 1; *Lattomus v. Farmers' Mutual Fire Ins. Co.*, 8 Houst. (Del.) 404.

The clause declaring that the policy shall be void if the hazard be increased by any means within the control of the insured refers to means not specifically referred to in the policy itself, and does not modify the force of other clauses declaring the policy void if specified acts are done or omitted (*Norwaysz v. Thuringia Ins. Co.*, 204 Ill. 334, 68 N. E. 551). The clause must be regarded as inserted for the purpose of preventing such a construction (*Boatwright v. Ætna Ins. Co.*, 1 Strob. [S. C.] 281). On the other hand, if a certain contingency is provided for by a special condition, this controls the general condition against increase of risk, so that it cannot be shown that while the special provision is not violated, yet the facts which it was claimed constituted a violation of such special provision increased the risk (*Herrman v. Merchants' Ins. Co.*, 81 N. Y. 184, 37 Am. Rep. 488).

It was a common provision in insurance policies before the adoption of the standard form, and is one of the conditions of the standard policy, that in case of a renewal of the policy any increase in the hazard must be made known to the insurer, or the policy will be void. It naturally follows that a change in the condition of the property, which does not increase the risk, will not affect the renewal (*Parker v. Arctic Fire Ins. Co.*, 59 N. Y. 1). It is equally obvious that, if the change increases the risk, the renewal is void.

Peoria Sugar Refining Co. v. People's Fire Ins. Co., 52 Conn. 581; *Cole v. Germania Fire Ins. Co.*, 99 N. Y. 36, 1 N. E. 38; *Wolff v. Oswego & Onondago Ins. Co.*, 6 N. Y. St. Rep. 548; *Brueck v. Phoenix Ins. Co.*, 21 Hun (N. Y.) 542.

(g) Same—What constitutes increase of risk.

It cannot be said, as a matter of law, that any particular change in the condition of the property insured, or the doing or omission of a particular act, increases the risk. What constitutes an increase of risk is essentially a question of fact.

Reference may be made to *Firemen's Ins. Co. v. Appleton Paper & Pulp Co.*, 161 Ill. 9, 43 N. E. 713; *Ætna Ins. Co. v. Norman*, 12 Ind. App. 652, 40 N. E. 1116; *Runkle v. Hartford Ins. Co.*, 99 Iowa, 414, 68 N. W. 712; *Liverpool, London & Globe Ins. Co. v. McGuire*, 52 Miss. 227; *Halpin v. Insurance Company of North America*, 10 N. Y. St. Rep. 345; *Moriarty v. United States Fire Ins. Co.*, 19 Tex. Civ. App. 669, 49 S. W. 132.

It is necessary that the increase of risk which will avoid the policy should be a substantial increase (*Janvrin v. Rockingham Farmers' Mut. Fire Ins. Co.*, 70 N. H. 35, 46 Atl. 686). As intimated in the preceding subdivision, increase of risk cannot be based on some merely temporary change, but must be permanent in its character.

Adair v. Southern Mutual Ins. Co., 107 Ga. 297, 33 South. 78, 45 L. R. A. 204, 73 Am. St. Rep. 122; *Fireman's Ins. Co. v. Cecil*, 12 Ky. Law Rep. 259.

In one case, at least, the court has gone so far as to hold that a clause declaring that the policy should be void if there was any increase of risk from means within the control of the insured refers to some permanent change purposely undertaken, and not to something the result of mere negligence on the part of the assured (*Albion Lead Works v. Williamsburg City Fire Ins. Co.* [C. C.] 2 Fed. 479). It has even been intimated that the question whether there has been an increase of risk depends on whether the change was connected with the cause of loss (*Schmidt v. Peoria Marine & Fire Ins. Co.*, 41 Ill. 295).⁸ In any event there must be an actual, and not merely a possible, increase of danger (*Plinsky v. Germania Fire & Marine Ins. Co.* [C. C.] 32 Fed. 47). Thus, it has been held that a failure to comply with the iron-safe clause was not an increase of risk, as compliance therewith had no effect on the risk, but merely tended to the better preservation of evidence.

Phoenix Ins. Co. v. Angel, 38 S. W. 1067, 18 Ky. Law Rep. 1034; *Ottizen's Ins. Co. v. Crist*, 56 S. W. 658, 22 Ky. Law Rep. 47.

⁸ Termination of risk and relation to cause of loss, see post, p. 1889.

Where a policy provides that it shall be void if the risk is increased, the question whether there has been an increase of risk is to be determined in view of the ordinary dangers to which the property is exposed. Thus, when the building became vacant, whether this was an increase of the risk was not dependent on the fact that the insured might have secured a vicious tenant, thus actually increasing the risk by the occupancy of the building, but the question was to be determined in view of the character of average ordinary tenants (*Luce v. Dorchester Mut. Fire Ins. Co.*, 110 Mass. 361). The stipulation as to increase of risk cannot be extended to cover risks created on adjacent property of independent proprietors who use their property in a legitimate manner (*Sun Ins. Co. v. Texarkana Foundry & Machine Works Co.*, 3 Willson, Civ. Cas. Ct. App. [Tex.] § 320). Generally speaking, an increase of risk does not occur where the use of the property insured remains the same as it was at the inception of the policy, and as was then known to the insurer to be the probable use of the building.

City of New York v. Exchange Fire Ins. Co., 22 N. Y. Super. Ct. 424, and *Same v. Hamilton Fire Ins. Co.*, 23 N. Y. Super. Ct. 537.

The extent of the change, though still keeping within the character of the original risk, may be the determining factor in answering the question whether there has been an increase of the risk (*Alston v. Greenwich Ins. Co.*, 100 Ga. 282, 29 S. E. 266). In such cases it becomes a question for the jury (*Smith v. Mechanics' & Traders' Fire Ins. Co.*, 32 N. Y. 399).

Though, in an action on a policy of insurance, which is defended on the ground of a change in use of the insured premises, evidence on the part of the insured, tending to show that by such change the risk was greatly decreased, is competent (*Smith v. Mechanics' & Traders' Fire Ins. Co.*, 32 N. Y. 399), yet where a policy provides for forfeiture in case of increase of risk, and there are two or more changes in the building, one of which increases the risk, the forfeiture is not prevented by the fact that the other changes diminished the risk (*Albion Lead Works v. Williamsburg City Fire Ins. Co.* [C. C.] 2 Fed. 479).

In determining whether the change constitutes an increase of risk, the fact that in view of such a change in the risk a higher premium would ordinarily be charged may be taken into consideration.

Planters' Mut. Ins. Co. v. Rowland, 86 Md. 236, 7 Atl. 257; *Schenck v. Mercer County Mut. Fire Ins. Co.*, 24 N. J. Law, 447.

(h) Effect as dependent on knowledge and intent of insured.

Though there is some difference of opinion as to the extent to which the effect of a breach of a promissory warranty or condition subsequent is dependent on the insured's knowledge of the breach, the courts are agreed that mere ignorance of the condition alleged to have been broken does not excuse the insured.

Reference may be made to *Cleaver v. Traders' Ins. Co.*, 71 Mich. 114, 39 N. W. 571, 15 Am. St. Rep. 275; *Quinlan v. Providence Washington Ins. Co.*, 133 N. Y. 356, 31 N. E. 31, 28 Am. St. Rep. 645; *Fuller v. Madison Mut. Ins. Co.*, 38 Wis. 599; *Morrison v. Insurance Co. of North America*, 69 Tex. 353, 6 S. W. 605, 5 Am. St. Rep. 63.

The rule is based on the general principle that, by accepting a policy of insurance, insured became bound by the conditions contained in such policy (*Allen v. German-American Ins. Co.*, 123 N. Y. 6, 25 N. E. 309).

As intimated above, the courts are not agreed as to the effect of the ignorance of the insured of the breach of conditions or warranties. In some of the early cases the principle is laid down that a breach of warranty or condition will forfeit the policy, irrespective of the knowledge or ignorance of the insured.

Wood v. Hartford Fire Ins. Co., 13 Conn. 533, 35 Am. Dec. 92; *Duncan v. Sun Fire Ins. Co.*, 6 Wend. (N. Y.) 488, 22 Am. Dec. 539; *Mead v. Northwestern Ins. Co.*, 7 N. Y. 530.

The rule asserted in several well considered cases is that, where the policy contains an absolute condition declaring it void in certain contingencies, a forfeiture is not excused by the insured's ignorance of the facts constituting the breach.

This is the principle governing *Schuermann v. Dwelling House Ins. Co.*, 161 Ill. 437, 43 N. E. 1093, 52 Am. St. Rep. 377, affirming 57 Ill. App. 200; *Norwaysz v. Thuringia Ins. Co.*, 204 Ill. 334, 68 N. E. 551; *Hartford Fire Ins. Co. v. Ross*, 23 Ind. 179, 85 Am. Dec. 452; *Kelly v. Worcester Fire Ins. Co.*, 97 Mass. 284; *Kohlmann v. Selvage*, 54 N. Y. Supp. 230, 34 App. Div. 380; *Straker v. Phenix Ins. Co.*, 101 Wis. 413, 77 N. W. 752.

Where a statement in the nature of a continuing warranty is qualified by a stipulation that the statements in the application are true so far as known to the insured, his knowledge becomes a controlling factor in determining the effect of a breach (*Redman v. Hartford Fire Ins. Co.*, 47 Wis. 89, 1 N. W. 393, 32 Am. Rep. 751). So, where the condition is that the policy shall be void if the risk

be increased by any means "within the knowledge of the insured," the effect of a breach is dependent on his knowledge thereof.

Waggonick v. Westchester Fire Ins. Co., 34 Ill. App. 629; *Gasner v. Metropolitan Ins. Co.*, 13 Minn. 483 (Gil. 447).

It has been held that a change affecting the risk forfeited the policy, though the insured did not realize that his acts did increase the risk (*Phoenix Ins. Co. v. Parsons*, 129 N. Y. 86, 29 N. E. 87). But in Pennsylvania the contrary rule has been announced, and it has been held that the insured must not only have knowledge of the breach, but that it increased the risk.

The rule is asserted in *Lebanon Mut. Ins. Co. v. Losch*, 109 Pa. 100; *Rife v. Lebanon Mut. Ins. Co.*, 115 Pa. 530, 6 Atl. 65, 2 Am. St. Rep. 580; *McKee v. Susquehanna Mut. Fire Ins. Co.*, 135 Pa. 544, 19 Atl. 1087; *McGonigle v. Susquehanna Mut. Fire Ins. Co.*, 168 Pa. 1, 81 Atl. 868.

On the other hand, where the policy provides for an absolute forfeiture on the occurrence of certain events increasing the risk, as in *Yentzer v. Farmers' Mut. Ins. Co.*, 200 Pa. 325, 49 Atl. 767, it is not necessary to show knowledge by the insured of an increase of risk. The case is to be distinguished from *Rife v. Ins. Co.*, 115 Pa. 530, 6 Atl. 65, 2 Am. St. Rep. 580, as in that case it was the duty of the insured to give notice, and he could only give notice of that which he knew would increase the risk.

As in the case of affirmative representations, a violation of a continuing representation will not forfeit the policy unless accompanied by actual fraud.

Germania Fire Ins. Co. v. Deckard, 3 Ind. App. 361, 28 N. E. 868; *Ætna Ins. Co. v. Norman*, 12 Ind. App. 652, 40 N. E. 1116.

It is in accord with this rule that the noncompliance with stipulations construed as mere declarations of intention has been held not to forfeit the policy unless accompanied by fraud.

Bryant v. Ocean Ins. Co., 22 Pick. (Mass.) 200; *Kimball v. Ætna Ins. Co.*, 9 Allen (Mass.) 540, 85 Am. Dec. 786.

On the other hand, it has been said that the rule that a fraudulent intent is necessary to effect a forfeiture does not apply in the case of continuing warranties (*Germania Fire Ins. Co. v. Deckard*, 3 Ind. App. 361, 28 N. E. 868), or an express condition prohibiting change in the premises (*Kyte v. Commercial Union Assur. Co.*,

144 Mass. 43, 10 N. E. 518). But in the absence of an express prohibition or provision for forfeiture the element of fraud must be present.

Billings v. Tolland County Mut. Fire Ins. Co., 20 Conn. 139, 50 Am. Dec. 277; O'Leary v. German American Ins. Co., 100 Iowa, 390, 69 N. W. 686.

In accord with the last cases are those in which it is held that failure to strictly comply with conditions or statements executory in their nature, due to mere negligence, will not afford a ground of forfeiture, as negligence is one of the risks covered by the policy.

Reference may be made to Albion Lead Works v. Williamsburg City Fire Ins. Co. (O. C.) 2 Fed. 479; McKenzie v. Scottish Union & National Ins. Co., 112 Cal. 548, 44 Pac. 922; Des Moines Ice Co. v. Niagara Fire Ins. Co., 68 N. W. 600, 99 Iowa, 193.

As was said in the McKenzie Case, the negligence must be willful, gross, and amounting to misconduct, to afford a basis on which to predicate forfeiture.

(d) Same—Responsibility of insured for acts of third persons.

Closely connected with the phase of the subject discussed in the preceding subdivision is the question as to what extent the insured is responsible for the acts of third persons, servants, tenants, or adjoining owners, and the like. The rule has been laid down that the condition "that in case of any change by which the degree of risk is increased, without the written consent of the company, this policy shall be null and void," has reference only to a change produced by the act of the insured; such a change as the company could consent to, upon the application of the insured, and not to one occasioned by accident, or a cause over which the insured had no control. (Breuner v. Liverpool & London & Globe Ins. Co., 51 Cal. 101, 21 Am. Rep. 703.)

A similar doctrine was laid down in Atlantic Ins. Co. v. Manning, 8 Colo. 224; North American Fire Ins. Co. v. Zaenger, 63 Ill. 464; German Ins. Co. v. Wright, 6 Kan. App. 611, 49 Pac. 704.

So, it has been held that such a condition does not extend to property not under the control of the insured, so as to make him responsible for the acts of his neighbors and contiguous owners, and require him to keep informed as to the manner in which other persons in the neighborhood used their property (State Ins. Co. v.

Taylor, 14 Colo. 499, 24 Pac. 333, 20 Am. St. Rep. 281). That is to say, the stipulation cannot be extended to cover risks created on the adjacent property of an independent proprietor, who uses his own premises in a legitimate manner (*Sun Ins. Co. v. Texarkana Foundry & Machine Works Co.*, 3 Willson, Civ. Cas. Ct. App. [Tex.] § 320). But there is nothing unreasonable in a provision in a policy that, if the risk should be increased by the acts of third persons, notice should be given, and an additional premium paid (*Shepherd v. Union Mut. Fire Ins. Co.*, 38 N. H. 232).

Generally speaking, the insured is not responsible for the acts of a tenant, not authorized or assented to by him, though the risk be increased (*Martin v. Mutual Fire Ins. Co.*, 45 Md. 51). So, where a policy provides that it shall be void if the risk is increased by the act of the "assured," this word means the person who owns the property and who applied for the insurance, and not the one to whom the money is payable in case of loss, though such person had a lease on the premises (*Sanford v. Mechanics' Fire Ins. Co.*, 12 Cush. [Mass.] 541). On the other hand, if the condition violated was that if the risk should be increased by any means whatever, without the assent of the company, the policy should be void, an increase of risk occasioned by a tenant will forfeit the policy, though the insured was ignorant thereof (*Long v. Beeber*, 106 Pa. 466, 51 Am. Dec. 532). A similar rule has been announced in New York (*Hobby v. Dana*, 17 Barb. 111), though in a later case (*Cassa Marittima v. Phoenix Ins. Co.*, 129 N. Y. 490, 29 N. E. 962) the court of appeals held that the insured under a marine policy was not affected by acts of the master by which, without his knowledge, his lien, on which his insurable interest was based, was destroyed. The rule has, however, been approved by the supreme court of the United States, which has held that a violation of a condition by the tenant of the insured will forfeit the policy as well as a violation by insured himself. The theory of the court is that, when insured committed the care of the premises to the tenant, the latter became his representative (*Liverpool & London & Globe Ins. Co. v. Gunther*, 116 U. S. 113, 6 Sup. Ct. 306, 29 L. Ed. 575). And in *Howell v. Baltimore Equitable Society*, 16 Md. 377, it was said that where a fire policy contains a condition making it void if any unauthorized hazardous trade, increasing the risk, is carried on in the building, the policy is avoided though the trade was carried on by a tenant without the knowledge or consent of the insured.

Whatever may be regarded as the effect of the foregoing decisions as to acts of a tenant, it is well established that where certain acts are prohibited, if the insured uses due care and diligence to enforce the rule in that respect, the fact that the rule is broken by a servant or other person without the knowledge or consent of the insured will not afford a basis for forfeiture.

The rule is supported by *Aurora Fire Ins. Co. v. Eddy*, 55 Ill. 213; *Insurance Co. of North America v. McDowell*, 50 Ill. 120, 99 Am. Dec. 497; *White v. Mutual Fire Assur. Co.*, 8 Gray (Mass.) 566.

So, where an act is to be performed, a mere accidental noncompliance through the negligence of a servant will not impose on the insured the penalty of forfeiture.

Albion Lead Works v. Williamsburg City Fire Ins. Co. (C. C.) 2 Fed. 479; *McKenzie v. Scottish Union & National Ins. Co.*, 112 Cal. 548, 44 Pac. 922; *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416, 59 Am. Dec. 192.

But as pointed out in the *McKenzie Case*, the willful or gross negligence of the insured would be a ground of forfeiture.

(j) Effect of breach as to part of property insured.

One of the most interesting questions connected with forfeiture of the policy for breach of warranty or condition arises when the policy covers several different classes of property, and the breach is as to only one of them. Owing to its importance, this question will be discussed in a separate brief.⁴

(k) Statutory provisions.

It is, of course, obvious that, in states where special statutory provisions as to the effect of breach of warranty or condition exist, the insured may be relieved of the strict penalty of forfeiture. Thus, the provisions of the Georgia Civil Code of 1882, § 2803 (Civ. Code 1895, § 2098), declaring that a policy will not be avoided by false representations or warranties unless material to the risk, have been held to apply to promissory warranties (*Scottish Union & Nat. Ins. Co. v. Stubbs*, 98 Ga. 754, 27 S. E. 180). The provisions of the statute were also applied in *Nussbaum v. Northern Ins. Co.* (C. C.) 37 Fed. 524, 1 L. R. A. 704. The Tennessee statute (Shannon's Code, § 3306) providing that no warranty in the negotiation

⁴ See post, p. 1894.

of a contract or policy of insurance shall, unless made with intent to deceive, or unless the matter represented increase the risk or loss, avoid the policy, has been applied where a breach of the iron-safe clause was involved (*Continental Fire Ins. Co. v. Whitaker* [Tenn. Sup.] 79 S. W. 119, 64 L. R. A. 451). The Ohio statute (Rev. St. § 3643) providing, in effect, that the agent of the insurer shall examine the property, and in the absence of fraud the policy shall not be avoided for breach of condition unless the risk is thereby increased, has been held not to apply to matters arising after the policy takes effect (*Sun Fire Office v. Clark*, 53 Ohio St. 414, 42 N. E. 248, 38 L. R. A. 562). Such statutes do not apply to policies issued before the statute took effect (*Elliott v. Farmers' Ins. Co.*, 114 Iowa, 153, 86 N. W. 224).⁵

In *Citizens' Ins. Co. v. Crist*, 56 S. W. 658, 22 Ky. Law Rep. 47, following *Insurance Co. v. Angel*, 38 S. W. 1067, 18 Ky. Law Rep. 1034, the latter case was regarded as applying the Kentucky act of February 4, 1874, by which it is provided that all statements or descriptions in the application shall be deemed representations, and not warranties, nor shall any misrepresentations, unless material or fraudulent, prevent a recovery on the policy. In Michigan, the statute (Comp. Laws 1897, § 5180) provides that breach of condition shall not avoid the policy unless the insurer was prejudiced thereby. Such statute has been declared valid and applied in *McGannon v. Michigan Millers' Mut. Fire Ins. Co.*, 127 Mich. 636, 87 N. W. 61, 54 L. R. A. 739, 89 Am. St. Rep. 501, and *Boyer v. Grand Rapids Ins. Co.*, 124 Mich. 455, 83 N. W. 124, 83 Am. St. Rep. 338. The Missouri statute (Rev. St. 1899, § 7973) provides that no condition in the policy shall be construed as other than a mere representation, unless it is material to the risk insured against. It has been held (*Kennefick-Hammond Co. v. Norwich Union Fire Ins. Soc.* [Mo. App.] 80 S. W. 694) that the statute did not apply where there was a breach of the condition forbidding the keeping of dynamite on the premises, as the keeping of such an article was manifestly material to the risk.

The Maine statute (Rev. St. 1883, c. 49, § 20) provides that a change in the property insured, its use or occupancy, or a breach of condition shall not affect the liability of the insurer unless the

⁵ See, also, Rev. Civ. Code S. D. 1903, § 1860; Rev. Codes N. D. 1899, § 4512, and *Sanders' Civ. Code Mont.* § 3479, providing that a breach of warranty without fraud merely exonerates the insurer from the time that it occurs.

risk is materially increased. Under this statute there must be an actual increase of risk.

Cannell v. Phoenix Ins. Co., 59 Me. 582; *Lancy v. Home Ins. Co.*, 82 Me. 492, 20 Atl. 79; *White v. Phoenix Ins. Co.*, 83 Me. 279, 22 Atl. 167; *Id.*, 85 Me. 97, 26 Atl. 1049.

Whether there has been an increase of risk, within the terms of the statute, is properly one for the jury.

Thayer v. Providence Washington Ins. Co., 70 Me. 531; *White v. Phoenix Ins. Co.*, 83 Me. 279, 22 Atl. 167; *Id.*, 85 Me. 97, 26 Atl. 1049; *Atherton v. British America Assurance Co.*, 91 Me. 289, 39 Atl. 1008.

It has been held, too, that, while there is a presumption that vacancy increases the risk within the statute, the presumption is not conclusive, but the burden is on the defendant to show the fact (*White v. Phoenix Ins. Co.*, 83 Me. 279, 22 Atl. 167; *Id.*, 85 Me. 97, 26 Atl. 1049). But this burden may generally be met by the natural presumption that vacancy does increase the risk in the absence of countervailing proof (*Jones v. Granite State Fire Ins. Co.*, 90 Me. 40, 37 Atl. 326).

Where the property insured was a summer residence, and a person was in charge of it, who visited it frequently, the court raised, but did not decide, the question whether that fact was sufficient to overcome the natural presumption of increase of risk which arises from vacancy, so as to bring the breach under the operation of the statute (*Hanscom v. Home Ins. Co.*, 90 Me. 333, 38 Atl. 324). The statute cannot be evaded by conditions in the policy declaring it void (*Cannell v. Phoenix Ins. Co.*, 59 Me. 582). It does not, however, prevent a forfeiture by unauthorized assignment of the policy where the policy provides that it shall be void if assigned without the written consent of the company. Such an act is not a change in the property, its use or occupancy. (*Waterhouse v. Gloucester Fire Ins. Co.*, 69 Me. 409.)

The Code of Virginia of 1904, p. 1712, § 3252,* provides that a failure to perform any condition of a policy issued after the statute takes effect shall not be a valid defense, unless such action is printed in type as large or larger than long primer, or written with pen and ink. It has been held that the statute is valid, and not in conflict with the constitution, either of the state or of the United States,

* Code 1887, § 3252 [Va. Code 1904, p. 1712].

and that the reason stated in the preamble—that is, that conditions printed in smaller type are likely to escape the attention of the insured—is a sound one, and in accord with a wise public policy (*Dupuy v. Delaware Ins. Co.* [C. C.] 63 Fed. 680). The statute does not, however, apply to stipulations in the nature of exceptions of risk, and imposes no burden on the insured (*Cline v. Western Assur. Co.*, 101 Va. 496, 44 S. E. 700).

(1) Reinstatement of forfeited policy.

Where a policy has been forfeited by a breach of warranty or condition, it can be revived and reinstated only on a new agreement based on a valid consideration.

New York Central Ins. Co. v. Watson, 23 Mich. 486; *Home Fire Ins. Co. v. Kuhlman*, 58 Neb. 488, 78 N. W. 936, 76 Am. St. Rep. 111; *Diehl v. Adams County Mut. Ins. Co.*, 58 Pa. 443, 98 Am. Dec. 302.

So, where a fire insurance policy is rendered void by reason of a violation of its provisions, it is not revived by attaching thereto an agreement for the benefit of a mortgagee, without a new consideration therefor (*Baldwin v. German Ins. Co.*, 105 Iowa, 379, 75 N. W. 326). After a policy has become forfeited by breach of condition by the insured, the mortgagor, and an entry by the mortgagee, an agreement that the policy shall attach and cover the mortgagee's interest is void for want of consideration (*Davis v. German-American Ins. Co.*, 135 Mass. 251). Where a member failed to pay an assessment for nearly a year, by reason of which his policy lapsed, it could not be reinstated by a subsequent tender of the premium after loss (*Hill v. Farmers' Mutual Fire Ins. Co.*, 129 Mich. 141, 88 N. W. 392). And even if payment of premium subsequent to loss will reinstate the policy for the remainder of the term, it will not render the insurer liable for the loss, if the policy provides that the policy shall be suspended while a premium remains unpaid (*Houston v. Farmers' & Merchants' Ins. Co.*, 64 Neb. 138, 89 N. W. 635).

3. PLEADING AND PRACTICE RELATING TO BREACH OF PROMISSORY WARRANTY OR CONDITION.

- (a) Pleading—General rules.
- (b) Same—Sufficiency of declaration or complaint.
- (c) Same—Sufficiency of plea or answer.
- (d) Same—Sufficiency and effect of reply.
- (e) Evidence—Presumptions and burden of proof.
- (f) Same—Admissibility and sufficiency.
- (g) Questions for court or jury.
- (h) Trial and review.

(a) Pleading—General rules.

After the policy has become a completed contract, it is not incumbent on plaintiff to allege compliance with conditions the non-compliance with which would forfeit the contract. Noncompliance with such conditions is a matter of defense, to be specially pleaded in the answer.

Reference may be made to *Bittinger v. Providence Washington Ins. Co.* (C. C.) 24 Fed. 549; *Gunther v. Liverpool & London & Globe Ins. Co.* (C. C.) 85 Fed. 846; *Bennett v. Maryland Fire Ins. Co.*, 3 Fed. Cas. 229; *Cassacia v. Phoenix Ins. Co.*, 28 Cal. 628; *Tischler v. California Mut. Fire Ins. Co.*, 66 Cal. 178, 4 Pac. 1169; *Lounsbury v. Protection Ins. Co.*, 8 Conn. 459, 21 Am. Dec. 686; *Tillis v. Liverpool & London & Globe Ins. Co.* (Fla.) 35 South. 171; *Clay Fire & Marine Ins. Co. v. Wusterhausen*, 75 Ill. 285; *Phenix Ins. Co. v. Caldwell*, 58 N. E. 814, 187 Ill. 73, affirming 85 Ill. App. 104; *Phenix Ins. Co. v. Golden*, 121 Ind. 524, 23 N. E. 503; *Louisville Underwriters v. Durland*, 123 Ind. 544, 24 N. E. 221, 7 L. R. A. 399; *Home Ins. Co. v. Boyd*, 19 Ind. App. 173, 49 N. E. 235; *Viele v. Germania Ins. Co.*, 26 Iowa, 9, 96 Am. Dec. 83; *Erb v. Fidelity Ins. Co.*, 99 Iowa, 727, 69 N. W. 261; *Cronin v. Fire Ass'n of Philadelphia*, 70 N. W. 448, 112 Mich. 106; *Newman v. Springfield Fire & Marine Ins. Co.*, 17 Minn. 123 (Gil. 98); *Winn v. Farmers' Mut. Fire Ins. Co.*, 88 Mo. App. 123; *Farmers' & Merchants' Ins. Co. v. Newman*, 53 Neb. 504, 78 N. W. 983; *Farmers' & Merchants' Ins. Co. v. Wiard*, 59 Neb. 451, 81 N. W. 312; *Woodruff v. Imperial Fire Ins. Co.*, 88 N. Y. 133; *City of New York v. Brooklyn Fire Ins. Co.*, *43 N. Y. 465; *Hunt v. Hudson River Ins. Co.*, 9 N. Y. Super. Ct. 481; *Henderson v. Ohio Farmers' Ins. Co.*, 2 Ohio Dec. 189, 2 Ohio N. P. 17; *Moody v. Amazon Ins. Co.*, 52 Ohio St. 12, 38 N. E. 1011, 26 L. R. A. 313, 49 Am. St. Rep. 699; *Old Dominion Ins. Co. v. Frank*, 2 Wkly. Law Bul. (Ohio) 93; *Copeland v. Western Assur. Co.*, 43 S. C. 26, 20 S. E. 754; *Kingman v. Lancashire Ins. Co.*, 54 S. C. 599, 32 S. E. 762; *Burlington Ins. Co. v. Rivers*,

9 Tex. Civ. App. 177, 28 S. W. 453; *Merchants' Ins. Co. v. Arnold* (Tex. Civ. App.) 82 S. W. 579; *Phoenix Assur. Co. v. Coffman*, 10 Tex. Civ. App. 631, 32 S. W. 810; *Cannon v. Home Ins. Co.*, 53 Wis. 585, 11 N. W. 11; *Butternut Mfg. Co. v. Manufacturers' Mut. Fire Ins. Co.*, 78 Wis. 202, 47 N. W. 386; *Johnston v. Northwestern Live Stock Ins. Co.*, 94 Wis. 117, 68 N. W. 868.

The contrary doctrine is asserted in *Emmons v. Home Ins. Co.*, 1 Pennewill (Del.) 83, 39 Atl. 775; *Aetna Ins. Co. v. Black*, 80 Ind. 513. And see, also, *North British & Mercantile Ins. Co. v. Rudy*, 28 Ind. App. 472, 60 N. E. 9, where a general denial, following plaintiff's general allegation of compliance with the condition of the policy, was held to raise an issue as to a condition subsequent.

Nor need the plaintiff set out in his pleading those provisions of the policy which are in the nature of conditions subsequent, or which are prohibitory of certain acts by the insured.

Whipple v. United Fire Ins. Co., 20 R. I. 260, 38 Atl. 498; *East Texas Fire Ins. Co. v. Dyches*, 56 Tex. 565; *Hawkes v. Dodge County Mut. Ins. Co.*, 11 Wis. 188.

The company must specially plead any verbal representations as to the future use of the property made by the insured at the time of the application, but not expressed in the policy (*New York v. Brooklyn Fire Ins. Co.*, 3 Abb. Dec. [N. Y.] 251).

The doctrine that the question of forfeiture by noncompliance with a condition subsequent may be raised by the general issue, or a plea of nil debet, would seem to be at variance with the general rule. Such a rule has nevertheless been announced in Tennessee and in the Appellate Court of Illinois.

Knoxville Fire Ins. Co. v. Avery, 95 Tenn. 296, 32 S. W. 256; *Western Assur. Co. v. Mason*, 5 Ill. App. 141; *Home Ins. Co. v. Field*, 42 Ill. App. 392; *American Central Ins. Co. v. Birds Bldg. & Loan Ass'n*, 81 Ill. App. 258. But see *Clay Fire & Marine Ins. Co. v. Wusterhausen*, 75 Ill. 285, and *Phenix Ins. Co. v. Caldwell*, 187 Ill. 73, 58 N. E. 314, where the general rule first stated is announced. In the last-named cases, however, it does not appear that any plea of general issue was filed.

Most of the cases setting out the general rule that it is incumbent on defendant to plead a breach of a condition under which the policy becomes vitiated after issuance do so without special reference to the nature of the clause, further than what its effect will be to defeat the completed contract. But occasionally this question has

been raised. Thus, where the condition went to the very essence of the contract, it being an implied warranty against deviation (*Amsinck v. American Ins. Co.*, 129 Mass. 189), and where the insurance was on property "while occupied" in a certain manner (*Allen v. Home Ins. Co.*, 133 Cal. 29, 65 Pac. 138), compliance was held to constitute a necessary part of plaintiff's case, which might be put in issue by general denial. And so, if a condition, though promissory in its nature, has been considered a warranty or a condition

St. Louis Ins. Co. v. Glasgow, 8 Mo. 713, 41 Am. Dec. 661; *Wilson v. Hampden Fire Ins. Co.*, 4 R. I. 159; *Rosenthal Clothing & Dry Goods Co. v. Scottish Union & National Ins. Co. (W. Va.)* 46 S. E. 102.

But in other cases the doctrine that compliance with a promissory warranty must be pleaded by plaintiff has been expressly repudiated.

Tillis v. Liverpool & London & Globe Ins. Co. (Fla.) 35 South. 171; *Merchants' Ins. Co. v. Arnold (Tex. Civ. App.)* 32 S. W. 579; *Redman v. Aetna Ins. Co.*, 49 Wis. 481, 4 N. W. 591; *Allemania Fire Ins. Co. v. Fred*, 11 Tex. Civ. App. 311, 32 S. W. 243.

It has been held in California that the plaintiff must aver performance of all conditions containing those things which he has stipulated to do, but that, as to prohibitory matters, no special averment need be made. Therefore, it not appearing that the application, which formed a part of the contract, contained any promises of future action by the insured, the court refused to sustain a demurrer because such application was not set out in the complaint. (*Cowan v. Phenix Ins. Co.*, 78 Cal. 181, 20 Pac. 408.)

The declaration declared sufficient by statute¹ in West Virginia contains no reference to a compliance with conditions. If the company wishes to litigate any such matter, it must give notice thereof in a statement to be filed by it (*Rosenthal Clothing & Dry Goods Co. v. Scottish Union & National Ins. Co. [W. Va.]* 46 S. E. 1021).

(b) Same—Sufficiency of declaration or complaint.

Under statutes providing that a compliance with conditions precedent may be pleaded generally, an allegation of due and full performance of all conditions will be a sufficient allegation of com-

¹ Code West Virginia 1899, c. 125, §§ 61, 64.

pliance with promissory warranties or representations or conditions subsequent, in so far as any allegation in respect thereto may be deemed necessary.

Phenix Ins. Co. v. Golden, 121 Ind. 524, 23 N. E. 503; *Louisville Underwriters v. Durland*, 123 Ind. 544, 24 N. E. 221, 7 L. R. A. 399; *Home Ins. Co. v. Boyd*, 19 Ind. App. 173, 49 N. E. 285; *Insurance Co. of North America v. Coombs*, 19 Ind. App. 331, 49 N. E. 471; *Ft. Wayne Ins. Co. v. Irwin*, 54 N. E. 817, 23 Ind. App. 53.²

And the same rule has been announced in Texas without reference by the court to any statutory provision (*London & L. Fire Ins. Co. v. Schwulst* [Tex. Civ. App.] 46 S. W. 89).

Where written consent to keep a prohibited article is pleaded, what was written should be stated, and not the conclusion that written consent was given. But if no objection is made to the averment, it will, if possible, be treated as a statement of the exact words (*Oriental Ins. Co. v. Drake*, 10 Ky. Law Rep. 445).

(c) Same—Sufficiency of plea or answer.

Where defendant specially pleads a breach of a condition subsequent, he must set out all the facts necessary to show a breach. A general allegation is not sufficient.

This rule is illustrated by *Illinois Fire Ins. Co. v. Stanton*, 57 Ill. 354; *Forehand v. Niagara Ins. Co.*, 58 Ill. App. 161; *Germania Fire Ins. Co. v. Stewart*, 18 Ind. App. 627, 42 N. E. 286; *Oriental Ins. Co. v. Drake*, 10 Ky. Law Rep. 445; *Kentucky & Louisville Mut. Ins. Co. v. Southard*, 8 B. Mon. (Ky.) 634; *Farmers' & Merchants' Ins. Co. v. Wiard*, 81 N. W. 312, 59 Neb. 451; *Merchants' & Manufacturers' Mut. Ins. Co. v. Washington Mut. Ins. Co.*, 1 Handy, 406, 12 Ohio Dec. 209; *Old Dominion Ins. Co. v. Frank*, 2 Wkly. Law Bul. (Ohio) 98.

The allegations under the same rule were considered sufficient in *City Drug Store v. Scottish Union & Nat. Ins. Co.* (Tex. Civ. App.) 44 S. W. 21; *Jones v. Capital City Ins. Co.*, 122 Ala. 421, 25 South. 790; *Cassimus v. Scottish Union & National Ins. Co.*, 135 Ala. 256, 33 South. 168; *Sisk v. Citizens' Ins. Co.*, 16 Ind. App. 565, 45 N. E. 804.

Care should also be taken, in alleging a noncompliance by plaintiff with the requirements of the policy, that the allegations be not

² See *Indiana Rev. St.* 1881, § 820; *Horner's Ann. St.* 1897, § 870; *Burns' Ann. St.* 1894, § 373.

of such a character as to imply a performance by plaintiff of all acts not specifically denied.

Western Assur. Co. v. McGlathery, 115 Ala. 213, 22 South. 104, 67 Am. St. Rep. 28; *Phoenix Ins. Co. v. Lawrence*, 4 Metc. (Ky.) 9, 81 Am. Dec. 521; *Breckinridge v. American Cent. Ins. Co.*, 87 Mo. 62.

Whatever effect a general denial of compliance by plaintiff with conditions precedent may have had, it was lost by subsequent allegations of breach of particular conditions (*Gunther v. Liverpool & London & Globe Ins. Co.* [C. C.] 85 Fed. 846).

A promissory representation should be pleaded as such, and not as a warranty (*Goddard v. East Texas Fire Ins. Co.*, 67 Tex. 69, 1 S. W. 906, 60 Am. Rep. 1). And a plea is demurrable which, professing to be an answer to the entire complaint, sets up a breach of the condition which does not forfeit the policy as to all the property destroyed (*Manchester Fire Assur. Co. v. Feibelman*, 118 Ala. 308, 23 South. 759). On the other hand, a plea of general issue with notice of breach of a specified condition has been held sufficient without a special plea setting up the breach (*Wilson v. Union Mut. Fire Ins. Co.*, 55 Atl. 662, 75 Vt. 320). Nor need a copy of the policy be filed with a special plea of breach of condition, when a copy thereof has been already filed with the complaint (*Replogle v. American Ins. Co.*, 132 Ind. 360, 31 N. E. 947).

In *North British & Merc. Ins. Co. v. Rudy*, 26 Ind. App. 472, 60 N. E. 9, where a general denial of plaintiff's general allegations of compliance was deemed sufficient, it was further held that it was not error to sustain a demurrer to defendant's special plea setting up a breach of condition. Likewise, in *Germania Fire Ins. Co. v. Stewart*, 13 Ind. App. 627, 42 N. E. 286, a demurrer was held to have been properly sustained to a paragraph of an answer setting up, to show a breach of condition, facts which, if sustained, would defeat plaintiff's claim by showing a lack of necessary ownership alleged by plaintiff, and denied elsewhere by defendant.

The statement of defendant as to a breach of condition, required by the West Virginia statute,^{*} was held in *Rheims v. Standard Fire Ins. Co.*, 39 W. Va. 672, 20 S. E. 670, to be an informal pleading, and in the same case a demurrer was interposed to such pleading, apparently without objection. In the earlier case of *Cappellar v. Queen Ins. Co.*, 21 W. Va. 576, it had been held that the statement was not subject to demurrer, and that the only remedy against an

^{*} Acts of 1877, c. 66.

insufficient statement was by the exclusion of evidence offered thereunder.

The allowing of an amendment setting up the violation of a condition subsequent is a matter somewhat within the discretion of the court.

First Baptist Church v. Citizens' Mut. Fire Ins. Co., 119 Mich. 203, 77 N. W. 702; *Hunt v. Hudson River Ins. Co.*, 9 N. Y. Super. Ct. 481; *Thompson v. Caledonia Fire Ins. Co.*, 92 Wis. 664, 66 N. W. 801. But see *Merchants' Nat. Ins. Co. v. Pearce*, 84 Ill. App. 255.

Nevertheless, the amendment should be allowed in the absence of any good reason to the contrary.

Merchants' Nat. Ins. Co. v. Pearce, 84 Ill. App. 255; *Thompson v. Caledonia Fire Ins. Co.*, 92 Wis. 664, 66 N. W. 801.

(d) Same—Sufficiency and effect of reply.

In Iowa, under provisions of the Code, the denial of the affirmative allegations of an answer implied by law is not affected by the admission as to the allegations of the answer implied by a reply setting up confession and avoidance. But a denial in the reply of information and belief will not stand as against an express admission of the defense forming a part of the further plea of confession and avoidance. And this, though by statute inconsistent defenses are allowable.

Meadows v. Hawkeye Ins. Co., 62 Iowa, 887, 17 N. W. 600; *Day v. Mill Owners' Mut. Fire Ins. Co.*, 75 Iowa, 694, 38 N. W. 113. See, also, *Ayers v. Home Ins. Co.*, 21 Iowa, 185, and *Viele v. Germania Ins. Co.*, 26 Iowa, 9, 96 Am. Dec. 83, decided under former Code provision.⁴

Under the Nebraska Code a reply setting up confession and avoidance, coupled with a general denial, admits only those elements of the defense which are necessary to the truth of the plea of confession and avoidance. Thus, a reply of confession and avoidance, going to all the conditions of the policy, will admit that they form part of the policy, but not that any one of them has been violated (*Farmers' & Merchants' Insurance Company v. Peterson*, 47 Neb. 747, 66 N. W. 847).⁵ A reply setting up matter in avoidance, but which is formally defective, will, after a trial on the merits, be construed so as to give effect to the evident intent of the pleader

⁴ Code Iowa 1873, §§ 2665-2667, 2710; ⁵ Code Civ. Proc. § 109. Code 1886, Id.

(*Phenix Ins. Co. v. Holcombe*, 57 Neb. 622, 78 N. W. 300, 73 Am. St. Rep. 532).

(e) Evidence—Presumptions and burden of proof.

The burden of proving the breach of a condition under which the policy may be forfeited after having attached rests, in general, upon the company.

Reference may be made to *Western Assurance Co. v. J. H. Mohlman Co.*, 83 Fed. 811, 28 C. C. A. 157, 40 L. R. A. 561; *Phenix Ins. Co. v. Luce*, 123 Fed. 257, 60 C. C. A. 655; *Catlin v. Springfield Fire Ins. Co.*, 5 Fed. Cas. 810; *Tidmarsh v. Washington Fire & Marine Ins. Co.*, 23 Fed. Cas. 1197; *Aetna Ins. Co. v. Jacobson*, 105 Ill. App. 283; *Niagara Fire Ins. Co. v. Scammon*, 144 Ill. 490, 28 N. E. 919, 19 L. R. A. 114; *Longhurst v. Star Ins. Co.*, 19 Iowa, 364; *Williams v. Niagara Fire Ins. Co.*, 50 Iowa, 561; *Shaeffer v. Anchor Mut. Fire Ins. Co.*, 118 Iowa, 652, 85 N. W. 985; *Pennsylvania Fire Ins. Co. v. C. D. Young & Co.*, 25 Ky. Law Rep. 1350, 78 S. W. 127; *Jones Mfg. Co. v. Manufacturers' Mut. Fire Ins. Co.*, 8 8 Oush. (Mass.) 82, 54 Am. Dec. 742; *Clark v. Hamilton Mut. Ins. Co.*, 9 Gray (Mass.) 148; *Orrell v. Hampden Fire Ins. Co.*, 13 Gray (Mass.) 431; *Clinton v. Norfolk Mut. Fire Ins. Co. (Mass.)* 57 N. E. 998, 50 L. R. A. 833, 79 Am. St. Rep. 325; *Fuller v. New York Fire Ins. Co.*, 184 Mass. 12, 67 N. E. 879; *N. & M. Friedman Co. v. Atlas Assur. Co.*, 94 N. W. 757, 133 Mich. 212; *Mistilski v. German Ins. Co.*, 64 Minn. 366, 67 N. W. 80; *Farmers' & Merchants' Ins. Co. v. Newman*, 78 N. W. 933, 58 Neb. 504; *Mead v. Am. Fire Ins. Co.*, 43 N. Y. Supp. 334, 13 App. Div. 476; *Rau v. Westchester Fire Ins. Co.*, 64 N. Y. Supp. 290, 50 App. Div. 428; *Fireman's Ins. Co. v. Holt*, 35 Ohio St. 189, 35 Am. Rep. 601; *Moody v. Amazon Ins. Co.*, 52 Ohio St. 12, 38 N. E. 1011, 28 L. R. A. 813, 49 Am. St. Rep. 699; *Copeland v. Western Assur. Co.*, 43 S. C. 26, 20 S. E. 754; *Nelson v. Atlanta Home Ins. Co.*, 120 N. C. 302, 27 S. E. 38; *Phoenix Ins. Co. v. Shearman*, 17 Tex. Civ. App. 456, 43 S. W. 930; *German Ins. Co. v. Pearlstone (Tex. Civ. App.)* 45 S. W. 832; *Fireman's Fund Ins. Co. v. Shearman*, 20 Tex. Civ. App. 843, 50 S. W. 598; *Mosley v. Vermont Mut. Fire Ins. Co.*, 55 Vt. 142; *Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 24 S. E. 393, 53 Am. St. Rep. 846; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507, 27 Am. Rep. 582.

There is, however, no presumption of fact, either for or against a forfeiture. *Denver Tp. Fire Ins. Co. v. Resor*, 95 Ill. App. 197.

This rule is particularly applicable where a change of risk must be shown.

Merrill v. Insurance Co. of North America (C. C.) 23 Fed. 245; *Catlin v. Traders' Ins. Co.*, 83 Ill. App. 40; *Greenlee v. North British &*

Mercantile Ins. Co., 102 Iowa, 427, 71 N. W. 534, 63 Am. St. Rep. 455; *White v. Phoenix Ins. Co.*, 83 Me. 279, 22 Atl. 167, second appeal 85 Me. 97, 28 Atl. 1049; *Jones v. Granite State Fire Ins. Co.*, 90 Me. 40, 37 Atl. 328; *Bryan v. Peabody Ins. Co.*, 8 W. Va. 606.

The statement in *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231, that "the insured must show himself within" the conditions of the policy, seems to have been made rather with reference to the validity of the forfeiting condition than to any question as to the burden of proof.

Most of the cases laying down the general rule as to burden of proof do so without any discussion of the question as to whether the provision of the policy under consideration constitutes a promissory warranty, or merely a representation or a condition under which the policy may be forfeited. In some cases, however, it has been expressly held that, if the provision constitutes a promissory warranty, the burden of proving compliance will rest on plaintiff.

McLoon v. Commercial Mutual Ins. Co., 100 Mass. 472, 1 Am. Rep. 129; *Fuller v. New York Fire Ins. Co.*, 184 Mass. 12, 67 N. E. 879; *Wilson v. Hampden Fire Ins. Co.*, 4 R. I. 159; *Sun Mut. Ins. Co. v. Texarkana Foundry & Machine Co.*, 4 Willson, Civ. Cas. Ct. App. (Tex.) § 81, 15 S. W. 34.

And where the provision was considered as a condition precedent it was further held that the burden was not shifted from plaintiff by a statute⁶ which compelled defendant to point out which condition had been violated (*Rosenthal Clothing & Dry Goods Co. v. Scottish Union & National Ins. Co.* [W. Va.] 46 S. E. 1021). But in other cases it has been expressly held that compliance with a promissory warranty need not be pleaded by plaintiff.

Redman v. Aetna Ins. Co., 49 Wis. 431, 4 N. W. 591; *Allemania Fire Ins. Co. v. Fred*, 11 Tex. Civ. App. 311, 32 S. W. 243. See, also, *Western Assurance Co. v. J. H. Mohlman Co.*, 83 Fed. 811, 28 C. C. A. 157, 40 L. R. A. 561, where a certain clause as to the falling of the building was held to constitute a condition precedent, a breach of which must be proved by defendant.

In California it has been held that an agreement by the insured to perform a certain act under certain conditions requires proof of the performance of such act, where the conditions have been shown

⁶ Code West Virginia 1899, c. 125, §§ 61, 64.

to exist (*Rankin v. Amazon Ins. Co.*, 89 Cal. 203, 26 Pac. 872, 23 Am. St. Rep. 460).

The general rule as to burden of proof is not changed by a general allegation by plaintiff of compliance with the conditions of the contract.

Bittinger v. Providence Washington Ins. Co. (C. C.) 24 Fed. 549; *Farmers' & Merchants' Ins. Co. v. Peterson*, 47 Neb. 747, 66 N. W. 847; *Rau v. Westchester Fire Ins. Co.*, 50 App. Div. 428, 64 N. Y. Supp. 290, affirmed in memorandum decision, 168 N. Y. 665, 61 N. E. 1134. See, also, *Western Assurance Co. v. J. H. Mohlman Co.*, 88 Fed. 811, 28 C. C. A. 157, 40 L. R. A. 561. Contra, *North British & Mercantile Ins. Co. v. Rudy*, 26 Ind. App. 472, 60 N. E. 9.

Matter excusing a breach of a condition subsequent must be proved by plaintiff.

This rule is supported by *Lunt v. Boston Marine Ins. Co.* (C. C.) 6 Fed. 562; *Strickland v. Council Bluffs Ins. Co.*, 66 Iowa, 466, 23 N. W. 926; *Kansas Farmers' Fire Ins. Co. v. Saindon*, 58 Kan. 623, 86 Pac. 983; *Cotton v. National Fire Ins. Co.*, 65 Kan. 511, 70 Pac. 557; *Whitmarsh v. Charter Oak Fire Ins. Co.*, 2 Allen (Mass.) 581; *Long Creek Bldg. Ass'n v. State Ins. Co.*, 29 Or. 569, 46 Pac. 366.

Similarly the burden is on plaintiff to show the giving of a notice required by the policy on a change of the risk.

Sun Ins. Co. v. Earle, 29 Mich. 406; *Harris v. Ohio Ins. Co.*, Wright (Ohio) 544.

So, too, the burden is on him to show a cessation of the facts constituting the breach sufficient to revive the policy (*Home Fire Ins. Co. v. Johansen*, 59 Neb. 349, 80 N. W. 1047).

(2) Same—Admissibility and sufficiency.

In proving the forfeiture of a policy, as elsewhere, the proof must correspond with the pleadings.

German Ins. Co. v. Fairbank, 82 Neb. 750, 49 N. W. 711, 29 Am. St. Rep. 459; *Niagara Ins. Co. v. Lee*, 78 Tex. 641, 11 S. W. 1024.

Expert testimony is admissible to prove the meaning of a technical term in the condition subsequent, and to show an increase of risk, if the circumstances are such that special skill is required to form an intelligent opinion.

Traders' Ins. Co. v. Catlin, 163 Ill. 256, 45 N. E. 255, 35 L. R. A. 595; *Schenck v. Mercer County Mut. Fire Ins. Co.*, 24 N. J. Law, 447;

Roots v. Cincinnati Ins. Co., 1 Disn. 188, 12 Ohio Dec. 535; *Orient Mut. Ins. Co. v. Reymersboffer*, 56 Tex. 234; *Roberts, Willis & Taylor Co. v. Sun Mutual Ins. Co.*, 18 Tex. Civ. App. 64, 35 S. W. 955.

Expert or opinion testimony cannot be given as to the increase of risk where the question is determined by a matter within common knowledge.

Fred J. Kiesel & Co. v. Sun Ins. Office, 88 Fed. 243, 81 C. C. A. 515; *Joyce v. Maine Ins. Co.*, 45 Me. 168, 71 Am. Dec. 536; *Cannell v. Phoenix Ins. Co.*, 59 Me. 582; *Thayer v. Providence Wash. Ins. Co.*, 70 Me. 581; *White v. Phoenix Ins. Co.*, 83 Me. 279, 22 Atl. 167, second appeal, 85 Me. 97, 26 Atl. 1049; *Jones v. Granite State Fire Ins. Co.*, 90 Me. 40, 87 Atl. 326; *Lyman v. State Mutual Fire Ins. Co.*, 14 Allen (Mass.) 329; *First Congregational Church v. Holyoke Mut. Fire Ins. Co.*, 158 Mass. 475, 33 N. E. 572, 19 L. R. A. 587, 35 Am. St. Rep. 506; *Luce v. Dorchester Ins. Co.*, 105 Mass. 297, 7 Am. Rep. 522; *Hahn v. Guardian Assurance Co.*, 23 Or. 576, 32 Pac. 683, 37 Am. St. Rep. 709; *Franklin Fire Ins. Co. v. Gruver*, 39 Leg. Int. (Pa.) 348.

Nor can expert testimony be given as to the technical increase of risk or rate.

Niagara Fire Ins. Co. v. Johnson, 4 Kan. App. 16, 45 Pac. 789; *Joyce v. Maine Ins. Co.*, 45 Me. 168, 71 Am. Dec. 536; *Franklin Fire Ins. Co. v. Gruver*, 39 Leg. Int. (Pa.) 348. But see *Kern v. South St. Louis Mut. Ins. Co.*, 40 Mo. 19.

That an insurance agent is not competent as such to give expert testimony as to increase of risk was decided in *Lee v. Agricultural Ins. Co.*, 79 Iowa, 379, 44 N. W. 683. But in *Kern v. So. St. Louis Mut. Ins. Co.*, 40 Mo. 19, it was held that one who had been for years an insurance "officer," and was familiar with the "rules of insurance," might give his opinion as to the increase of hazard. In that case, however, an increase in the rate of premium was also provided for, and no distinction seems to be drawn between the two.

Questions as to the admissibility and sufficiency of evidence to prove specific cases of compliance or forfeiture must, of course, ordinarily be governed by the general rules of evidence.

Questions as to admissibility were considered in *Poor v. Hudson Ins. Co.* (C. C.) 2 Fed. 432; *Liverpool & London & Globe Ins. Co. v. Morris*, 79 Ga. 666, 5 S. E. 125; *Rivara v. Queen's Ins. Co.*, 62 Miss. 720; *Griswold v. American Central Ins. Co.*, 70 Mo. 654; *Cumberland Mut. Fire Ins. Co. v. Giltinan*, 48 N. J. Law, 495, 7 Atl. 424,

57 Am. Rep. 586; Tierney v. Phoenix Ins. Co., 4 N. D. 565, 62 N. W. 642, 36 L. R. A. 760; Diehl v. Adams County Mut. Ins. Co., 58 Pa. 448, 98 Am. Dec. 302; Aetna Ins. Co. v. Eastman, 95 Tex. 34, 64 S. W. 863; Roberts, Willis, etc., Co. v. Sun Mut. Ins. Co., 19 Tex. Civ. App. 338, 48 S. W. 559; London & L. Fire Ins. Co. v. Schwulst (Tex. Civ. App.) 46 S. W. 89; Delaware Ins. Co. v. Monger & Henry (Tex. Civ. App.) 74 S. W. 792.

Questions as to the sufficiency of evidence were considered in Baker v. Merchants' Mut. Ins. Co. (C. C.) 16 Fed. 916; Commercial Ins. Co. v. Spankneble, 52 Ill. 53, 4 Am. Rep. 582; Continental Ins. Co. v. Hulman, 92 Ill. 145, 34 Am. Rep. 122; Henning v. Western Assur. Co., 77 Iowa, 319, 42 N. W. 308; White v. Phoenix Ins. Co., 83 Me. 279, 22 Atl. 167, second appeal, 85 Me. 97, 26 Atl. 1049; Jones v. Granite State Fire Ins. Co., 90 Me. 40, 37 Atl. 326; City Five Cents Sav. Bank v. Pennsylvania Fire Ins. Co., 122 Mass. 165; Allegre's Adm'rs v. Maryland Ins. Co., 2 Gill & J. (Md.) 136, 20 Am. Dec. 424; Mascott v. Granite State Fire Ins. Co., 68 Vt. 253, 35 Atl. 75.

(2) Questions for court or jury.

That it is for the jury to determine the truth as to disputed facts and circumstances upon which a forfeiture depends is so patent as to have been rarely judicially announced.

Reference may, however, be made to Bayly v. London & L. Ins. Co., 2 Fed. Cas. 1067; Kansas Farmers' Fire Ins. Co. v. Saindon, 52 Kan. 486, 35 Pac. 15, 39 Am. St. Rep. 356; Augusta Ins. & Banking Co. v. Abbott, 12 Md. 348; Georgia Home Ins. Co. v. Kinnier's Adm'r, 28 Grat. (Va.) 88.

It is also elementary that the determination of the question as to whether there has been an increase of risk is primarily for the jury.

It is deemed sufficient to refer to Imperial Fire Ins. Co. v. Coos Co., 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231; Phoenix Assur. Co. v. Franklin Brass Co., 58 Fed. 166, 7 C. C. A. 144, 8 U. S. App. 451; Daniels v. Equitable Fire Ins. Co., 48 Conn. 106; Lat-tomus v. Farmers' Mutual Fire Ins. Co., 8 Houst. (Del.) 404; Adair v. Southern Mut. Ins. Co., 107 Ga. 297, 33 S. E. 78, 25 L. R. A. 204, 73 Am. St. Rep. 122; Hartford Fire Ins. Co. v. Walsh, 54 Ill. 164, 5 Am. Rep. 115; Collins v. Merchants' & Bankers' Mut. Ins. Co., 95 Iowa, 540, 64 N. W. 602, 58 Am. St. Rep. 438; Western Assur. Co. v. Ray, 105 Ky. 523, 49 S. W. 326; Atherton v. British America Assur. Co., 91 Me. 289, 39 Atl. 1006; Schaeffer v. Farmers' Mutual Fire Ins. Co., 80 Md. 563, 31 Atl. 317, 45 Am. St. Rep. 361; Luce v. Dorchester Ins. Co., 105 Mass. 297, 7 Am. Rep. 522; Janvrin v. Rockingham Farmers' Mut. Fire Ins. Co., 70 N. H. 35, 46 Atl. 686; Jolly's Adm'rs v. Baltimore Equitable Society, 1 Har. & G. (Md.) 295, 18 Am. Dec. 288; Roby v. American Cent. Ins. Co., 120 N. Y. 510, 24 N. E. 808; Hahn v. Guardian Assur. Co., 23 Or. 576,

82 Pac. 683, 37 Am. St. Rep. 709; *Manheim Mut. Fire Ins. Co. v. Thompson* (Pa.) 1 Atl. 370; *Minneapolis Threshing Machine Co. v. Darnall*, 13 S. D. 279, 88 N. W. 266; *Pool v. Milwaukee Mechanics' Ins. Co.*, 91 Wis. 530, 65 N. W. 54, 51 Am. St. Rep. 919.

Though, of course, the evidence of increase of risk may be so strong as to require a decision by the court.

White v. Phoenix Ins. Co., 88 Me. 279, 22 Atl. 167, second appeal, 85 Me. 97, 26 Atl. 1049; *Jones v. Granite State Fire Ins. Co.*, 90 Me. 40, 37 Atl. 326; *Allegre's Adm'rs v. Maryland Ins. Co.*, 2 Gill & J. (Md.) 136, 20 Am. Dec. 424; *Moore v. Phoenix Fire Ins. Co.*, 64 N. H. 140, 6 Atl. 27, 10 Am. St. Rep. 384.

That the question is conclusively settled by the fact that the fire was caused by the alteration was decided in *Northwestern Nat. Ins. Co. v. Davis*, 9 Ky. Law Rep. 933, and denied in *Pool v. Milwaukee Mechanics' Ins. Co.*, 91 Wis. 530, 65 N. W. 54, 51 Am. St. Rep. 919.

In determining whether there has been a forfeiture many questions arise as to the nature or character of certain acts, things, or circumstances. Thus, was a certain building "vacant," was an article a "drug," was a delay "reasonable," was a certain person an "agent," and many other similar questions. In deciding such questions it is always for the court to determine the meaning of the word or phrase within which it is sought to bring the particular fact or circumstance.

Dwelling House Ins. Co. v. Osborn, 1 Kan. App. 197, 40 Pac. 1099; *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64, 34 Am. Rep. 106; *Moody v. Amazon Ins. Co.*, 52 Ohio St. 12, 38 N. E. 1011, 28 L. R. A. 313, 49 Am. St. Rep. 699; *Conn. Fire Ins. Co. v. Clark*, 24 Ohio Cir. Ct. R. 33; *Hume, Small & Co. v. Insurance Co.*, 23 S. O. 190.

And as a general rule it is for the jury to decide whether the particular facts fall within the meaning as thus determined.

The following cases are illustrative: *Phoenix Assur. Co. v. Franklin Brass Co.*, 58 Fed. 166, 7 C. C. A. 144, 8 U. S. App. 451; *Wich v. Equitable Fire & Marine Ins. Co.*, 2 Colo. App. 484, 31 Pac. 389; *Northern Assur. Co. v. Chicago Mut. Bldg. Ass'n*, 198 Ill. 474, 64 N. E. 979; *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64, 34 Am. Rep. 106; *Runkle v. Hartford Ins. Co.*, 99 Iowa, 414, 68 N. W. 712; *Dwelling House Ins. Co. v. Osborn*, 1 Kan. App. 197, 40 Pac. 1099; *Percival v. Maine N. M. Ins. Co.*, 83 Me. 242; *First Congregational Church v. Holyoke Mut. Fire Ins. Co.*, 158 Mass. 475, 33 N. E. 572, 19 L. R. A. 587, 35 Am. St. Rep. 508; *Hunt v. State Ins. Co.*, 66 Neb. 121, 92 N. W. 921, 61 L. R. A. 313; *Stone v. Granite State Fire Ins. Co.*, 69 N. H. 438, 45 Atl. 235; *Thebaud v. Great Western Ins. Co.*,

155 N. Y. 516, 50 N. E. 284; *Moody v. Amazon Ins. Co.*, 52 Ohio St. 12, 38 N. E. 1011, 26 L. R. A. 818, 49 Am. St. Rep. 699; *Power v. City Fire Ins. Co.*, 8 Phila. (Pa.) 566, affirmed 2 Leg. Op. 167; *Lindsey v. Union Mut. Fire Ins. Co.*, 3 R. I. 157; *Roberts, Willis, etc., Co. v. Sun Mut. Ins. Co.*, 19 Tex. Civ. App. 338, 48 S. W. 559; *Carrigan v. Lycoming Fire Ins. Co.*, 53 Vt. 418, 38 Am. Rep. 687; *Kircher v. Milwaukee Mechanics' Mut. Ins. Co.*, 74 Wis. 470, 43 N. W. 487, 5 L. R. A. 779.

From the nature of the questions involved, however, it must frequently happen, particularly where the facts are not in dispute, that the determination of the whole matter lies properly with the court.

Reference may be made to *Oliver v. Maryland Ins. Co.*, 7 Cranch, 487, 3 L. Ed. 414; *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64, 34 Am. Rep. 106; *Home Ins. Co. v. Boyd*, 49 N. E. 285, 19 Ind. App. 173; *Kimball v. Monarch Ins. Co.*, 70 Iowa, 513, 30 N. W. 862; *Henning v. Western Assur. Co.*, 77 Iowa, 319, 42 N. W. 308; *Kimball v. Howard Fire Ins. Co.*, 8 Gray (Mass.) 83; *Richards v. Continental Ins. Co.*, 83 Mich. 508, 47 N. W. 350, 21 Am. St. Rep. 611; *Riggin v. Petasco Ins. Co.*, 7 Har. & J. (Md.) 279, 16 Am. Dec. 308; *Plyer v. German American Ins. Co.*, 48 Hun, 618, 1 N. Y. Supp. 895; *Long Creek Bldg. Ass'n v. State Ins. Co.*, 29 Or. 569, 46 Pac. 366; *Alamo Fire Ins. Co. v. Davis*, 25 Tex. Civ. App. 342, 60 S. W. 802.

(h) Trial and review.

Admissions as to forfeiture, made during the trial, by the counsel of either party, will be given weight in accordance with the usual rules relating thereto.

Fred J. Kiesel & Co. v. Sun Ins. Office, 88 Fed. 243, 31 C. C. A. 515; *Sheldon v. Hartford Fire Ins. Co.*, 22 Conn. 235, 58 Am. Dec. 420.

And where evidence as to a forfeiture is admitted without objection, the absence of a special plea of the forfeiture is waived.

Williams v. People's Fire Ins. Co., 57 N. Y. 274; *Ryan v. Providence Washington Ins. Co.*, 79 N. Y. Supp. 460, 79 App. Div. 316.

But where the evidence is also competent for another purpose, no such result will follow (*Gunther v. Liverpool & London & Globe Ins. Co.* [C. C.] 85 Fed. 846).

In *Pennsylvania Fire Ins. Co. v. Kittle*, 39 Mich. 51, the erroneous admission of an excuse for a forfeiture was held cured by an instruction disregarding the excuse, and requiring a verdict for

defendant unless the real issues of the case were found in favor of plaintiff.

A requested charge should be specific as to the facts which it is claimed constitute the forfeiture (*Residence Fire Ins. Co. v. Hannawold*, 37 Mich. 103). And where there is no evidence as to a forfeiture (*Insurance Co. v. Baring*, 20 Wall. 159, 22 L. Ed. 250), or where no issue has been raised as to an excuse for an alleged forfeiture (*McCoy v. Iowa State Ins. Co.*, 77 N. W. 529, 107 Iowa, 80), no instruction in relation thereto should be given. But an abstract charge as to a forfeiture of which there is no sufficient evidence will give the defendant no just cause of complaint (*Bayley v. London & L. Ins. Co.*, 2 Fed. Cas. 1087). So, also, even though there is an error in an instruction, it will not justify reversal, if under the evidence it could not have affected the result reached.

Bayly v. London & L. Ins. Co., 2 Fed. Cas. 1087; *Western Assur. Co. v. Althelmer Bros.*, 58 Ark. 565, 25 S. W. 1067.

An instruction as to the forfeiture need not, on request, be repeated in different words (*East Texas Fire Ins. Co. v. Dyches*, 56 Tex. 565). But the fact that an error in an instruction may have been inadvertent and owing to the phraseology used will not render it any the less fatal (*Peoria Marine & Fire Ins. Co. v. Anapow*, 45 Ill. 86).

It was decided in *Bilson v. Manufacturers' Ins. Co.*, 3 Fed. Cas. 388, that on motion for new trial the court may consider a forfeiture which will entirely discharge the company from liability, though attention may not have been particularly directed thereto at the trial. But on appeal, as a general rule, advantage can only be taken of those errors to which objection was made in the lower court.

Fred J. Kiesel & Co. v. Sun Ins. Office, 88 Fed. 243, 81 O. C. A. 515; *Catlin v. Springfield Fire Ins. Co.*, 5 Fed. Cas. 310; *Dwelling-House Ins. Co. v. Butterly*, 133 Ill. 534, 24 N. E. 873; *Phoenix Ins. Co. v. Maxson*, 42 Ill. App. 164; *Wilhelmi v. Des Moines Ins. Co.*, 86 Iowa, 326, 53 N. W. 233; *Ross v. Hawkeye Ins. Co.*, 93 Iowa, 222, 61 N. W. 852, 24 L. R. A. 466; *Pratt v. Dwelling House Mut. Fire Ins. Co.*, 130 N. Y. 206, 29 N. E. 117; *Galantschik v. Globe Fire Ins. Co.*, 10 Misc. Rep. 369, 31 N. Y. Supp. 32.

But it has been held in Illinois (*American Ins. Co. v. Walston*, 111 Ill. App. 133) that the question whether a forfeiture has taken place will be considered by the court on appeal, where the plaintiff

at the trial permitted, without objection, the introduction of evidence on such issue.

While the bill of exceptions should show the evidence, if any, on which a request for instructions was based (*Insurance Co. v. Baring*, 20 Wall. 159, 22 L. Ed. 250), yet if an affidavit setting up forfeiture was treated by the lower court and the parties as denied, it will be so considered by the supreme court, though the record shows no express denial thereof (*Wisconsin Nat. Loan & Building Ass'n v. Webster*, 97 N. W. 171, 119 Wis. 476).

The general rule that a decision on appeal becomes the law of the case throughout its subsequent course has been several times applied to decisions as to forfeiture of the policy.

Garretson v. Merchants' & Bankers' Ins. Co., 92 Iowa, 298, 60 N. W. 540; *Davis v. Northwestern Mut. Ins. Co.*, 12 Ky. Law Rep. 844. See, also, *Ellis v. State Ins. Co.*, 68 Iowa, 578, 27 N. W. 762, 56 Am. Rep. 865.

The supreme court of Illinois has decided that the question as to whether the risk has been increased is one of fact, as to which the decision of the appellate court is final.

German Ins. Co. v. Steiger, 109 Ill. 254; *North British & Mercantile Ins. Co. v. Steiger*, 124 Ill. 81, 16 N. E. 95, affirming 28 Ill. App. 228.

4. PERSONS AFFECTED BY FORFEITURE.

- (a) In general.
- (b) Rights of mortgagee.
- (c) Loss payable to mortgagee as interest may appear.
- (d) Rights of mortgagee under "union mortgage clause."
- (e) Same—Notice by mortgagee.
- (f) Persons claiming under mortgagee.
- (g) Assignee of policy.
- (h) Same—Assignment as creation of new contract.
- (i) Same—Cases regarded as asserting a contrary doctrine.
- (j) Same—Assignment as collateral security.

(a) In general.

The question has sometimes arisen whether the rights of third persons interested directly or indirectly in the insurance are affected by a forfeiture resulting from the acts or neglect of the insured.

It is obvious that, where several owners are insured under one policy, acts of forfeiture by one of them will forfeit the policy as to all. (*Clark v. Protection Ins. Co.*, 5 Fed. Cas. 909.) So, too, it is obvious that an ordinary creditor of an insured who has violated the conditions of his policy has no better right to enforce payment against the company than the insured himself (*Phenix Ins. Co. v. Willis*, 70 Tex. 12, 6 S. W. 825, 8 Am. St. Rep. 566).

The question usually arises, however, under a clause in the policy making the loss payable to a third person as his interest may appear. Such a clause amounts merely to a designation of the person to whom the policy is to be paid in case of loss, and not to an insurance on his behalf. (*Union Bldg. Ass'n v. Rockford Ins. Co.*, 83 Iowa, 647, 49 N. W. 1032, 14 L. R. A. 248, 32 Am. St. Rep. 323.) He is a mere appointee, whose right is not an independent one, but is a mere right to receive the whole or a part of the money to which the insured may be entitled (*Wunderlich v. Palatine Fire Ins. Co.*, 80 N. W. 471, 104 Wis. 395). Consequently the rights of the appointee are wholly dependent on the rights of the insured, and any act of the latter in violation of the conditions of the policy will also forfeit the rights of his appointee.

Richmond v. Phoenix Assur. Co., 88 Me. 105, 88 Atl. 786; *Same v. Liberty Ins. Co.*, Id.; *Tallman v. Atlantic Fire & Marine Ins. Co.*, *42 N. Y. 87, 4 Abb. Dec. (N. Y.) 845, 88 How. Prac. (N. Y.) 400; *Van Alstyne v. Aetna Ins. Co.*, 14 Hun (N. Y.) 860; *Snow v. National Cotton Oil Co.*; and *Home Ins. Co.* (Tex. Civ. App.) 34 S. W. 177.

The insured himself may become an appointee so as to be deprived of his rights under the policy by the acts of another. Thus, in *Meiswinkel v. St. Paul Fire & Marine Ins. Co.*, 75 Wis. 147, 43 N. W. 669, 6 L. R. A. 200, the insured, having sold the property, assigned the policy to the vendee with the consent of the insurer. The policy was then indorsed, making it payable to the vendor (the original insured) as his interest might appear. The court held that notwithstanding this indorsement the policy would be forfeited by acts of the vendee in violation of the conditions of the policy, both as to vendor and the vendee.

(b) Rights of mortgagees.

Where a mortgagee effects insurance on his mortgage interest, it is obvious that his rights should not, in common justice, be

affected by any acts of the mortgagor which, had the policy been issued to him, would have forfeited the insurance.

Reference may be made to *Humphry v. Hartford Fire Ins. Co.*, 12 Fed. Cas. 884; *Mutual Fire Ins. Co. v. Alvord*, 61 Fed. 752, 9 C. C. A. 623; *Boyd v. Thuringia Ins. Co.*, 25 Wash. 447, 65 Pac. 785, 55 L. R. A. 165.

It is apparent from the *Boyd Case*, also, that if the insurance is on the mortgagee's interest only the rule will apply though the policy was taken out by the mortgagor and in his name. So, too, when the policy is taken out by the mortgagee in the name of the mortgagor, but covering the mortgagee's interest, the rule will govern (*Pratt v. New York Central Ins. Co.*, 64 Barb. [N. Y.] 589). If, however, the insurance is on the mortgagor's interest, the mortgagee to whom the loss was made payable cannot evade the effect of a forfeiture by the fact that he took out the policy himself.

Merwin v. Star Fire Ins. Co., 7 Hun (N. Y.) 659, affirmed without opinion 72 N. Y. 608; *Holbrook v. Baloise Fire Ins. Co.*, 117 Cal. 561, 49 Pac. 555.

So, too, an agreement without consideration on the part of an insurance company, after the policy has become void by an alienation of the premises by the insured, the mortgagor, and an entry by the mortgagee, that the policy shall cover and attach to the mortgagee's interest, is void for want of consideration (*Davis v. German-American Ins. Co.*, 135 Mass. 251).

(c) Loss payable to mortgagee as interest may appear.

For the purpose of protecting the interest of a mortgagee, a policy taken out by the mortgagor usually contains a clause making the loss, if any, payable to the mortgagee as his interest may appear. This clause may be the ordinary loss payable clause, as stated, or may be what is known as a "union mortgage clause."

If the policy contains merely the ordinary loss payable clause, the mortgagee has no direct rights against the insurer, but recovers solely on the right of his mortgagor, and is therefore affected by a forfeiture, the same as the mortgagor.

Reference may be made to *Humphry v. Hartford Fire Ins. Co.*, 12 Fed. Cas. 884; *Friemansdorf v. Watertown Ins. Co.* (C. C.) 1 Fed. 68; *Sias v. Roger Williams Ins. Co.* (C. C.) 8 Fed. 187; *Delaware Ins. Co. v. Greer*, 120 Fed. 916, 57 C. C. A. 188, 61 L. R. A. 137; *Scania Ins. Co. v. Johnson*, 22 Colo. 476, 45 Pac. 431; *Continental Ins. Co.*

v. Hulman, 92 Ill. 145, 84 Am. Rep. 122; American Cent. Ins. Co. v. Birds Building & Loan Ass'n, 81 Ill. App. 258; Union Bldg. Ass'n v. Rockford Ins. Co., 83 Iowa, 647, 49 N. W. 1082, 14 L. R. A. 248, 82 Am. St. Rep. 823; Christenson v. Fidelity Ins. Co., 117 Iowa, 77, 90 N. W. 495, 94 Am. St. Rep. 286; Bergman v. Commercial Union Ins. Co., 12 Ky. Law Rep. 942; Monroe Building & Loan Ass'n v. Liverpool & London & Globe Ins. Co., 50 La. Ann. 1243, 24 South. 238; Brunswick Institution v. Commercial Union Ins. Co., 68 Me. 313, 28 Am. Rep. 56; Agricultural Ins. Co. v. Hamilton, 82 Md. 88, 33 Atl. 429, 30 L. R. A. 633, 51 Am. St. Rep. 457; Loring v. Manufacturers' Ins. Co., 8 Gray (Mass.) 28; Young v. Eagle Fire Ins. Co., 14 Gray (Mass.) 150, 74 Am. Dec. 673; Franklin Sav. Institution v. Central Mut. Fire Ins. Co., 119 Mass. 241; Davis v. German-American Ins. Co., 135 Mass. 251; Jaskulski v. Citizens' Mut. Fire Ins. Co., 131 Mich. 603, 92 N. W. 98; Kabrich v. State Ins. Co., 48 Mo. App. 393; Farmers' & Merchants' Ins. Co. v. Newman, 58 Neb. 504, 78 N. W. 933; Antes v. State Ins. Co., 61 Neb. 55, 84 N. W. 412; Baldwin v. Phoenix Fire Ins. Co., 60 N. H. 164; Warbasse v. Sussex Co. Mut. Ins. Co., 42 N. J. Law, 208; Lattan v. Royal Ins. Co., 45 N. J. Law, 453; Grosvenor v. Atlantic Fire Ins. Co., 17 N. Y. 891, reversing 12 N. Y. Super. Ct. 517; Perry v. Lorillard Fire Ins. Co., 61 N. Y. 214, 19 Am. Rep. 272, affirming 6 Lans. (N. Y.) 201; Merwin v. Star Fire Ins. Co., 7 Hun (N. Y.) 659, affirmed without opinion in 72 N. Y. 603; Weed v. London & Lancashire Fire Ins. Co., 116 N. Y. 106, 22 N. E. 229; Moore v. Hanover Fire Ins. Co., 141 N. Y. 219, 36 N. E. 191; Browning v. Home Ins. Co., 6 Daly (N. Y.) 522; Hine v. Homestead Fire Ins. Co., 29 Hun (N. Y.) 84; Rosenstein v. Traders' Ins. Co., 79 N. Y. Supp. 736, 79 App. Div. 481; Lewis v. Guardian Fire & Life Assur. Co., 87 N. Y. Supp. 525, 98 App. Div. 157; Little v. Eureka Ins. Co., 5 Ohio Dec. 285, 4 Am. Law Rec. 228; Boyd v. Thuringia Ins. Co., 25 Wash. 447, 65 Pac. 785, 55 L. R. A. 165; Ritchie County Bank v. Firemen's Ins. Co. (W. Va.) 47 S. E. 94; Gillett v. London & Liverpool & Globe Ins. Co., 73 Wis. 203, 41 N. W. 78, 9 Am. St. Rep. 784; Keith v. Royal Ins. Co., 117 Wis. 531, 94 N. W. 295.

Reference may also be made to Franklin Ins. Co. v. Wolff, 23 Ind. App. 556, 54 N. E. 772, where the violation of condition was by one to whom the policy had been assigned by the mortgagor, and Hocking v. Virginia Fire & Marine Ins. Co., 99 Tenn. 729, 42 S. W. 451, 39 L. R. A. 148, 63 Am. St. Rep. 862, though the point involved is not forfeiture for breach of condition.

See, also, California Civ. Code, § 2541, providing that where the insurance is effected in the name of the mortgagor, with loss payable to the mortgagee, any act of the mortgagor which would otherwise avoid the insurance will have the same effect as to the mortgagee (Sharp v. Scottish Union & National Ins. Co., 69 Pac. 253, 615, 136 Cal. 542, dissenting opinion).

If, however, the policy also contains the "union mortgage clause," the

rules applicable in such a case will govern. See *Insurance Co. of North America v. International Trust Co.*, 71 Fed. 88, 17 C. C. A. 616.

The theory of the rule is, as shown in the leading case of *Grosvenor v. Atlantic Fire Ins. Co.*, 17 N. Y. 391, that the policy is the contract of the mortgagor, and an insurance of his interest, the mortgagee being merely an appointee to receive the money in case of loss. The contract as to him is collateral to the principal undertaking to pay the mortgagor.

Delaware Ins. Co. v. Greer, 120 Fed. 916, 57 C. C. A. 188, 61 L. R. A. 137; *Brunswick Sav. Inst. v. Commercial Union Ins. Co.*, 68 Me. 313, 28 Am. Dec. 56; *Loring v. Manufacturers' Ins. Co.*, 8 Gray (Mass.) 28; *Young v. Eagle Fire Ins. Co.*, 14 Gray (Mass.) 150, 74 Am. Dec. 673; *Kabrich v. State Ins. Co. of Des Moines*, 48 Mo. App. 393; *Antes v. State Ins. Co.*, 61 Neb. 55, 84 N. W. 412; *Warbasse v. Sussex County Mut. Ins. Co.*, 42 N. J. Law, 208; *Bidwell v. Northwestern Ins. Co.*, 19 N. Y. 179; *Little v. Eureka Ins. Co.*, 4 Am. Law Rec. 223, 5 Ohio Dec. 285.

If the policy is in the name and covers the interest of the mortgagor, the rule is the same, though it was actually procured by the mortgagee.

Holbrook v. Baloise Fire Ins. Co., 117 Cal. 561, 49 Pac. 555; *Merwin v. Star Fire Ins. Co.*, 7 Hun (N. Y.) 659, affirmed without opinion in 72 N. Y. 603.

The rule would, however, be otherwise if the policy, though in the name of the mortgagor, was taken out by the mortgagee and covers his interest (*Pratt v. New York Central Ins. Co.*, 64 Barb. [N. Y.] 589).

The rule will, of course, be modified by circumstances and concurrent conditions. Thus where the policy recognizes that the legal title to the property insured is in the mortgagee, a condition against change of title can apply only to the mortgagee, and he is not affected by any attempt on the part of the mortgagor to change the title (*Appleton Iron Co. v. British America Assur. Co.*, 46 Wis. 23, 1 N. W. 9, 50 N. W. 1100). The rights of a mortgagee are not cut off by the death of the insured, notwithstanding the policy contains a provision rendering it void in case of change in the title (*Westchester Fire Ins. Co. v. Dodge*, 44 Mich. 420, 6 N. W. 865). Where the policy contained the further condition that a change of title should not affect the right of the mortgagee to re-

cover in case of loss (*City Five Cents Savings Bank v. Pennsylvania Insurance Co.*, 122 Mass. 165), the court held that the procuring of additional insurance by a purchaser of the property would not affect the rights of the mortgagee, as the purchaser had an undoubted right as owner to insure his interest in the property. The nature of condition was also an important factor in *Francis v. Butler Mut. Fire Ins. Co.*, 7 R. I. 159, where the policy provided that a mortgagee protected by the policy should pay any assessments not paid by the insured on demand. Neither the mortgagor nor the mortgagee paid the assessments, though both were notified; but the court held that this did not forfeit the policy as to the mortgagee, since the provision was not intended as a mere permission to him to keep the policy alive as to his interest by paying the assessment, but that by failing to specify any time within which it must be paid by the mortgagee, and by making him apparently absolutely liable for it, it served to continue the policy as to him after it had been forfeited by the mortgagor.

Policies sometimes contain a provision that if, with the consent of the company, an interest under the policy shall exist in favor of a mortgagee or any person having an interest other than the interest of the insured as described, the conditions contained therein shall apply in the manner expressed in such conditions of insurance relating to such interest as shall be written upon, attached, or appended thereto. It has been held in some jurisdictions that if the rider containing the "loss payable" clause did not contain any conditions of forfeiture or reference to the conditions in the policy providing for forfeiture a violation of the conditions by the mortgagor would not affect the rights of the mortgagee.

Queen Ins. Co. v. Dearborn Savings L. & B. Ass'n, 175 Ill. 115, 51 N. E. 717; *Northern Assur. Co. v. Chicago Mut. B. & L. Ass'n*, 98 Ill. App. 152, affirmed on other points in 198 Ill. 474, 64 N. E. 979; *Christenson v. Fidelity Ins. Co.*, 117 Iowa, 77, 90 N. W. 495, 94 Am. St. Rep. 286; *East v. New Orleans Ins. Ass'n*, 76 Miss. 697, 26 South. 691; *Senor v. Western Millers' Mut. Fire Ins. Co.*, 181 Mo. 104, 79 S. W. 687; *Henton v. Farmers' & Merchants' Ins. Co.*, 1 Neb. (Unof.) 425, 95 N. W. 670; *Oakland Home Ins. Co. v. Bank of Commerce*, 47 Neb. 717, 66 N. W. 646, 36 L. R. A. 673, 58 Am. St. Rep. 663; *Boyd v. Thuringia Ins. Co.*, 25 Wash. 447, 65 Pac. 785, 55 L. R. A. 165.

In *Franklin Insurance Co. v. Wolff*, 23 Ind. App. 549, 54 N. E. 772, the court refused to follow the rule laid down in the Illinois and Nebraska cases, insisting that the contract was still purely

one between the mortgagor and the insurer, whereas those cases proceed on the theory that a new contract had been created.

It has been said in *Panhandle Nat. Bank v. Security Co.*, 18 Tex. Civ. App. 96, 44 S. W. 15, that a violation by the mortgagor of the condition against change of title would not affect the rights of the mortgagee. The exact point does not appear to have been necessarily involved in the case, and was not passed upon in the supreme court (*Security Co. v. Panhandle Nat. Bank*, 93 Tex. 575, 57 S. W. 22), where it was held, however, that a mortgagee under the loss payable clause took an interest in the policy of which it could not be deprived by a subsequent agreement between the insurer and the insured making the loss payable to another person. But in a recent case (*Hamburg-Bremen Fire Ins. Co. v. Ruddell* [Tex. Civ. App.] 82 S. W. 826) it was held that where a fire policy was payable to a mortgagee of the property insured as his interest might appear, and contained no stipulation exempting the mortgagee and those claiming under him from the effect of the acts or defaults of the mortgagor, the mortgagee was not in privity of contract with the insurer, and was therefore subject to any defense which could be properly made against the insured.

(d) Rights of mortgagee under "union mortgage clause."

There is sometimes attached to the policy, in lieu of the ordinary "loss payable" or "open" mortgage clause, a rider containing what is known as the "union mortgage clause." This clause provides that the loss, if any, shall be payable to the mortgagee as his interest shall appear, and, further, that the insurance, as to the interest of the mortgagee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by the policy; provided, that the mortgagee shall notify the company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee, and, unless permitted by the policy, it shall be noted thereon, and the mortgagee shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise the policy shall be null and void. As said in the leading case of *Syndicate Ins. Co. v. Bohn*, 65 Fed. 165, 12 C. C. A. 531, 27 L. R. A. 614, the effect of this clause, when attached to a policy

running to the mortgagor, is to make a new and independent contract between the mortgagee and the insurer, and to effect a separate insurance on the mortgagee's interest.

Reference may also be made to *Westchester Fire Ins. Co. v. Coverdale*, 48 Kan. 446, 29 Pac. 682; *Hanover Fire Ins. Co. v. Bohn*, 48 Neb. 743, 67 N. W. 774, 58 Am. St. Rep. 719; *Hastings v. Westchester Fire Ins. Co.*, 73 N. Y. 141; *Smith v. Union Ins. Co. (R. I.)* 55 Atl. 715; *Pioneer Savings & Loan Co. v. Providence-Washington Ins. Co.*, 17 Wash. 175, 49 Pac. 231, 38 L. R. A. 397. In this connection, see *Ulster County Savings Inst. v. Leake*, 73 N. Y. 161, 29 Am. Rep. 115, and *Meriden Savings Bank v. Home Ins. Co.*, 50 Conn. 396, where a separate collateral agreement embodying the usual provisions of the union mortgage clause was entered into between the insurer and the mortgagee.

The independent contract thus created is regarded as supported by a sufficient consideration, either in the agreement to give notice and pay additional premium for increased risks (*Planters' Mut. Ins. Ass'n v. Southern Sav. Fund & Loan Co.*, 56 S. W. 443, 68 Ark. 8), or in the subrogation agreement, also made a part of the union mortgage clause (*Insurance Co. of North America v. Martin*, 151 Ind. 209, 51 N. E. 361). Being a separate insurance of the mortgagee's interest, its validity is dependent solely on the acts of the mortgagee, and is not affected by any act or neglect of the mortgagor, in violation of the conditions of the policy, of which the mortgagee is ignorant.

This rule is asserted in *Mutual Fire Ins. Co. v. Alvord*, 61 Fed. 752, 9 C. C. A. 623, 21 U. S. App. 228; *Syndicate Ins. Co. v. Bohn*, 65 Fed. 165, 12 C. C. A. 531, 27 L. R. A. 614; *Insurance Co. of North America v. International Trust Co.*, 71 Fed. 88, 17 C. C. A. 616; *Planters' Mut. Life Ass'n v. Southern Savings Fund & Loan Co.*, 56 S. W. 443, 68 Ark. 8; *Hartford Fire Ins. Co. v. Olcott*, 97 Ill. 439; *Phenix Ins. Co. v. Union Mutual Life Ins. Co.*, 101 Ind. 392; *Insurance Co. of North America v. Martin*, 151 Ind. 209, 51 N. E. 361; *Palmer Sav. Bank v. Insurance Co.*, 166 Mass. 189, 44 N. E. 211, 32 L. R. A. 615, 55 Am. St. Rep. 387; *Hardy v. Lancashire Ins. Co.*, 166 Mass. 210, 44 N. E. 209, 33 L. R. A. 241, 55 Am. St. Rep. 395; *Whiting v. Burkhardt*, 60 N. E. 1, 178 Mass. 535, 52 L. R. A. 788, 86 Am. St. Rep. 503; *Magoun v. Firemen's Fund Ins. Co.*, 86 Minn. 486, 91 N. W. 5, 91 Am. St. Rep. 370; *Phenix Ins. Co. v. Omaha Loan & Trust Co.*, 41 Neb. 834, 60 N. W. 133, 25 L. R. A. 679; *Hanover Fire Ins. Co. v. Bohn*, 48 Neb. 743, 67 N. W. 774, 58 Am. St. Rep. 719; *Springfield Fire & Marine Ins. Co. v. Allen*, 43 N. Y. 389, 3 Am. Rep. 711; *Eddy v. London Assur. Corp.*, 143 N. Y. 311, 38 N. E. 307, 25 L. R. A. 686; *Ormsby v. Phenix Ins. Co.*, 5 S. D. 72, 58 N. W. 301; *Boyd v. Thuringia Ins. Co.*, 25

Wash. 447, 65 Pac. 785, 55 L. R. A. 165. Judge Anders, in a dissenting opinion in the Boyd Case, took the position that the mortgage slip attached to the policy amounted to nothing more than a simple agreement that the company might pay the loss, when payable, to the mortgagee, for and on account of the insured, and that in no other respect did it affect, or purport to affect, the contract between the insurer and the insured.

The operation of the clause is not limited by the existence in the policy of the ordinary or "open" mortgage clause (*Insurance Co. of North America v. International Trust Co.*, 71 Fed. 88, 17 C. C. A. 616). The clause contemplates, however, a case where the owner could act or could neglect, and not a case where the policy is issued in the name of an infant, who by reason of incapacity can furnish no protection to the company whatever (*Graham v. Fireman's Ins. Co.*, 87 N. Y. 69, 41 Am. Rep. 348). And of course it affords the mortgagee no protection against his own act or neglect (*Cole v. Germania Fire Ins. Co.*, 99 N. Y. 36, 1 N. E. 38).

It has been held in some of the leading cases that the effect of the clause is the same whether the act or neglect of the mortgagor referred to a time prior or subsequent to the issue of the policy.

Syndicate Ins. Co. v. Bohn, 65 Fed. 165, 12 C. C. A. 531, 27 L. R. A. 614; *Hanover Fire Ins. Co. v. Bohn*, 48 Neb. 743, 67 N. W. 774, 58 Am. St. Rep. 719.

On the other hand, on the theory that the mortgagor, in making the application, acts as agent for the mortgagee, it has been held in other cases that the clause is effective only as to the subsequent acts or neglect of the mortgagor.

Glens Falls Ins. Co. v. Porter, 44 Fla. 568, 33 South. 473; *Graham v. Fireman's Ins. Co.*, 87 N. Y. 69, 41 Am. Rep. 348; *Genesee Falls Permanent Savings & Loan Ass'n v. United States Fire Ins. Co.*, 44 N. Y. Supp. 979, 16 App. Div. 587; *American Cent. Ins. Co. v. Cowan* (Tex. Civ. App.) 34 S. W. 460.

Thus, it was said in *Baldwin v. German Ins. Co.*, 105 Iowa, 379, 75 N. W. 326, that if a condition of the policy has already been violated so as to afford a ground for forfeiture, it cannot be revived by attaching thereto the mortgage clause unless a new consideration is paid therefor.

(c) Same—Notice by mortgagee.

Reference has already been made to the proviso of the union mortgage clause requiring the mortgagee to give notice of any

change of ownership or occupancy or increase of risk which shall come to his knowledge. In some jurisdictions this provision has been regarded as an absolute condition, noncompliance with which will forfeit the policy as to the mortgagee.

Continental Ins. Co. v. Anderson, 107 Ga. 541, 33 S. E. 887; *Cole v. Germania Fire Ins. Co.*, 99 N. Y. 36, 1 N. E. 38; *Ormsby v. Phenix Ins. Co.*, 5 S. D. 72, 58 N. W. 301.

Therefore it was said in the *Ormsby Case* that the failure of the mortgagee to comply with such provision suspends the operation of the union mortgage clause, and leaves in force the stipulations in the policy as to the acts of the mortgagor that will forfeit the policy, but the burden of proving such noncompliance is on the insurer. Knowledge of the change in ownership by the mortgagee's agent is knowledge by the mortgagee, so as to impose on him the duty of giving notice.

Galantschik v. Globe Fire Ins. Co., 10 Misc. Rep. 369, 81 N. Y. Supp. 82; *Ormsby v. Phenix Ins. Co.*, 5 S. D. 72, 58 N. W. 301.

In *Gasner v. Metropolitan Ins. Co.*, 13 Minn. 483 (Gil. 447), the proviso was regarded as being in effect a warranty against the use of the premises for hazardous purposes with the knowledge of the mortgagee.

On the other hand, in other jurisdictions the proviso has been regarded as a covenant merely, for breach of which damages might be recovered, and under which injury to the insurer must be shown.

Whitney v. American Ins. Co. (Cal.) 56 Pac. 50; *Phenix Ins. Co. v. Omaha Loan & Trust Co.*, 41 Neb. 834, 60 N. W. 183, 26 L. R. A. 679; *Pioneer Savings & Loan Co. v. Providence-Washington Ins. Co.*, 17 Wash. 175, 49 Pac. 231, 88 L. R. A. 897.

So, the commencement of foreclosure proceedings by the mortgagee named in the policy is not within the contemplation of the proviso, as foreclosure tends to increase the interest of the mortgagee, and cannot be regarded as an increase of risk.

Lancashire Ins. Co. v. Boardman, 58 Kan. 339, 49 Pac. 92, 62 Am. St. Rep. 621; *Dodge v. Hamburg-Bremen Fire Ins. Co.*, 4 Kan. App. 415, 46 Pac. 25.

Generally it may be said that the proviso refers only to a change of title to a third person (*Pioneer Savings & Loan Co. v. St. Paul*

Fire & Marine Ins. Co., 68 Minn. 170, 70 N. W. 979), and not to a change from mortgagor to mortgagee by foreclosure.

National Bank of D. O. Mills v. Union Ins. Co., 88 Cal. 497, 28 Pac. 509, 22 Am. St. Rep. 324; *Phenix Ins. Co. v. Union Mut. Life Ins. Co.*, 101 Ind. 392; *Eddy v. London Assur. Corp.*, 143 N. Y. 811, 38 N. E. 307, 25 L. R. A. 688.

Proceedings by a creditor to foreclose a judgment lien is not within the terms of the proviso (*Sun Ins. Office v. Beneke* [Tex. Civ. App.] 53 S. W. 98). And in any event the mortgagee can be called upon to give notice only after he has acquired knowledge of a change in title (*Southern Building & Loan Ass'n v. Pennsylvania Fire Ins. Co.*, 23 Pa. Super. Ct. 88).

(2) Persons claiming under mortgagee.

It is obvious that under general principles of law persons claiming under the mortgagee will take exactly the same rights as the mortgagee possessed. Thus, in view of the established rule that under the ordinary "loss payable" or "open" mortgage clause the mortgagee has merely the rights of the insured, an assignee of such a mortgagee is entitled only to the same rights, and these, as has been seen, are dependent on the acts of the mortgagor. Acts constituting a forfeiture as to the mortgagor will therefore forfeit the policy as to one who holds it by assignment from the mortgagee.

Hale v. Mechanics' Mut. Fire Ins. Co., 6 Gray (Mass.) 169, 66 Am. Dec. 410; *Badger v. Platts*, 68 N. H. 222, 44 Atl. 296, 73 Am. St. Rep. 572; *Platts v. Badger*, Id.; *Hazard v. Franklin Mut. Fire Ins. Co.*, 7 R. I. 429.

On the other hand, where the policy contains the "union mortgage clause," relieving the mortgagee of responsibility for the acts or neglect of the mortgagor, the rights of an assignee of such mortgagee (*Whitney v. Burkhardt*, 178 Mass. 535, 60 N. E. 1, 52 L. R. A. 788, 86 Am. St. Rep. 503), or a pledgee of the mortgage to whom the mortgagee's rights in the policy are also assigned (*Breeyear v. Rockingham Farmers' Mut. Fire Ins. Co.*, 52 Atl. 860, 71 N. H. 445), are not affected by acts of the mortgagor in violation of the conditions of the policy.

An interesting phase of the question arose in *Merchants' Insurance Company v. Story*, 13 Tex. Civ. App. 124, 35 S. W. 68, where the insured mortgagor sold the mortgaged premises, with the consent of the insurer, to one who assumed the mortgage. The court

held that the original mortgagor became a surety for the payment of the mortgage, and since, as such surety, he was entitled to be subrogated to the rights of the mortgagee, he was protected by the provisions of the union mortgage clause. But it has been held in Ohio (*Little v. Eureka Ins. Co.*, 5 Ohio Dec. 285, 4 Am. Law Rec. 228) that, where the policy contained only the ordinary "loss payable" clause, a subrogee of the mortgagee was bound by acts of the mortgagor forfeiting the policy.

(g) Assignee of policy.

The extent to which the rights of an assignee of the policy are affected by a breach, by the insured, of the conditions of the contract, must depend to a greater or less extent on the character of the assignment.

This principle is expressly recognized in *Planters' Mut. Ins. Ass'n v. Southern Savings Fund & Loan Co.*, 68 Ark. 8, 56 S. W. 443, and *Insurance Co. v. Trask*, 8 Phila. (Pa.) 32.

.. So, where the assignment is of such nature that it amounts merely to an assignment of the claim for loss, the rights of the assignee are merely those of the insured, and, if the latter's rights have been forfeited, the assignee cannot recover.

Hale v. Mechanics' Mut. Fire Ins. Co., 6 Gray (Mass.) 169, 66 Am. Dec. 410; *Bonefant v. American Fire Ins. Co.*, 76 Mich. 653, 43 N. W. 682; *Archer v. Merchants' & Manufacturers' Ins. Co.*, 43 Mo. 434; *Van Alstyne v. Aetna Ins. Co.*, 14 Hun (N. Y.) 360; *Insurance Co. v. Trask*, 8 Phila. (Pa.) 32. Reference may also be made to *Pupke v. Resolute Fire Ins. Co.*, 17 Wis. 378, 84 Am. Dec. 754, when the assignment was after loss, and the insured failed to comply with the conditions relating to proofs of loss.

If the policy contains a provision to the effect that no assignment shall be valid unless the company consents thereto, it is obvious that, if the assignment is not consented to, the assignee is, so far as the insurer is concerned, a mere stranger to the contract, and occupies at best the position of an assignee of the claim for loss. In such a case, therefore, the assignee's rights are wholly dependent on the rights of the insured, and are affected adversely by any breach which would terminate the rights of the insured.

Insurance Co. v. Trask, 8 Phila. (Pa.) 32; *Olyphant Lumber Co. v. People's Mut. Live Stock Ins. Co.*, 4 Pa. Super. Ct. 100.

But see *Mershon v. National Ins. Co.*, 34 Iowa, 87, where the condition was that if the policy shall be assigned, either before or after

loss, without consent of the company, the insured shall not be entitled to recover from the company any loss occurring; and it was held that the condition would not preclude the assignee of the policy from recovering, especially in view of Revision, § 1798, providing that, where the assignment of an instrument is prohibited, the assignment may be valid, but the maker may avail himself of any legal or equitable defense against the assignee which he may have against the assignor before suit is commenced. It is to be remarked, however, that the decision seems based fully as much on the ground that it was the "insured" who should not be entitled to recover in case of assignment as upon the statute.

An interesting phase of the general question of the rights of the assignee is illustrated by *Miller v. Hillsborough Mut. Fire Ass'n*, 44 N. J. Eq. 224, 14 Atl. 278, reversing 7 Atl. 895, 42 N. J. Eq. 459, and 10 Atl. 106, 44 N. J. Eq. 224, where the liability of the insurer was limited by reference to the "by-laws." A number of by-laws were annexed to the policy, but a by-law declaring the policy void if the premises became and remained vacant was not annexed. In an action on the policy, breach of the condition was pleaded in defense. The court held that the assignee was entitled to have the policy reformed so that it would be subject only to the conditions annexed to it. The rule thus adopted was applied on a subsequent hearing ([N. J. Ch.] 17 Atl. 293).

(h) Same—Assignment as creation of new contract.

In a comparatively early case (*Traders' Ins. Co. v. Robert*, 9 Wend. 404) it was decided in New York that a breach, by the insured, of a condition in the policy, would not affect the rights of the assignee, the ground of the decision being that, as the assignor could not directly discharge the right of action which he had assigned, he could not do so indirectly. The main principle has been reasserted not only in New York but in other jurisdictions, though a different reason has been given for the doctrine. The rule as laid down by the weight of authority is that an assignment of the policy, assented to by the insurer, creates a new contract between the assignee and the insurer, which cannot be affected by any act of the insured.

The rule is asserted in *Ellis v. Insurance Co.* (C. O.) 32 Fed. 646; *In re Hamilton* (D. C.) 102 Fed. 833; *Virginia-Carolina Chemical Co. v. Insurance Co.* (C. O.) 108 Fed. 451; *Planters' Mut. Ins. Ass'n v. Southern Savings Fund & Loan Co.*, 68 Ark. 8, 56 S. W. 443; *New England Fire & Marine Ins. Co. v. Wetmore*, 32 Ill. 221; *City*

Fire Ins. Co. v. Mark, 45 Ill. 482; *Continental Ins. Co. v. Munns*, 120 Ind. 30, 22 N. E. 78, 5 L. R. A. 430; *Kimball v. Monarch Ins. Co.*, 70 Iowa, 513, 30 N. W. 862; *Pollard v. Somerset Mut. Fire Ins. Co.*, 42 Me. 221; *Hall v. Niagara Fire Ins. Co.*, 93 Mich. 184, 53 N. W. 727, 32 Am. St. Rep. 497, 18 L. R. A. 135; *Bayless v. Merchants' Town Mut. Ins. Co.*, 80 S. W. 289, 106 Mo. App. 684; *Barnes v. Union Mut. Fire Ins. Co.*, 45 N. H. 21; *Tillou v. Kingston Mut. Ins. Co.*, 5 N. Y. 405, affirming 7 Barb. (N. Y.) 570; *Boynton v. Clinton & Essex Mut. Ins. Co.*, 16 Barb. (N. Y.) 254; *Allen v. Hudson River Mut. Ins. Co.*, 19 Barb. (N. Y.) 442; *Hooper v. Hudson River Fire Ins. Co.*, 17 N. Y. 424; *Shearman v. Niagara Fire Ins. Co.*, 46 N. Y. 526, 7 Am. Rep. 380, affirming 40 How. Prac. (N. Y.) 393; *Steen v. Niagara Fire Ins. Co.*, 89 N. Y. 315, 42 Am. Rep. 297; *Insurance Co. v. Trask*, 8 Phila. (Pa.) 32; *Home Mut. Ins. Co. v. Nichols* (Tex. Civ. App.) 72 S. W. 440.

The theory of the cases probably is that the contract between the insurer and the assignee is supported by an adequate consideration in the unearned premium.

Ellis v. Insurance Co. (C. C.) 32 Fed. 646; *Planters' Mut. Ins. Ass'n v. Southern Savings Fund & Loan Co.*, 68 Ark. 8, 56 S. W. 443.

The contract may, therefore, as said in the *Ellis Case*, be regarded as a substitution of parties rather than an ordinary assignment. The principle asserted in the foregoing cases will apply also, though there is only an equitable assignment, if the insurer has consented thereto (*Neve v. Charleston Ins. & Trust Co.*, 2 McMul. [S. C.] 237).

A modified form of the rule has been applied in Massachusetts to assignments of policies in mutual companies, and it has been held (*Foster v. Equitable Mut. Fire Ins. Co.*, 2 Gray [Mass.] 216) that, where the assignee executes an obligation for the payment of future assessments, the contract becomes a new one, under which the rights of the assignee are not affected by the acts of the original insured. It follows as a matter of course that, where the assignee does not enter into such an obligation, any act forfeiting the policy as to the insured will also forfeit it as to the assignee.

Fogg v. Middlesex Mut. Fire Ins. Co., 10 Cush. (Mass.) 337; *Bowditch Mutual Fire Ins. Co. v. Winslow*, 3 Gray (Mass.) 415; *Edes v. Hamilton Mut. Ins. Co.*, 3 Allen (Mass.) 362; *Lawrence v. Holyoke Ins. Co.*, 11 Allen (Mass.) 387.

See, also, in this connection *Brannin v. Mercer County Mut. Fire Ins. Co.*, 28 N. J. Law, 92, where a policy in a mutual company was assigned to a purchaser of the insured premises, who gave his own premium note in lieu of the one originally given, which was given

up to the maker; there being at the time an assessment unpaid upon it. Notice of this assessment was given to the makers of each note, and afterwards the premises were burned. It was provided in the policy that "any member" who should refuse payment of an assessment for 30 days after notice should forfeit his policy, provided his premium note, after paying losses, should be given up to him on demand. It was held that, within the meaning of this provision, the assignee of the policy was not a member of the company, and that he could recover for his loss, notwithstanding the unpaid assessment.

The general doctrine, though recognized in Illinois (*New England Fire & Marine Ins. Co. v. Wetmore*, 32 Ill. 221), has been qualified, and it has been held that if the breach existed at the time of the assignment, and with the knowledge of the assignee was allowed to continue, he could not be protected on the theory that the consent to the assignment constituted a new contract (*Insurance Co. of North America v. Garland*, 108 Ill. 220, reversing 9 Ill. App. 571). The breach in this case was of the vacancy clause, and under a like state of facts a similar principle was asserted in Michigan (*Ranspach v. Teutonia Fire Ins. Co.*, 109 Mich. 699, 67 N. W. 967). The principle was applied in Iowa (*Ellis v. State Ins. Co.*, 68 Iowa, 578, 27 N. W. 762, 56 Am. Rep. 865), where the breach was of the clause against incumbrances. So, too, it has been held in Kentucky (*Home Insurance Co. v. Allen*, 93 Ky. 270, 19 S. W. 743) that, while an assignment with consent creates a new contract, if the assignee was guilty of a fraudulent concealment of a breach in obtaining such consent he would not be protected from the forfeiture. Similarly it was held in *Wilson v. Mutual Fire Ins. Co.*, 174 Pa. 554, 34 Atl. 122, where there had been a breach by taking out additional insurance, and the other policy was assigned at the same time as the policy in suit, that, as the assignee knew of the breach at the time of the assignment, he took subject thereto, irrespective of whether the assignment constituted a new contract or not.

(1) Same—Cases regarded as asserting a contrary doctrine.

There are several cases in various jurisdictions which have been cited as denying the rule that the assignment creates a new contract, under which the assignee takes free from the penalty of forfeiture for breach of condition by the insured. Certain cases in Pennsylvania, Rhode Island, and New York have been referred to especially. An examination of the cases, however, discloses that

the decisions are based on particular facts and circumstances, which are justly regarded as affording grounds for modifying the general doctrine. In a large proportion of the cases the assignment was to a mortgagee as collateral security. These cases will be discussed in the succeeding subdivision. In other cases the facts were such as to render the rule inapplicable.

The Pennsylvania decisions have been referred to especially as authority for the doctrine that the rights of the assignee are strictly dependent on the acts of the insured, the supposed doctrine in that state being considered as based on *State Mut. Fire Ins. Co. v. Roberts*, 31 Pa. 438. This case, however, involved an assignment to a mortgagee. Moreover, the rule that an assignment with consent of the insurer creates a new contract is directly asserted in *Insurance Co. of Pennsylvania v. Trask*, 8 Phila. 32, and is recognized by implication, at least, in *Wilson v. Mutual Fire Ins. Co. of Montgomery County*, 174 Pa. 554, 34 Atl. 122. In this case additional insurance had been taken out by the insured, and the other policy was assigned at the same time as the policy in suit. The court held that, as the assignee knew of the breach at the time of the assignment, he was bound thereby, irrespective of the question whether the consent to the assignment amounted to a new contract, thus approving the qualified rule of the Illinois courts. In *Burger v. Farmers' Mut. Ins. Co.*, 71 Pa. 422, the court held merely that the assignee of a policy in a mutual company was bound to know the conditions of the charter and by-laws just as the original member was bound to know them.

Ellis v. State Ins. Co., 68 Iowa, 578, 27 N. W. 762, 56 Am. Rep. 865, has also been cited as denying the rule, but it is to be observed that in this case the condition alleged to have been broken, "if the title is * * * incumbered this policy shall be void," was regarded as becoming part of the new contract, and the assignee was held to be in fault in permitting the incumbrance to remain on the property in violation of the condition. The general doctrine that consent to the assignment created a new contract was not denied. *Van Alstyne v. Ætna Ins. Co.*, 14 Hun (N. Y.) 360, has been regarded as an opposing case, but this view is based on a dictum merely, the real question involved being whether a breach affected the rights of a mortgagee, to whom the loss was made payable, and therefore governed by an entirely different principle. Moreover, the dictum is based on *Grosvenor v. Atlantic Fire Ins. Co.*,

17 N. Y. 391, and the Roberts Case, already referred to, neither of which involved the precise question under discussion.

In *Bergson v. Builders' Ins. Co.*, 38 Cal. 541, the premium was never paid, and it was considered that the assignee took nothing under his assignment. *Wilson v. Hakes*, 36 Ill. App. 539, did not involve a question of forfeiture, but merely the right to proceeds.

(j) Same—Assignment as collateral security.

Reference has already been made to *Traders' Ins. Co. v. Robert*, 9 Wend. (N. Y.) 404, and *Tillou v. Kingston Mut. Ins. Co.*, 5 N. Y. 405, as the cases on which rests the doctrine that an assignment with the consent of the insurer creates a new contract by virtue of which the assignee's rights are independent of the acts of the insured. As a matter of fact, these cases are not adequate authority for the rule, as they involved assignments to mortgagees as security, and have been overruled in that respect by *Grosvenor v. Atlantic Fire Ins. Co.*, 17 N. Y. 391, affirming 12 N. Y. Super. Ct. 517. It is to be remarked, however, that the *Grosvenor* Case did not involve an assignment, but the effect of a clause making the policy payable to the mortgagee. It is true, it was held in *Boynton v. Clinton & Essex Mut. Ins. Co.*, 16 Barb. (N. Y.) 254, that the interests of the mortgagor and a mortgagee to whom the policy was assigned were severable; but it is to be observed that in this case the assignee signed the premium notes, thus bringing the case within the rule laid down in Massachusetts. Since the decision in *Buffalo Steam Engine Works v. Sun Mut. Ins. Co.*, 17 N. Y. 401, the rule must be regarded as settled in New York that an assignment to a mortgagee confers on him only such rights as the insured may have.

The dictum of the *Grosvenor* Case was adopted by the supreme court of Pennsylvania in *State Mut. Fire Ins. Co. v. Roberts*, 31 Pa. 438, and fixed the rule in that state, and directly or indirectly influenced the courts in other jurisdictions to adopt the rule that an assignment as security does not create a new contract, but the assignee's rights will be forfeited by any acts which will forfeit the policy as to the insured.

Reference may be made to *Bilson v. Manufacturers' Ins. Co.*, 3 Fed. Cas. 388; *Buckley v. Garrett*, 47 Pa. 204; *Hoxsie v. Providence Mut. Fire Ins. Co.*, 6 R. I. 517; *Hazard v. Franklin Mut. Fire Ins. Co.*, 7 R. I. 429; *Moulthrop v. Farmers' Mut. Fire Ins. Co.*, 52 Vt. 123.

This principle has also been approved in other jurisdictions where the general doctrine as to the creation of a new contract prevails.

Illinois Mut. Fire Ins. Co. v. Fix, 53 Ill. 151, 5 Am. Rep. 38; *Home Mut. Fire Ins. Co. v. Hauslein*, 60 Ill. 521; *Kempf v. Farmers' Mut. Fire Ins. Co.*, 41 Mo. App. 27.

So, also, in *Swenson v. Sun Fire Office*, 68 Tex. 461, 5 S. W. 60, the supreme court of Texas approved the principle, but laid stress on the fact that the mortgagee assumed no obligation to the company. In this respect the Texas court seems to be in line with the Massachusetts cases involving policies in mutual companies, assigned to mortgagees. The Massachusetts doctrine is that where the mortgagee substitutes his deposit note for that of the insured (*Foster v. Equitable Mut. Fire Ins. Co.*, 2 Gray [Mass.] 216), he holds under a new contract independent of the insured. If he does not assume such obligation, his rights are dependent on the rights of the insured.

Bowditch Mut. Fire Ins. Co. v. Winslow, 8 Gray (Mass.) 415; *Edes v. Hamilton Mut. Ins. Co.*, 8 Allen (Mass.) 362; *Lawrence v. Holyoke Ins. Co.*, 11 Allen (Mass.) 387.

The assignment in *Pollard v. Somerset Mut. Fire Ins. Co.*, 42 Me. 221, was to a mortgagee, but the court held that the acts of the insured would not defeat the rights of such assignee; basing the decision on *Traders' Ins. Co. v. Robert*, 9 Wend. (N. Y.) 404, already referred to.

5. NECESSITY AND SUFFICIENCY OF PROCEEDINGS TO GIVE EFFECT TO FORFEITURE.

- (a) Breach as rendering policy void or only voidable.
- (b) Same—New York.
- (c) Same—Pennsylvania.
- (d) Same—Iowa.
- (e) Same—Wisconsin.
- (f) Same—Other states.
- (g) Sufficiency of proceedings declaring forfeiture.

(a) Breach as rendering policy void or only voidable

Conceding that a forfeiture has been incurred by a breach of warranty or condition, does the policy become ipso facto void, or

must there be some affirmative action on the part of the insurer to give effect to the forfeiture? On the answer to this question the courts are by no means agreed; but it is evident that the solution of the problem depends to a large extent on the form of the conditions relating to forfeiture. It is noticeable, however, that the courts are far from consistent in the construction of the conditions.

(b) Same—New York.

In view of the strictness with which the conditions of marine policies are construed, it is elementary that a breach of such conditions terminates the policy on the instant (*Audenreid v. Mercantile Mut. Ins. Co.*, 60 N. Y. 482, 19 Am. Rep. 204). So far as fire policies are concerned, however, the New York courts seem to have taken a more liberal view, and to have regarded the effect of forfeiture as dependent on the particular form of the condition. If the policy expressly provides that a default by the insured shall render the policy wholly void, a noncompliance with the condition is regarded as making the policy not merely voidable, but absolutely void.

Hand v. Williamsburgh City Fire Ins. Co., 57 N. Y. 41, followed in *Galantshik v. Globe Fire Ins. Co.*, 10 Misc. Rep. 369, 81 N. Y. Supp. 32.

So, where the policy contained a provision that on breach of a condition the policy should be void, and a by-law of the company provided that upon a breach of such condition the policy should be surrendered to the company to be canceled, and a ratable proportion of the unearned premium be returned, it was held that the by-law did not so limit the condition of the policy as to prevent it becoming void until the return of the unearned premium (*Buchanan v. Westchester County Mut. Ins. Co.*, 61 N. Y. 611). Under a clause declaring the policy void if the risk be increased by acts of the insured, the violation of the condition forfeits the policy without notice, notwithstanding a subsequent condition authorizing the insurer to terminate the insurance on notice, if the premises should be occupied or used so as to increase the risk; the latter clause being construed as referring only to an increase of risk by the acts of third persons (*Williams v. People's Fire Ins. Co.*, 57 N. Y. 274).

On the other hand, the rule that, in the absence of special conditions, a policy is not rendered void, but only voidable, was recog-

nized in a comparatively early case (*Potter v. Ontario & L. Mut. Ins. Co.*, 5 Hill, 147).

The rule must also be regarded as supported by *Hyatt v. Wait*, 37 Barb. 29, where it was held that, though a breach of condition renders the policy void, the insured cannot take advantage of it to escape payment of assessments.

The rule has also been asserted by the Court of Appeals; the decisions resting apparently on the principle that, as the insurer may waive a breach of condition, such breach does not render the policy absolutely void, but only voidable.

Landers v. Watertown Fire Ins. Co., 86 N. Y. 414, 40 Am. Rep. 554; *Benninghoff v. Agricultural Ins. Co.*, 93 N. Y. 495; *Klernan v. Dutchess County Mut. Ins. Co.*, 150 N. Y. 190, 44 N. E. 698. Reference may also be made to *Burke v. Niagara Fire Ins. Co.*, 58 Hun, 605, 12 N. Y. Supp. 254; *Lobee v. Standard Live Stock Ins. Co.*, 12 Misc. Rep. 499, 33 N. Y. Supp. 657.

(c) Same—Pennsylvania.

The general rule that a policy is not ipso facto void by a breach of condition was asserted in *Crawford County Mut. Ins. Co. v. Cochran*, 88 Pa. 230, apparently on the theory that the breach merely suspended the risk, and that on termination of the ground of forfeiture the policy would be revived. Where a policy provides that the company shall be relieved from liability for loss if the premises become vacant without immediate notice to the company and consent indorsed thereon, and notice is given the company within a reasonable time (*Strunk v. Firemen's Ins. Co.*, 160 Pa. 345, 28 Atl. 779, 40 Am. St. Rep. 721), it is optional with the company to give or refuse its consent, and the policy continues in force until the consent is given or refused. There would be no reason for notice and consent, if the policy were rendered void ipso facto by the vacancy. The same principle was also applied where the condition provided for notice of other insurance (*McSparran v. Southern Mut. Fire Ins. Co.*, 193 Pa. 184, 44 Atl. 317).

If, however, the policy declares that it shall be void if certain acts are done "without the consent of the company indorsed" on the policy, the policy becomes ipso facto void on a breach of the condition without such consent (*Girard Fire & Marine Ins. Co. v. Hebard*, 95 Pa. 45). Where the charter of a mutual company provides that under certain contingencies the insurance of a member shall

be suspended (*Pennsylvania Training School v. Independent Mutual Fire Ins. Co.*, 127 Pa. 559, 18 Atl. 392) suspension follows the happening of the event by force of law, and no act on the part of the insurer is necessary to give effect to the forfeiture.

The rule that the policy is void ipso facto is also approved in *Gonder v. Lancaster County Mutual Fire Ins. Co.*, 17 Pa. Super. Ct. 119; *Marshall v. Insurance Co. of North America*, 10 Pa. Co. Ct. R. 87; *Davison v. London & Lancashire Fire Ins. Co.*, 42 Atl. 2, 189 Pa. 182.

(d) Same—Iowa.

The Supreme Court of Iowa has drawn some very fine distinctions in its construction of conditions relating to forfeiture. In a leading case (*Viele v. Germania Ins. Co.*, 26 Iowa, 9, 96 Am. Dec. 83) it was held that the phrase "shall be void," as used in the condition relating to increase of risk, does not mean that the policy shall be absolutely void and of no effect, but merely gives the insurer the option of forfeiting the policy; and this doctrine was subsequently reaffirmed (*Hubbard v. Hartford Fire Ins. Co.*, 33 Iowa, 325, 11 Am. Rep. 125). But, where it was provided that the existence of certain conditions "shall immediately render this policy null and void" (*Meadows v. Hawkeye Ins. Co.*, 62 Iowa, 387, 17 N. W. 600), this clause was regarded as rendering the policy ipso facto void on the happening of the contingency. So a provision that, if an incumbrance should fall or be executed on the insured property, the policy should be void until the consent of the insurer was obtained and indorsed on the policy, rendered the policy absolutely void if a mortgage was placed on the property (*Supple v. Iowa State Ins. Co.*, 58 Iowa, 29, 11 N. W. 716). A removal of the insured property necessarily terminates the insurance ipso facto (*Harris v. Royal Canadian Ins. Co.*, 53 Iowa, 236, 5 N. W. 124).

Where the policy provides that on the failure to comply with the condition the officers of the insurer may "at their option annul the policy," affirmative action on the part of the insurer is necessary to forfeit the policy.

Supple v. Iowa State Ins. Co., 58 Iowa, 29, 11 N. W. 716; *Coles v. Iowa State Mut. Ins. Co.*, 18 Iowa, 425.

The effect of conditions of the policy may, of course, be controlled by special statutory provisions relating to the necessity of affirm-

ative action to give effect to forfeiture (*Marden v. Hotel Owners' Ins. Co.*, 85 Iowa, 584, 52 N. W. 509, 39 Am. St. Rep. 316).

(c) Same—Wisconsin.

Though there are some expressions in the late decisions of the Supreme Court of Wisconsin that might give rise to doubts, the rule must be regarded as settled in that state that a breach of condition forfeits the policy *ipso facto*. It is true that, in *Appleton Iron Co. v. British-American Ins. Co.*, 46 Wis. 23, 1 N. W. 9, the court regarded it as well settled that on a forfeiture by change of title or possession the policy becomes voidable at the election of the insurer, not void; but the court seems to base its decision on the fact that such a condition might be waived, and it is worthy of note, moreover, that the breach was by the mortgagor, while the insurance was in favor of the mortgagee. Again in *Wakefield v. Orient Ins. Co.*, 50 Wis. 532, 7 N. W. 647, where the policy contained a clause that, if the premises become vacant without immediate notice to the company and indorsement of the policy, the insurance shall be void, the court held that under this condition, after receiving notice of vacancy, if the company did not desire to continue the risk, it must notify the insured that it elected to terminate the policy.

The most explicit expression of the court is, however, to be found in *Carey v. German-American Ins. Co.*, 84 Wis. 80, 54 N. W. 18, 36 Am. St. Rep. 907, 20 L. R. A. 267. In this case the provision was that, "if any change takes place in the * * * possession of the property, * * * this policy shall be void." The court held that by virtue of this provision the policy became *ipso facto* void. The provision was regarded as clear, explicit, and positive, affording no ground for construction. As soon as the change took place the policy was void. The court distinguishes the *Wakefield Case*, as in that case the provision was that, if the property should become vacant "without immediate notice to the company and indorsement made on the policy," the instrument should be void. Under such a clause, when the insured has given notice of the vacancy, he has done all that he can do or is required to do. After that the company must act, and if it fails to act there will be no forfeiture. In a recent case the court held that a violation of the same condition rendered the policy *ipso facto* void, though recognizing the principle that the company might waive the breach (*Keith v. Royal Ins. Co. of Liverpool*, 117 Wis. 531, 94 N. W. 295).

(2) Same—Other states.

The Supreme Court of Michigan has given explicit expression to the rule that a breach of condition renders the policy void *ipso facto*.

New York Central Ins. Co. v. Watson, 23 Mich. 486; Emery v. Mutual City & Village Ins. Co., 51 Mich. 469, 18 N. W. 816, 47 Am. Rep. 590; A. M. Todd Co. v. Farmers' Mut. Fire Ins. Co. (Mich.) 100 N. W. 442.

But where the charter of a mutual company provides that on the violation of a condition the secretary or board of directors may suspend or cancel the insurance, and allows an appeal to the directors from the action of the secretary, it was held that forfeiture for breach of condition must be declared in the manner provided by the charter (*Olmstead v. Farmers' Mutual Fire Ins. Co.*, 50 Mich. 200, 15 N. W. 82).

The Court of Appeals of Kentucky has held that, where the policy provides that it shall be void on failure to pay premiums, such non-payment would not render the policy *ipso facto* void, but only voidable (*Louisville Underwriters v. Pence*, 93 Ky. 96, 19 S. W. 10, 40 Am. St. Rep. 176). The court apparently bases its decision on the fact that such a condition may be waived. So, under the provisions of the statute (section 712), declaring that the policy of a member of a co-operative company may be canceled for failure to pay an assessment and that the secretary shall notify him of the fact, forfeiture for failure to pay an assessment does not result *ipso facto*, but only after action by the company (*Hurst Home Ins. Co. v. Muir*, 107 Ky. 148, 53 S. W. 3).

▲ breach of condition is regarded as rendering the policy voidable only, and not absolutely void, in *Turner v. Meridan Fire Ins. Co.* (O. C.) 16 Fed. 459; *Tillis v. Liverpool & London & Globe Ins. Co.* (Fla.) 85 South. 171; *Swedish-American Ins. Co. v. Knutson*, 87 Kan. 71, 72 Pac. 526, 100 Am. St. Rep. 382; *Commercial Ins. Co. v. Mehlman*, 48 Ill. 318, 95 Am. Dec. 543; *Williamsburg City Fire Ins. Co. v. Cary*, 88 Ill. 453; *Manufacturers' & Merchants' Mut. Ins. Co. v. Armstrong*, 145 Ill. 469, 34 N. E. 553; *Garland v. Insurance Co. of North America*, 9 Ill. App. 571; *Stephens v. Phoenix Ins. Co.*, 85 Ill. App. 671; *Hanover Fire Ins. Co. v. Dole*, 20 Ind. App. 383; 50 N. E. 772; *Joyce v. Maine Ins. Co.*, 45 Me. 168, 71 Am. Dec. 536; *McCullum v. Niagara Fire Ins. Co.*, 61 Mo. App. 352; *Farmers' Mut. Ins. Co. v. Home Fire Ins. Co.*, 54 Neb. 740, 74 N. W. 1101; *Hunt v. State Ins. Co.*, 66 Neb. 121, 92 N. W. 921; *Wilson v. Home Ins. Co.*, 6 Ohio Dec. 708; *Kingman v. Lancashire Ins. Co.*, 54 S. C. 599, 32 S. E. 762; *Morrison v. Insurance Co. of North America*, 69 Tex. 353, 6 S. W. 605, 5 Am. St. Rep. 63; *Medley v. German*

Alliance Ins. Co. (W. Va.) 47 S. E. 101. In these cases the ruling seems to rest on the principle that, as such conditions may be waived, a breach cannot render the policy absolutely void.

The opposite view was taken in *Petit v. German Ins. Co.* (C. C.) 98 Fed. 800; *Farmers' Mut. Ins. Ass'n v. Price*, 112 Ga. 264, 37 S. E. 427; *Allen v. Massasoit Ins. Co.*, 99 Mass. 160; *Johnson v. American Fire Ins. Co.*, 41 Minn. 396, 43 N. W. 59; *Betcher v. Capital Fire Ins. Co.*, 78 Minn. 240, 80 N. W. 971; *Muhleman v. National Ins. Co.*, 6 W. Va. 508. But the court recognizes in the *Allen Case* the principle that, if affirmative action by the insurer is provided for in the policy, the contract is not ipso facto void.¹

Of course, where the breach of condition relates to facts on the existence of which the policy as a contract rests, as where there is a transfer of title divesting the insurable interest of the insured, the policy is absolutely void (*New v. German Ins. Co.*, 5 Ind. App. 82, 31 N. E. 475).

(g) Sufficiency of proceedings declaring forfeiture.

In Arkansas, the rule has been laid down that it is not necessary for an insurer to take any action in order to be entitled to the benefit of a forfeiture of the policy, provided the insured, under the circumstances, could not, from the insurer's silence, reasonably infer that the company did not intend to insist or rely on the forfeiture (*Sun Mut. Ins. Co. v. Dudley*, 65 Ark. 240, 45 S. W. 539). On the other hand, it has been said in Iowa (*Victor v. Hartford Fire Ins. Co.*, 33 Iowa, 210) that there must be an express declaration of some sort. Mere publication in a newspaper is not sufficient evidence of actual notice to the insured of a forfeiture for nonpayment of premiums (*Sinking Springs Ins. Co. v. Hoff's Ex'rs*, 2 Wkly. Notes Cas. [Pa.] 41). Where there was delay in the fulfillment of a promissory warranty, forfeiture cannot be predicated thereon until there has been a demand for fulfillment and notice of intention to forfeit if the demand is not complied with (*Howell v. Hartford Fire Ins. Co.*, 12 Fed. Cas. 700). Where the charter provides that on breach of a certain condition the insurance may be suspended or canceled by the secretary or board of directors, and that if action is taken by the secretary there may be an appeal to the board (*Olmstead v. Farmers' Mut. Fire Ins. Co.*, 50 Mich. 200, 15 N. W. 82), there must be a hearing and an explicit declaration of forfeiture or suspension. So, where the statute pro-

¹ See, as to the effect of a breach of a condition subsequent in a deed, Cent. Dig. vol. 16, "Deeds," § 521.

vides a special manner of forfeiting a policy for breach of condition as to payment of premiums, the insured has a right to rely on the policy until it is terminated in the manner directed (*Hurst Home Ins. Co. v. Muir* [Ky.] 53 S. W. 3).

6. GROUNDS OF FORFEITURE OF MARINE POLICIES IN GENERAL.

- (a) General principles.
- (b) Matters relating to the risk in general.
- (c) Additional insurance.
- (d) Matters relating to title and interest.
- (e) Sailing, voyage, and navigation of vessel.
- (f) Maintenance of seaworthiness.
- (g) Same—What constitutes seaworthiness.
- (h) Same—Competency of officers and sufficiency of crew.
- (i) Same—Employment of pilot.
- (j) Nature and stowage of cargo.
- (k) Same—Overloading.
- (l) Nationality or neutrality of vessel or cargo.
- (m) Questions of practice.

(a) General principles.

It is the general rule that warranties and prohibitory conditions in marine policies must be strictly complied with.

Odiorne v. New England Mut. Marine Ins. Co., 101 Mass. 551, 8 Am. Rep. 401; *Lovett v. China Mut. Ins. Co.*, 54 N. H. 338, 174 Mass. 108.

But this rule operates in favor of the insured, as well as against him, and there must, therefore, be an actual breach of the warranty or condition.

Snow v. Columbian Ins. Co., 48 N. Y. 624, 8 Am. Rep. 578; *Wheeler v. New York Mut. Ins. Co.*, 85 N. Y. Super. Ct. 247.

Therefore clauses in the policy providing for forfeiture will be strictly construed against the insurer.

Hitchcock v. Northwestern Ins. Co., 26 N. Y. 68; *Lazarus v. Commonwealth Ins. Co.* 5 Pick. (Mass.) 76.

In determining whether there has been a breach of representations or stipulations, the provisions of the policy must be reasonably construed in favor of the insured.

Irvin v. Sea Ins. Co., 22 Wend. (N. Y.) 380; *Plyer v. German-American Ins. Co.*, 48 Hun, 618, 1 N. Y. Supp. 395.

Where the statement has the character of a promissory representation only, a substantial compliance therewith is sufficient.

Suckley v. Delafield, 2 Caines (N. Y.) 222; *Lunt v. Boston Marine Ins. Co.* (C. C.) 6 Fed. 562.

So, if the statement is merely a declaration of expectation or intention, it must be made with a fraudulent intent, in order to base a forfeiture thereon because of noncompliance (*Bryant v. Ocean Ins. Co.*, 22 Pick. [Mass.] 200); but a breach of warranty vacates the policy, irrespective of the reason of the breach or the good faith of the insured (*Camors v. Union Marine Ins. Co.*, 104 La. 349, 28 South. 926, 81 Am. St. Rep. 128). A concealment of an intention may render the policy void, but not unless it is a present and positive intent, and even then it is doubtful. In any event, the concealment of a contingent intent would not affect the policy. (*Clark v. Protection Ins. Co.*, 5 Fed. Cas. 909.) Neither would a concealment of an intent to do that which the insured had a perfect right to do (*Houston v. New England Ins. Co.*, 5 Pick. [Mass.] 89).

In the absence of a special provision, there must usually be an increase of risk in order to afford a ground for forfeiture.

Lapham v. Atlas Ins. Co., 24 Pick. (Mass.) 1; *Orient Mut. Ins. Co. v. Reymershoffer's Sons*, 56 Tex. 234.

The rule has indeed been stated that the insured warrants that the risk will not be unnecessarily increased (*Cleveland v. Union Ins. Co.*, 8 Mass. 308). The insured, after selecting a proper carrier, does not, however, warrant his diligence, or that of any other person, save his own agents, through whom the consignment passes in the course of navigation (*Underwriters' Agency v. Sutherlin*, 55 Ga. 266).

(b) Matters relating to the risk in general.

It is a general rule that there can be no material change in the condition of the property covered by a marine policy. Words of description, when they go to the very essence of the contract, as a description of the vessel as a "steamer," import a warranty that she will remain a vessel propelled by steam, and, if dismantled, the warranty is broken (*Baker v. Central Ins. Co.*, 3 Ohio Dec. 478). So, the fact that a vessel was beached, and her furniture taken out, and she left unoccupied during one summer, rendered void a fire policy providing that it should be void if the "premises" should be

vacated and remain unoccupied for 20 days without notice (*Reid v. Lancaster Fire Ins. Co.*, 90 N. Y. 382, affirming 23 Hun [N. Y.] 295).

▲ A scow may be regarded as a building, within the vacancy clause in a fire policy (*Enos v. Sun Ins. Co.*, 87 Cal. 621, 8 Pac. 379).

But an alteration for the purpose of making repairs rendered necessary by sea damage will not afford a ground of forfeiture. In such a case the consent of the insurer is not required to authorize alteration. (*Waller v. Louisiana Ins. Co.*, 9 Mart. O. S. [La.] 276.)

A provision in a marine policy warranting the vessel to be securely moored in a safe place during the winter months must be regarded as a warranty, which must be strictly complied with. Neither the condition requiring the insured to make reasonable exertions to safeguard the vessel, nor the implied warranty to keep the vessel in repair and seaworthy condition, modifies the "safety moored clause." Therefore the removal of the vessel to make repairs is a violation of the latter clause, especially since it appeared that by pumping the vessel could have been kept free from water. (*Ryan v. Providence-Washington Ins. Co.*, 79 N. Y. Supp. 460, 79 App. Div. 316.) A warranty that a vessel should be "securely moored in a safe place satisfactory to the company, * * * the company to be duly notified of the time and place of laying up," is broken if no notice is given to the insurer (*Devens v. Mechanics' & Traders' Ins. Co.*, 83 N. Y. 168).

The use of kerosene oil to light the cabin of a steamboat does not render void a policy of insurance providing that "if naphtha, benzine, chemical, crude, or refined coal or earth oils, are kept or used on the premises without written consent," the policy shall be void, as such provision refers to oils similar to coal or earth oils and other substances specifically named, in respect to their dangerous and inflammable character (*Morse v. Buffalo Fire & Marine Ins. Co.*, 30 Wis. 534, 11 Am. Rep. 587). Where the policy prohibited the use of "burning fluid or chemical oil," the court held that, in the absence of proof, it could not consider kerosene oil, which it was shown had been used, as coming within the term "burning fluid or chemical oil" (*Mark v. National Fire Ins. Co.*, 24 Hun [N. Y.] 565).

Under the rule that, in determining whether there has been a breach, a reasonable construction must be given to a representation

or condition, a representation that "no spirits would be allowed on board" is not falsified by the fact that the master did have two kegs of spirits, which were not broached on the voyage; the spirits not being on board for use and not being used (*Irvin v. Sea Ins. Co.*, 22 Wend. [N. Y.] 380). So a stipulation that a vessel is "in charge of a watchman" is sufficiently complied with if there is a watchman at the yard of the person who is in charge of the repairs on the vessel, and such watchman is taking care of the vessel, exercising dominion and control over it (*Plyer v. German-American Ins. Co.*, 48 Hun, 618, 1 N. Y. Supp. 395).

Acts of the insured which impair the insurer's right of subrogation afford a ground for forfeiture.

Atlantic Ins. Co. v. Storrow, 5 Paige (N. Y.) 285; *Phoenix Ins. Co. v. Parsons*, 129 N. Y. 86, 29 N. E. 87.

But the impairment of the insurer's right of subrogation against a carrier will affect the policy only as to losses by perils for which the carrier is responsible (*Pennsylvania R. Co. v. Manheim Ins. Co.* [D. C.] 56 Fed. 301).

Where an open policy contained a warranty that all risks should be reported to insurer as soon as known to assured, a failure to report risks known to assured was a breach of the policy as an entirety at the option of insurer, and not merely as to the risks not reported. The warranty entitled the insurer, should he believe the insured was not acting in good faith in delaying the report of a shipment, so as to avoid paying the premium on it after it safely arrived, to at once avail himself thereof and vacate the whole policy. Nor was a breach excused by the fact that an epidemic prevailed, and assured failed to make prompt reports of risks on account of the sickness of his clerks. (*Camors v. Union Marine Ins. Co.*, 28 South. 926, 104 La. 349, 81 Am. St. Rep. 128.) The fact that, in the application for insurance, it was understood that the assured were to get insured in the company all goods consigned to or shipped by them, will not, of itself, on their failure so to do, work a forfeiture of the policy, unless such were the express terms of the instrument (*Arkansas Ins. Co. v. Bostick*, 27 Ark. 539).

Policies on vessels sometimes provide that notice of any change of masters shall be given to the underwriters. Under this clause it has been held that the consent of the insurers to one change was not a complete performance of the requirement, and that notice of any subsequent change of masters must be given, or the policy

would cease to be binding (*Tennessee Marine & Fire Ins. Co. v. Scott*, 14 Mo. 46). Nor does the consent of the insurer previously obtained do away with the necessity of notice when the change actually takes place (*Eddy v. Tennessee Marine & Fire Ins. Co.*, 21 Mo. 587). But, under a clause providing that the policy should become void upon a change of command, the seizure of the vessel by the sheriff at the suit of a creditor would not have the effect of forfeiting the policy. The captain was no less the commander of the vessel because of the seizure. (*Marigny v. Home Mutual Ins. Co.*, 13 La. Ann. 338, 71 Am. Dec. 511.)

It is not an abandonment of the vessel, forfeiting the policy, for a master of a steamboat which has grounded to leave it to advise the owners and underwriters of its condition, and to consult with them as to the best method to be adopted for its security (*Fireman's Ins. Co. v. Powell*, 13 B. Mon. [Ky.] 311).

(c) Additional insurance.

Though overinsurance of a vessel contrary to the terms of the policy will forfeit the insurance (*Columbus Ins. Co. v. Walsh*, 18 Mo. 229), it is a general principle that a condition against other insurance is not broken unless the additional insurance covers the same property and interest.

Marigny v. Home Mutual Ins. Co., 13 La. Ann. 338, 71 Am. Dec. 511;
Perkins v. New England Marine Ins. Co., 12 Mass. 214; *Williams' Adm'rs v. Cincinnati Ins. Co.*, Wright (Ohio) 542.

Thus an overinsurance of the cargo is not a breach of warranty by the owner of the vessel not to insure his interest in the vessel beyond a certain amount.

Merchants' Mut. Ins. Co. v. Allen, 121 U. S. 67, 7 Sup. Ct. 821, 30 L. Ed. 858, reaffirmed on rehearing, 122 U. S. 376, 7 Sup. Ct. 1248, 30 L. Ed. 1200.

Nor is a warranty against other insurance in a policy on freight broken by the taking out of another policy by the consignee for his own interest, though the consignor might, by assenting thereto, have been benefited, if he did not in fact do so (*Williams v. Crescent Mut. Ins. Co.*, 15 La. Ann. 651). But a policy taken out by the owner, "loss, if any, payable to" the mortgagee, is avoided by a subsequent policy taken out in another company by the owner for his own benefit, since they cannot be sustained as issued on distinct interests (*Van Alstyne v. Ætna Ins. Co.*, 14 Hun [N. Y.] 360).

Two insurances on the same ship, not for the same entire risk, do not constitute double insurance (*Columbian Ins. Co. v. Lynch*, 11 Johns. [N. Y.] 233); but this principle does not allow the taking out of a voyage policy on a vessel already insured under a time policy (*Van Alstyne v. Ætna Ins. Co.*, 14 Hun [N. Y.] 360). Where the policy contained a memorandum providing for its cancellation "should the vessel and cargo be insured in England," and the vessel was insured in England, it was held that, though the original policy was void as to the vessel, it was valid as to the cargo (*Davis v. Boardman*, 12 Mass. 80). A policy on a vessel containing a warranty not to insure for more than \$11,000, and in case of excess over such amount the policy to be void, is forfeited by subsequent policies in excess of such amount, though the subsequent policies contained a provision that they "shall become void if any other insurance" be made in excess of a certain sum, for the provision against other insurance in these policies relates to subsequent and not to prior policies (*Mussey v. Atlas Mut. Ins. Co.*, 14 N. Y. 79).

In this connection see *In re Carow*, 5 Fed. Cas. 101, where it was held that an adjudication of bankruptcy ended the liability of insurance companies upon policies held by the bankrupt, unless they saw fit to consent to continue their liability under the policy by the transfer of the same from the bankrupt to the register or marshal on account of the creditors of the estate, and that it would be optional with the company to continue their risks by transfers.

An interesting case is *St. Paul Fire & Marine Ins. Co. v. Knickerbocker Steam Towage Co.*, 93 Fed. 931, 36 C. C. A. 19. The policy provided that it should be void if other insurance was made on the vessel exceeding \$50,000. The policy also provided that, in the event of a deviation from certain waters, the policy should be suspended, and take effect on return to such waters. The tug, desiring to go outside of the waters designated, applied to defendant company for permission and indorsement on the policy, which was refused. Thereafter it took out a policy in another insurance company, which, with the policies then existing, would have exceeded the prescribed amount. The latter policy provided that, if the assured had other insurance prior in date, the company should be liable only for so much as the amount of the prior insurance was deficient towards covering the property insured. This prior insurance was to the total value of the vessel. It was held that, as such latter policy could take effect only on the suspension of the

other policies, and was at once suspended upon the revival of the other policies on a return within the limits, there was at no time insurance in effect more than the agreed amount, and the policy sued on was not void for overinsurance.

(d) Matters relating to title and interest.

Where a policy on a steamer, obtained by the owner, does not prohibit him from selling, he can do so without forfeiting it, if the insurers are not thereby put in a worse situation (*Bell v. Western Marine & Fire Ins. Co.*, 5 Rob. [La.] 423, 39 Am. Dec. 542). But it is to be noted that in this particular case the insurer was informed of the existence of the contract to sell. This distinguishes the case from *Bell v. Firemen's Ins. Co.*, 3 Rob. (La.) 423, involving a policy on the same vessel in which the insured was simply described as owner, and it was held that a transfer of interest forfeited the policy. So it has been held that, where the policy recites that it is on account of whom it may concern (*Rogers v. Traders' Insurance Co.*, 6 Paige [N. Y.] 583), the insurer must have contemplated that a change of ownership might take place during the life of the policy. Similarly it has been held that the words "for account of whom it may concern," inserted in writing immediately following the name of the insured in a policy of marine insurance, protect a subsequent vendee of an interest in the vessel, notwithstanding the retention in the policy, which is written on a blank intended for insurance of property on land, of the printed clause that such policy shall be entirely void, unless otherwise provided by agreement, if any change in interest, title, or possession shall be made (*Hagan v. Scottish Union & National Ins. Co.*, 186 U. S. 423, 22 Sup. Ct. 862, 46 L. Ed. 1229).

For the opinion of the trial court, see *Hagan v. Scottish Union & National Ins. Co.* (D. C.) 98 Fed. 129, and of the Circuit Court of Appeals, see *Scottish Union & National Ins. Co. v. Hagan*, 102 Fed. 919, 43 C. C. A. 55, reversed by the Supreme Court, which approves the doctrine laid down by the trial court.

In the absence of any stipulation to the contrary, a policy is valid, though the insured has made a conditional sale of his interest, if the condition has been broken, and the vessel has been reconveyed to him, and the loss occurs after such reconveyance (*Worthington v. Bearse*, 12 Allen [Mass.] 382, 90 Am. Dec. 152). In accordance with the principle that a clause providing for forfeiture of the policy in case of any transfer or termination of the interest of the assured

in the policy or property insured, without the written consent of the company, should be construed strictly, it has been held that a sale of the insured vessel, a mortgage thereof being given back by the purchasers, is not such a transfer as will render the policy void (*Hitchcock v. Northwestern Ins. Co.*, 26 N. Y. 68). And this is true, though the original conveyance was by an absolute bill of sale, and the mortgage back was not given until several days thereafter (*Fernandez v. Great Western Ins. Co.*, 26 N. Y. Super. Ct. 457).

The contrary view was taken in *Bell v. Firemen's Ins. Co.*, 3 Rob. (La.) 423.

Though the execution of a chattel mortgage on a tugboat is not a violation of the clause prohibiting a sale or transfer (*Hennessey v. Manhattan Fire Ins. Co.*, 28 Hun [N. Y.] 98), a mortgage will forfeit the policy if the condition prohibits the sale, transfer, or pledge of the property (*Atherton v. Phoenix Ins. Co.*, 109 Mass. 32).

An interesting case is *Cassa Marittima v. Phoenix Ins. Co.*, 129 N. Y. 490, 29 N. E. 962, affirming 59 Hun, 361, 12 N. Y. Supp. 811. The insured advanced money on a vessel and its freight, and took from the master an instrument securing a lien on the vessel and freight, which provided, among other things, that the owner or master should not take any other advances upon the vessel or its earnings at the port of loading, but that, if they did, they should be bound to return the present loan to plaintiff, even though the vessel should be lost. This provision was violated by the master, who took further advances without insured's knowledge before leaving port, but subsequent to the issuance of the policy in suit. It was claimed that by this, under the stipulations in the instrument between the insured and master, insured's maritime lien was destroyed, and with it his insurable interest in the property, forfeiting the policy. But the court held that the acts of the master without the knowledge of insured could not have this effect.

In an early case (*Earl v. Shaw*, 1 Johns. Cas. [N. Y.] 313, 1 Am. Dec. 117) it was held that the assignment of a marine policy previous to the sailing of the vessel did not alter the risk, so as to vitiate the insurance; the court saying that such assignments are common, and it is not easy to perceive how they can affect the insurer, unless in the case of neutral property assigned to a subject or citizen of one of the belligerent parties. Though a different result might follow if there was an express stipulation, yet an agreement

that a policy shall be void if transferred or pledged without the previous consent in writing of the assurers must be construed strictly, and nothing but an effectual transfer or pledge will come within the terms of it (*Lazarus v. Commonwealth Ins. Co.*, 5 Pick. [Mass.] 76). Therefore an assignment for the benefit of the creditors did not render the policy void, as the general assignment could only be held to include such policies as were assignable (*Lazarus v. Commonwealth Ins. Co.*, 19 Pick. [Mass.] 81).

(c) Sailing, voyage, and navigation of vessel.

A mere statement that a vessel is ready to sail, or will sail soon, is not a promissory representation, which binds the insured, and the breach of which will vitiate the policy (*Augusta Ins. & Banking Co. v. Abbott*, 12 Md. 348). So a statement that the vessel "is to sail from L. in the course of this month" should not be construed as a representation in its technical sense, but as a statement by the insured of his expectation in relation to the matter (*Allegre's Adm'rs v. Maryland Ins. Co.*, 2 Gill & J. [Md.] 136, 20 Am. Dec. 424). If, however, the policy is "at and from," an unreasonable delay in the beginning of the voyage will amount to a noninception of the voyage insured, so as to discharge the underwriter (*Seamans v. Loring*, 21 Fed. Cas. 920).

It is a general principle that, in contracts of insurance, the voyage is to be performed in such a manner that the insurer is responsible for no extraordinary risks, which were not contemplated and which are unnecessarily incurred (*Cleveland v. Union Ins. Co.*, 8 Mass. 308). So where, without any provision therefor having been inserted in the policy, an insured vessel takes another vessel in tow, thereby increasing the risk, the policy is forfeited (*Hermann v. Western Marine & Fire Ins. Co.*, 13 La. 516).

The custom of dividing fleets of barges in the Ohio and Mississippi rivers, and towing part of them up at a time, is not so unreasonable as to prevent its admission in an action on an insurance policy on barges lost in consequence of the custom. *Pittsburgh Ins. Co. v. Dravo*, 2 Wkly. Notes Cas. 194.

A clause in the memorandum stating that the vessel "is bound to K.; if not allowed to sell there, will proceed to Cuba," is not necessarily part of the policy, so as to be a warranty (*Andrews v. Essex Fire & Mar. Ins. Co.*, 1 Fed. Cas. 885). Where the policy covered a voyage "to K. and a market," the insured was not pro-

hibited from going first to other ports, though he could not thereafter go to K. (*Houston v. New England Ins. Co.*, 5 Pick. [Mass.] 89). A warranty that "orders will be given that the ship shall not cruise" is a very different thing from a warranty that orders will not be given that the ship shall cruise, and consequently a failure to give definite orders forbidding cruising is a breach of the warranty (*Ogden v. Ash*, 1 Dall. [Pa.] 162, 1 L. Ed. 82). Where insurance was effected on a vessel at and from Charleston to the coast of Africa, during her stay and trade there, and at and from thence back to Charleston, warranted not to remain on the coast longer than four months, it was held that when the captain entered the Senegal, though with the loss of an anchor and after having been driven from his anchorage and blown off the coast, and though seeking for another anchor, he had arrived on the coast within the intent of the policy, and the four months began then to run, and his stay and trading on the coast more than four months from that arrival was a breach of warranty (*Murden v. South Carolina Ins. Co.*, 1 Mill, Const. [S. C.] 200).

A condition that the vessel insured is prohibited from certain waters or ports is an express warranty that the vessel will not enter such waters or ports, and must be strictly complied with.

Cobb v. Lime Rock Fire & Marine Ins. Co., 58 Me. 328; *Lovett v. China Mut. Ins. Co.*, 174 Mass. 108, 54 N. E. 338.

But where the policy permitted the vessel to navigate certain rivers, and provided that "the said vessel shall be run and navigated upon the privileged waters as is usual for vessels of her class in the usual prosecution of business," this is not a warranty by the assured that he will navigate no other waters, but only that he will navigate the permitted waters in a proper and skillful manner, as is usual with boats of her class (*Wilkins v. Tobacco Ins. Co.*, 30 Ohio St. 317, 27 Am. Rep. 455).

In determining the character of conditions relating to prohibited ports or waters, a distinction must be drawn between warranty and exception of risk (*Greenleaf v. St. Louis Ins. Co.*, 37 Mo. 25).

If the vessel enters prohibited ports or waters in violation of the condition, there is a breach of warranty, which forfeits the policy.

Odiorne v. New England Mut. Marine Ins. Co., 101 Mass. 551, 3 Am. Rep. 401; *Day v. Orient Ins. Co.*, 1 Daly (N. Y.) 13; *Cogswell v. Chubb*, 1 App. Div. 93, 36 N. Y. Supp. 1076, affirmed without opinion 157 N. Y. 709, 53 N. E. 1124.

The warranty not to use certain ports or waters means not to go into them. Merely going near them, or in that direction, without actual entry, is not a breach of the warranty, even though there may have been an intent to enter.

New Haven Steam Sawmill Co. v. Security Ins. Co. (D. C.) 7 Fed. 847; *Snow v. Columbian Ins. Co.*, 48 N. Y. 624, 8 Am. Rep. 578, reversing 48 Barb. (N. Y.) 469.

Hence clearing for or sailing toward a prohibited port is not a violation of the warranty (*Wheeler v. New York Mutual Ins. Co.*, 85 N. Y. Super. Ct. 247). On the other hand, when a vessel sails for a prohibited port or river, intending to use it, and anchors at a buoy near the entrance, whence she is driven ashore by a storm, there is a violation of the prohibition (*Thames & Mersey Marine Ins. Co. v. O'Connell*, 86 Fed. 150, 29 C. C. A. 624). The question of intent was regarded as material in *Friend v. Gloucester Mut. Fishing Ins. Co.*, 113 Mass. 326, where a policy on a fishing vessel provided that she should not leave on a voyage east of Cape Sable after a certain date. After that date the vessel was fully equipped for a voyage to the prohibited district, with the exception of bait, to procure which she sailed for Eastport and was lost on the way. It did not appear whether or not the contemplated voyage to the prohibited district depended on the contingency of her being able to secure bait at Eastport. The determination of the question whether or not she was on the voyage prohibited, or was on an independent voyage to Eastport, was regarded as depending on whether she left on the voyage to Eastport, contingently to be prolonged to Cape Sable, or whether she left with full purpose of going on a voyage east of Cape Sable, liable to be defeated on her going to Eastport. In the latter case the plaintiffs could not recover.

(f) Maintenance of seaworthiness.

It has been asserted in several cases that the warranty of seaworthiness implied in every contract of marine insurance is a continuing warranty.

Reference may be made to *Baker v. Merchants' Ins. Co.* (O. C.) 16 Fed. 916; *Seaman v. Enterprise Fire & Marine Ins. Co.* (O. C.) 21 Fed. 778; *McDowell v. General Mut. Ins. Co.*, 7 La. Ann. 684, 56 Am. Dec. 619; *Paddock v. Franklin Ins. Co.*, 11 Pick. (Mass.) 227; *Copeland v. New England Marine Ins. Co.*, 2 Metc. (Mass.) 482; *Dabney v. New England Mut. Marine Ins. Co.*, 14 Allen (Mass.) 300; *Cudworth v. South Carolina Ins. Co.*, 4 Rich. Law (S. C.) 416, 55 Am.

Dec. 892; *Dupeyre v. Western Marine & Fire Ins. Co.*, 2 Rob. (La.) 457, 38 Am. Dec. 218.

The principle is regarded as applying also to cargo policies.

Barret v. General Mut. Ins. Co., 8 La. Ann. 99; *Howard v. Orient Mut. Ins. Co.*, 25 N. Y. Super. Ct. 539.

In *Van Valkenburgh v. Astor Mut. Ins. Co.*, 14 N. Y. Super. Ct. 61, the policy was on a cargo shipped from New York to Chagres, thence by the usual conveyance across the isthmus, and thence by steamer to San Francisco. The goods were damaged by leakage in the flatboats by which they were conveyed up the Chagres river, this being the usual mode of conveyance at that point. Though the point was not absolutely decided, Justice Bosworth was of opinion that a warranty of seaworthiness attached at the commencement of each separate stage of the voyage. Justice Hoffman, however, did not consider that any warranty of seaworthiness attached, except to the steamer conveying the goods from New York to the isthmus. The implied warranty of seaworthiness is based upon the theory that the insured is aware of the condition of the ship. This reason is not of much force when the insurance is upon goods, since the owner of the goods has no right to inspect the vessel. Still he has the right of selecting her, and on this ground the warranty is extended as to him also. Nevertheless the warranty does not apply to each successive port at which a vessel may touch on her voyage. If she is seaworthy at the commencement, the warranty is satisfied. The principle thus approved by Justice Hoffman seems to have governed in *Morse v. St. Paul Fire & Marine Ins. Co.* (C. C.) 122 Fed. 748.

Civ. Code Cal. § 2683, provides that the implied warranty of seaworthiness is complied with if the ship is seaworthy at the time of the commencement of the risk, except on a time policy; and when the insurance is on a cargo, which is to be transhipped at intermediate ports, the implied warranty must be complied with at the commencement of the particular voyage. This statute was applied in *Pope v. Swiss Lloyd Ins. Co.* (D. C.) 4 Fed. 153.

There are, however, cases which apparently hold that there is no continuing warranty of seaworthiness, but that all that is implied is a warranty of seaworthiness at the commencement of the risk.

Merchants' Mut. Ins. Co. v. Butler, 20 Md. 41; *Starbuck v. New England Marine Ins. Co.*, 19 Pick. (Mass.) 198; *Berwind v. Greenwich Ins. Co.*, 114 N. Y. 231, 21 N. E. 151; *Peters v. Phoenix Ins. Co.*, 3 Serg. & R. (Pa.) 25.

But, as shown in the *Starbuck* and the *Peters* Cases, there is at least a duty resting on the insured to repair all known defects arising during the continuance of the policy. So, though it has been held that, under a policy on unlimited time, the insurer is discharged if the vessel become unseaworthy (*Cleveland v. Union Ins. Co.*, 8 Mass. 308), the general rule undoubtedly is that in a time policy seaworthiness is not a continuing warranty, except to the extent that it is the duty of the insured to keep a vessel seaworthy if in his power. If she is rendered unseaworthy, he is bound to supply the damage or loss as soon as he conveniently can, and if, in consequence of his neglect to do so, loss ensues, the insurer will not be liable.

Union Ins. Co. v. Smith, 124 U. S. 405, 8 Sup. Ct. 534, 31 L. Ed. 497; *Jones v. Insurance Co.*, 13 Fed. Cas. 982; *Capen v. Washington Ins. Co.*, 12 Cush. (Mass.) 517; *American Ins. Co. v. Ogden*, 15 Wend. (N. Y.) 532, affirmed in 20 Wend. (N. Y.) 287; *Hathaway v. Sun Mut. Ins. Co.*, 21 N. Y. Super. Ct. 83.

We are, therefore, justified in assuming that, designated as a continuing warranty of seaworthiness or not, there is an implied warranty that the insured or the master shall use reasonable discretion and diligence to have defects remedied and proper repairs made at the nearest convenient port.

Reference may be made to *Seaman v. Enterprise Fire & Marine Ins. Co.* (C. C.) 21 Fed. 778; *Morse v. St. Paul Fire & Marine Ins. Co.* (C. C.) 122 Fed. 748; *Paddock v. Franklin Ins. Co.*, 11 Pick. (Mass.) 227; *Dabney v. New England Mut. Marine Ins. Co.*, 14 Allen (Mass.) 800; *Van Valkenburgh v. Astor Mut. Ins. Co.*, 14 N. Y. Super. Ct. 61; *Cudworth v. South Carolina Ins. Co.*, 4 Rich. Law (S. C.) 416, 55 Am. Dec. 692.

The warranty does not necessarily mean that it is the duty of the master to proceed at once to the nearest port, but the court holds that this must depend upon the danger and peril in the judgment of the master. It may be that he can safely proceed to some other intermediate port, further distant geographically, but nearer on the course of the voyage to the ultimate destination of the vessel (*Turner v. Protection Ins. Co.*, 25 Me. 515, 43 Am. Dec. 294). So the necessity for haste in making the repairs depends on the character of the defect (*Seaman v. Enterprise Fire & Marine Ins. Co.* [C. C.] 21 Fed. 778). Where a policy provides that vessels used by the insured shall be approved by the insurance company, and inspection is made only in the port of departure, there is no obliga-

tion on the insured that the vessel shall be put in as good condition in intermediate ports as when inspected (*Marine Fire Ins. Co. v. Burnett*, 29 Tex. 433).

The failure to make necessary repairs at an intermediate port does not, as a matter of course, discharge the insurer; but if the master, after a careful examination made in good faith, adjudged it safe so to proceed, and that such a course was the best, an insurer was liable for a loss occurring on such voyage, though the brig might have been repaired at an intermediate port after waiting repairs on other vessels (*Hathaway v. Sun Mut. Ins. Co.*, 21 N. Y. Super. Ct. 33). So, if a boat has been injured by one of the perils insured against, and partially repaired, so as merely to enable her to run, running her in this unseaworthy state, in good faith, until she is finally repaired, does not avoid the policy (*Gazzam v. Cincinnati Ins. Co.*, 6 Ohio, 71). Even where there is an express representation that the vessel is "to be repaired," in the absence of a specific representation as to the character of the repairs, the policy is not forfeited by failure to make repairs, if none were needed to make the vessel seaworthy; substantial compliance being all that is necessary (*Lunt v. Boston Marine Ins. Co.* [C. C.] 6 Fed. 562).

An interesting question has arisen in the construction of "at and from" policies. In *Garrigues v. Cox*, 1 Bin. (Pa.) 592, 2 Am. Dec. 493, it was held that when the insurance is "at and from" the warranty of seaworthiness must be referred to the commencement of the risk, and if between that time and the sailing of the vessel she becomes unfit for sea, without fault of the insured, he may recover. On the other hand, in *Taylor v. Lowell*, 3 Mass. 331, 3 Am. Dec. 141, which was an action to recover a premium, the insured contended that as the vessel was unseaworthy when the policy would otherwise have attached—that is, while the vessel was in port—the policy never did in fact attach, and no premium was due. The court, however, held that the warranty did not refer to the time while the vessel was in port, but to the time of departure. This doctrine was subsequently reaffirmed in *Merchants' Ins. Co. v. Clapp*, 11 Pick. (Mass.) 56.

A failure to maintain the vessel in a seaworthy condition will forfeit the policy, when it results in loss.

Barret v. General Mut. Ins. Co., 8 La. Ann. 99; *Capen v. Washington Ins. Co.*, 12 Oush. (Mass.) 517; *Howard v. Orient Mut. Ins. Co.*, 25 N. Y. Super. Ct. 539; *Cudworth v. South Carolina Ins. Co.*, 4 Rich. Law (S. C.) 416, 55 Am. Dec. 692.

The weight of authority is, however, that a breach of the continuing warranty of seaworthiness will not forfeit the policy, if such breach did not cause or contribute to the loss.

The principle is asserted in *Union Ins. Co. v. Smith*, 124 U. S. 405, 8 Sup. Ct. 534, 31 L. Ed. 497; *Seaman v. Enterprise Fire & Marine Ins. Co.* (C. C.) 21 Fed. 778; *Lapene v. Sun Ins. Co.*, 8 La. Ann. 1, 58 Am. Dec. 668; *Pointer v. Merchants' Mutual Ins. Co.*, 20 La. Ann. 100; *Paddock v. Franklin Ins. Co.*, 11 Pick. (Mass.) 227; *Deblois v. Ocean Ins. Co.*, 16 Pick. (Mass.) 303, 28 Am. Dec. 245; *Starbuck v. New England Marine Ins. Co.*, 19 Pick. (Mass.) 198; *Worthington v. Bearse*, 12 Allen (Mass.) 382, 90 Am. Dec. 152; *American Ins. Co. v. Ogden*, 20 Wend. (N. Y.) 287, affirming 15 Wend. (N. Y.) 582.

It has even been held that, though the vessel was unseaworthy by reason of the temporary absence of the master, and this absence contributed to the loss, yet, as the loss was by stranding within the terms of the policy, and the insured had shown due diligence, he might recover (*Lewis v. Aetna Ins. Co.* [D. C.] 123 Fed. 157, affirmed in 129 Fed. 1006, 64 C. C. A. 210).

(g) Same—What constitutes seaworthiness.

To be considered seaworthy, a vessel must not only be tight, staunch, and strong, but must be provided with everything necessary for the purposes of safe and secure navigation (*Whitney v. Ocean Ins. Co.*, 14 La. 485, 33 Am. Dec. 595). She must be properly manned, commanded, and equipped (*Williams v. New England Ins. Co.*, 29 Fed. Cas. 1383).

Unseaworthiness from defect in equipment may result where there is a lack of an anchor (*American Ins. Co. v. Ogden*, 20 Wend. [N. Y.] 287), a pump (*Dupeyre v. Western Marine & Fire Ins. Co.*, 2 Rob. [La.] 457, 38 Am. Dec. 218), or a wing rudder (*Seaman v. Enterprise Fire & Marine Ins. Co.* [C. C.] 21 Fed. 778). In this connection reference may be made to *Clark v. Protection Ins. Co.*, 5 Fed. Cas. 909, where a part of the equipment of the vessel consisted of a smuggled chain. It was contended that, as the chain was subject to forfeiture, it could not be considered as a lawful part of the equipment, and the vessel was unseaworthy without it. The court held, however, that until actually seized by the government it was part of the equipment.

If a steamboat or other vessel be overloaded or unduly laden, she is unseaworthy; but whether or not she is unduly laden depends

upon the capacity of the boat or vessel, not upon the depth of water upon the shoals and bars in the river in which she is navigated. Reference is to be had to the capacity of the craft, and not to the capacity of the river, in deciding that question. (*Cincinnati Mut. Ins. Co. v. May*, 20 Ohio, 211). If the policy attached upon the first sailing of a vessel, the fact that afterwards she may have been rendered unseaworthy by being overloaded does not discharge the insurers from their liability for a loss which afterwards happened from the dangers of the seas (*Merchants' Mut. Ins. Co. v. Butler*, 20 Md. 41).

(h) Same—Competency of officers and sufficiency of crew.

It may be stated as a general principle that the law imposes upon the insured the duty to provide a master of competent skill, prudence, and discretion, and that, if any loss takes place which may be justly supposed to have happened from a master of that character not having been provided, the underwriters are not responsible for it (*Brazier v. Clap*, 5 Mass. 1). But, even if the insured is bound by express stipulation in the contract to provide a master, and one of competent skill, prudence, and discretion, it does not therefore follow that he also warrants that the master ordinarily competent shall not be guilty of negligence or mistakes (*St. Louis Ins. Co. v. Glasgow*, 8 Mo. 713, 41 Am. Dec. 661). Where a policy of insurance contained a warranty "that the vessel be commanded by a captain holding a certificate from the A. S. Association," and at the loss of the ship the captain had such certificate, of a certain date, which under the rules of the association required its presentation for examination before the date of loss, if, though not so presented, it was unrevoked, the warranty was complied with (*McLoon v. Commercial Mut. Ins. Co.*, 100 Mass. 472, 1 Am. Rep. 129). The requirement meant a valid and subsisting certificate, but it was immaterial whether the captain or the association considered that he held a certificate at the time of loss; the only question under the terms of the warranty being whether he actually held one.

The question as to the competency of officers often arises under the warranty of seaworthiness. If a vessel, insured on a voyage out and home, departs with officers and crew competent for the voyage, it does not become unseaworthy by reason of the master's becoming incompetent at a foreign port to command the vessel.

Copeland v. New England Marine Ins. Co., 2 Metc. (Mass.) 432;
Phoenix Ins. Co. v. Erie & Western Transp. Co., 19 Fed. Cas. 532.

It was also said in the Copeland Case that though, in case of the incompetency of the master, it is the duty of the mate to take command of the vessel, and though he has a right to resort to all lawful means to establish himself in command, yet if, from want of judgment, or even negligence, he omits so to do, and the vessel sails under the master's command, the underwriters are not discharged.

Neither an express stipulation nor the implied warranty of seaworthiness demands that there should be a full complement of officers and men on board while the vessel is laid up or in the hands of workmen for repairs.

Bell v. Western Marine & Fire Ins. Co., 5 Rob. (La.) 423, 39 Am. Dec. 542; *Marigny v. Home Mutual Ins. Co.*, 13 La. Ann. 838, 71 Am. Dec. 511; *St. Louis Ins. Co. v. Glasgow*, 8 Mo. 713, 41 Am. Dec. 661; *Missouri Ins. Co. v. Glasgow*, 8 Mo. 725.

Nor does the occasional or temporary absence of the master or one of the crew forfeit the policy.

Caldwell v. Western Marine & Fire Ins. Co., 19 La. 42, 36 Am. Dec. 667; *Lewis v. Aetna Ins. Co. (D. C.)* 123 Fed. 157, affirmed in 129 Fed. 1006, 64 C. C. A. 210.

A stipulation, in a policy of insurance on a flatboat, that the boat should be manned with a certain number of hands, is an executory stipulation or promissory warranty, which required a strict performance, and for a breach of which the policy would be void from its inception (*Grant v. Lexington Fire, Life & Marine Ins. Co.*, 5 Ind. 23, 61 Am. Dec. 74). But if by the terms of a policy of insurance the risk on property is to begin from the time of lading thereof on a boat, the policy attaches, so that there can be no recovery of premiums, though a warranty that the boat shall be manned by a given number of men is not complied with (*Hicks v. Merchants' & Manufacturers' Ins. Co.*, 1 Ohio Dec. 374, 8 West. Law J. 416).

The underwriter must be regarded as contracting with reference to a well-known custom of flatboatmen to demand and receive their discharge at a certain intermediate port (*Grant v. Lexington F. L. & Marine Ins. Co.*, 5 Ind. 23, 61 Am. Dec. 74).

Failure to have a sufficient crew on board during the voyage will forfeit the policy (*Dow v. Smith*, 1 Caines [N. Y.] 82).

A breach of warranty of seaworthiness, through a vessel's leaving port without a sufficient crew, is not justified, though it be exceedingly difficult, or even impossible, to procure competent hands to manage her, since the obligation to supply a sufficient crew is absolute on the owner and master, and continues throughout the voyage (*The Gentleman*, 10 Fed. Cas. 190).

(4) Same—Employment of pilot.

Analogous to the rule that the insured vessel must be properly manned is the principle that when entering or leaving harbor a competent pilot must be employed. In Louisiana the presence of a pilot on board at such time has been regarded as an element of seaworthiness, so that there could be no recovery on the policy if, on failure to take a pilot, a loss occurred.

Whitney v. Ocean Ins. Co., 14 La. 485, 33 Am. Dec. 595; *McDowell v. General Mut. Ins. Co.*, 7 La. Ann. 684, 56 Am. Dec. 619.

On the other hand, in *McMillan v. Union Ins. Co.*, Rice (S. C.) 248, 33 Am. Dec. 112, the court held that the matter of the employment of a pilot did not enter into the question of the seaworthiness of the vessel. Nothing can enter into that which is not for the whole voyage. The business of a pilot is merely temporary. He is a part of the crew of a vessel for only a few miles, or a few hours. Under such circumstances, it would be an abuse of terms to say that a competent pilot was necessary to make a vessel seaworthy. Rather is the failure to employ a pilot a negligent omission in the conduct of the master, which will relieve the insurer if loss is the result. Nor is the question affected by the existence of statutes requiring the employment of pilots. Thus the Maryland statute, requiring that a licensed pilot be taken on a vessel on entering the Potomac river, is merely directory, and the implied warranty of seaworthiness in a time policy will not be broken by a failure to take on a licensed pilot, where the vessel is sailed by her mate, who is a skillful navigator (*Keeler v. Fireman's Ins. Co.*, 3 Hill [N. Y.] 250). Under the Pennsylvania statute, which requires that the master of an outward-bound vessel shall take on board a licensed pilot, or pay as a penalty half pilotage, a policy of insurance on a vessel is not forfeited by the master's refusing to receive on board a pilot, though a loss occurs on pilot ground (*Flanigen v. Washington Ins. Co.*, 7 Pa. 306).

(4) Nature and stowage of cargo.

A representation in time of peace that a vessel shall sail in ballast is merely a statement that the vessel shall not be exposed to the sea perils attending a loaded ship, and is substantially complied with, though the vessel sails with a trunk of shoes and ten barrels of gunpowder taken on board by the master without the owner's knowledge (*Suckley v. Delafield*, 2 Caines [N. Y.] 222). A state-

ment by the insured that he was loading with stone for ballast, but would load partially with hay, constituted a mere statement of the insured's intention, and, if honestly made at the time, was not such a representation as would avoid the policy, though material, and though the intention of the insured was afterwards changed, and the vessel was loaded altogether with stone (*Bryant v. Ocean Ins. Co.*, 22 Pick. [Mass.] 200).

Under a warranty not to carry petroleum, it may be shown that the article carried is different from the substance known in commerce as petroleum (*McLoon v. Mercantile Mut. Ins. Co.*, 100 Mass. 474, note). Where a policy of reinsurance on a barge contained a clause prohibiting the use of the barge for extrahazardous articles, and denominated as extrahazardous "hay or straw pressed in bundles," the use of the barge for carrying hay or straw forfeited the policy, though the original insurer had given the insured permission to carry such articles (*St. Nicholas Ins. Co. v. Merchants' Mut. Fire & Marine Ins. Co.*, 83 N. Y. 604, reversing 11 Hun [N. Y.] 108).

Though a policy of marine insurance is rendered void by any breach of the implied warranty that the goods will be stowed in the usual and customary place for the carriage of such goods, where such breach varies the risk and increases the perils insured against (*Leitch v. Atlantic Mut. Ins. Co.*, 66 N. Y. 100), yet carrying a load on deck will not of itself forfeit the policy, unless it increases the risk (*Lapham v. Atlas Ins. Co.*, 24 Pick. [Mass.] 1), and in determining that point the custom of vessels may be taken into consideration (*Orient Mut. Ins. Co. v. Reymersshoffer's Sons*, 56 Tex. 234).

(k) Same—Overloading.

Reference has already been made to the effect of overloading on the implied warranty of seaworthiness. The policy may also contain a special warranty as to overloading. Such was the case in *Thwing v. Great Western Ins. Co.*, 103 Mass. 401, 4 Am. Rep. 567, where the policy contained a warranty that the vessel should not "load more than her registered tonnage" of certain articles, including coal. The court held that while the provision was a warranty, breach of which would vitiate the policy, yet it must be strictly construed, and would apply only to articles laden as cargo, and not to coal taken for dunnage, even though freight was received for its carriage. There was evidence tending to show, and the jury found, that coal was a suitable and proper article to be used for dunnage, that it was actually and in good faith used for that purpose, and that

at least as much as the excess above the registered tonnage was reasonably necessary for the dunnage of the ship for her voyage. The mere fact that freight was paid on the coal used for dunnage was not necessarily inconsistent with the finding of the jury, and on such finding there was no breach of warranty.

The same policy was involved in *Great Western Ins. Co. v. Thwing*, 10 Fed. Cas. 1051, and the federal court arrived at the same conclusion. On appeal, however, the Supreme Court of the United States (*Insurance Co. v. Thwing*, 13 Wall. 672, 20 L. Ed. 607) reversed the Circuit Court. The Supreme Court took the position the court had no right to import into the warranty an implied qualification that a reasonable amount of merchandise suitable for dunnage shall not be reckoned as loading. If such were the construction, the cargo might consist of only one article, needing no dunnage, and the shipowner would be entitled to deduct a reasonable amount for that purpose. When merchandise is used in lieu of dunnage, it does not lose its character as cargo, and the insurance company have the right to treat it as cargo, and no form of words which the captain and charterer may use can affect the rights of the company. Therefore the court believes that the evidence required an instruction that, if freight was received and paid for as coal, it was cargo, and came within the warranty. Subsequently the Supreme Court of Massachusetts (*Thwing v. Great Western Ins. Co.*, 111 Mass. 93) reaffirmed the doctrine laid down in 103 Mass. 401, 4 Am. Rep. 567, declining to follow the reasoning of the Supreme Court of the United States.

A similar question was involved in *Hearn v. Equitable Safety Ins. Co.*, 11 Fed. Cas. 965, where the applicant's letters to the underwriters stated that the vessel would take her registered tonnage of coal. The court held that, though the vessel did in fact carry more than her registered tonnage, there was no forfeiture. The court bases its decision on the grounds, first, that the letters, when properly construed, did not amount to a representation that the cargo would not exceed the registered tonnage; second, because the representation was not in fact material to the risk, as there was no pretense that she was overloaded, or that the excess had any effect to prolong the passage or to increase the risk; and, third, because the representation did not have any effect to determine the underwriters to insure, or to regulate their estimate of the premium. The emphasis, however, is mainly placed upon the last ground, and upon the clause in the policy whereby a certain per cent. was to be added if the ves-

sel was loaded with more than her registered tonnage. It would seem that the company did not regard the statement as to the cargo as founded upon positive knowledge, and consequently inserted the provision for an additional premium. This case was affirmed in 20 Wall. 494, 22 L. Ed. 398, but without any discussion of this point.

Where the policy contained a warranty against loading more than her registered tonnage of coal, and the vessel was loaded beyond such tonnage with patent fuel, composed of coal, tar, etc., pressed into blocks, the insured was allowed to show that the article loaded was known in commerce as a different article from coal (*Howard v. Great Western Ins. Co.*, 109 Mass. 384). But a mere usage existing at the place of loading is insufficient to show the fact. Where a vessel built in the United States and originally having an American register was sold to a citizen of a foreign country and received a foreign register, whether a warranty not to load more than her registered tonnage was broken was to be determined by such foreign register (*Reck v. Phenix Ins. Co.*, 130 N. Y. 160, 29 N. E. 137).

(1) Nationality or neutrality of vessel or cargo.

Where a vessel is warranted to be American, there is an implied warranty that she shall conduct herself during the voyage as an American (*Fitzsimmons v. Newport Ins. Co.*, 4 Cranch, 185, 2 L. Ed. 591). Generally speaking, in case of a warranty of neutrality, it is not only necessary that the vessel or cargo should be in truth neutral, but also that no act of commission or of omission should be performed to jeopardize the claim to a neutral character, whether by the owner or by his agents.

Maryland Ins. Co. v. Woods, 6 Cranch, 29, 3 L. Ed. 148; *Calbreath v. Gracy*, 4 Fed. Cas. 1030; *Schwartz v. Ins. Co. of North America*, 21 Fed. Cas. 768; *Cleveland v. Union Ins. Co.*, 8 Mass. 308; *Seamans v. Loring*, 21 Fed. Cas. 920. The theory of these cases seems to be that the risk is varied or increased by conduct inconsistent with the duties of neutrality.

So a warranty of neutral property in a marine policy amounts to an engagement that it shall be accompanied by all the documents required by the belligerents to entitle it to protection as such (*Ludlow v. Union Ins. Co.*, 2 Serg. & R. [Pa.] 119). But it is not a sufficient compliance with the warranty that the papers are on board, if they are concealed or not produced.

Calbreath v. Gracy, 4 Fed. Cas. 1030; *Murray v. Alsop*, 3 Johns. Cas. (N. Y.) 47.

So, if a neutral endeavors by false appearances to cover the property of a belligerent from the lawful seizure of his enemy, such conduct identifies the neutral with the belligerent whom he thus endeavors to protect; and the increase of risk, by being carried in for adjudication, is produced, not by a legal act, but by a fraud on the neutrality of his own government and upon the rights of the belligerent.

Calbreath v. Gracy, 4 Fed. Cas. 1030; *Schwartz v. Insurance Co. of North America*, 21 Fed. Cas. 768.

But the warranty does not require the master to put in a claim in the proceedings for condemnation (*Gardere v. Columbia Ins. Co.*, 7 Johns. [N. Y.] 514).

While no acts done by the insured to avoid confiscation under the laws of a foreign power, if justified by the usage of trade, can avoid the policy, if a vessel take on board papers which increase the risk of capture, and it is not the regular usage of the trade insured to take such papers, the nondisclosure of the fact that they would be on board will vacate the policy (*Livingston v. Maryland Ins. Co.*, 6 Cranch, 274, 3 L. Ed. 222).

Whether there was a breach of the warranty of neutrality, in view of the particular facts, was considered in the following cases: *Maryland Ins. Co. v. Woods*, 6 Cranch, 29, 3 L. Ed. 143; *Livingston v. Maryland Ins. Co.*, 6 Cranch, 274, 3 L. Ed. 222; *Winthrop v. Union Ins. Co.*, 80 Fed. Cas. 876; *Bulkley v. Derby Fishing Co.*, 1 Conn. 572; *Jenks v. Hallet*, 1 Caines (N. Y.) 60; *Hallett v. Jenks*, 1 Caines Cas. (N. Y.) 43; *Barnewall v. Church*, 1 Caines (N. Y.) 217, 2 Am. Dec. 180; *Goold v. United Ins. Co.*, 2 Caines (N. Y.) 73; *Gouverneur v. United Ins. Co.*, 1 Caines (N. Y.) 592; *De Wolf v. New York Firemen's Ins. Co.*, 20 Johns. (N. Y.) 214; *Lawrence v. Ocean Ins. Co.*, 11 Johns. (N. Y.) 241; *New York Firemen Ins. Co. v. Lawrence*, 14 Johns. (N. Y.) 46; *Snowden v. Phoenix Ins. Co.*, 3 Bin. (Pa.) 457.

(m) Questions of practice.

It has been held that seaworthiness is a matter of warranty on the part of the assured, compliance with which must be averred in the complaint (*Ward v. China Mut. Ins. Co.* [C. C.] 44 Fed. 43); and this is true, though on the trial plaintiff may rely upon a presumption to establish the affirmative of that issue, and is not called upon in limine to give evidence of his compliance with the warranty. Such fact does not change the issue itself, and does not render neces-

sary a pleading of unseaworthiness as a distinct and separate defense.

As it is settled in the second circuit that seaworthiness is presumed, a libel on a marine policy need not allege seaworthiness. *Earnmoor v. California Ins. Co.* (D. C.) 40 Fed. 847.

In an action on a time policy, the plea must state such facts as show either that at the commencement of the insurance the ship was in her original port of departure, and commenced her voyage in an unseaworthy condition, and so continued till the time of her loss, or that, having come into a distant port in a damaged condition, before or after the commencement of the risk, where she might or ought to have been repaired, the owner or his agents neglected to repair her, and that she was lost in consequence (*Jones v. Insurance Co.*, 13 Fed. Cas. 982).

If the vessel insured sails in a seaworthy condition apparently, and is never afterwards heard from, there is no presumption that the loss occurred through a breach of the continuing warranty of seaworthiness (*Paddock v. Franklin Ins. Co.*, 11 Pick. [Mass.] 227). On the other hand, the fact that a ship has performed her voyage, and arrived at her home port in safety, raises a presumption that she had been all the time properly manned and in every respect seaworthy, and it devolves upon insurers to prove that at the time of loss she had not a full complement of men (*Meigs v. Sun Mut. Ins. Co.*, 16 Fed. Cas. 1323), though the burden of showing seaworthiness is in general on the insured (*Lunt v. Boston Marine Insurance Company* [C. C.] 6 Fed. 562, Id., 17 Fed. 411). The burden of proving compliance with a warranty in a marine policy that the vessel shall be commanded by a captain holding a certificate from a certain association rests upon the assured (*McLoon v. Commercial Mut. Ins. Co.*, 100 Mass. 472, 1 Am. Rep. 129).

Under a warranty not to carry certain articles, the burden is on the insured to prove that the article carried was known in commerce as a different article from that which was prohibited.

McLoon v. Mercantile Mut. Ins. Co., 100 Mass. 474, note; *Howard v. Great Western Ins. Co.*, 109 Mass. 384.

Where a policy prohibited "loading off shore," parol evidence of experts was admissible to show that the words had acquired a certain definite meaning among nautical men, and that they included loading at a bridge pier (*Johnson v. Northwestern National Insurance Company*, 39 Wis. 87). Where the issue was whether the

policy was forfeited by carrying cargo on deck, evidence of experienced persons to show the custom in this respect was admissible.

Lapham v. Atlas Ins. Co., 24 Pick. (Mass.) 1; *Orient Mut. Ins. Co. v. Reymershoffer's Sons*, 56 Tex. 234.

On an issue as to whether an alleged blockade was in fact being maintained, the master of the vessel alleged to have broken it is a competent witness, though, in case there was a blockade, his act in attempting to run it would have rendered him liable to the owners; it further appearing that he could defeat any action by the owners on that account under the act of limitations (*Ludlow v. Union Ins. Co.*, 2 Serg. & R. [Pa.] 119).

In an action on a marine policy containing a warranty of neutrality, it is sufficient for plaintiff in the first instance to give general evidence of neutrality, leaving it to defendant to show probable cause to suspect that the papers necessary to establish neutrality in the eyes of the belligerents were wanting; but, on the introduction of such evidence, the burden of proof will be thrown upon the plaintiff (*Ludlow v. Union Ins. Co.*, 2 Serg. & R. [Pa.] 119). While the courts are not wholly in accord on the question, the general rule is that a foreign decree condemning a vessel for breach of neutrality laws is not conclusive in an action between the owner and the insurer.¹

On an issue as to breach of the continuing warranty as to seaworthiness, it is a question for the jury to determine whether a vessel was in such condition at its immediate port that it could in safety proceed with its journey without making repairs (*Coffin v. Phenix Ins. Co.*, 15 Pick. [Mass.] 291). Under a warranty not to carry petroleum, it is a question of fact for the jury whether the article carried was known in commerce as a different article from that which is bought and sold as petroleum (*McLoon v. Mercantile Mut. Ins. Co.*, 100 Mass. 474, note). So it is a question for the jury whether there has been a breach of the warranty of neutrality (*Ludlow v. Union Ins. Co.*, 2 Serg. & R. [Pa.] 119). The jury are to determine if, by taking a deck load, the risk was increased, upon a balance of the advantages and disadvantages of so doing (*Lapham v. Atlas Ins. Co.*, 24 Pick. [Mass.] 1). But the question whether the risk was increased by the time of sailing of the vessel ought not to be submitted to the jury, when there is no evidence from which the jury can draw a conclusion (*Allegre's Adm'rs v. Maryland Ins. Co.*, 2 Gill & J. [Md.] 136, 20 Am. Dec. 424).

¹ See Cent. Dig. vol. 30, "Judgment," cols. 2680-2684, § 1524.

7. DEVIATION OR OTHER CHANGE OF VOYAGE.

- (a) General principles.
- (b) Intent to deviate—Noninception and abandonment of voyage.
- (c) Time policies.
- (d) Preparation—Trial trip.
- (e) Other voyage and change in method of conducting voyage.
- (f) Change in order or omission of specified ports—Touching at ports not specified.
- (g) Delay in general.
- (h) Trading, selling, or taking cargo—Transshipment of cargo.
- (i) Taking prizes.
- (j) Agency.
- (k) Necessity which will excuse deviation.
- (l) Usage.
- (m) Deviation to save life or property.

(a) General principles.

Whenever the insurance is on a specified voyage, there is an implied condition to be performed by the insured—that the ship shall pursue the most direct course, and that the voyage shall be prosecuted to its final termination with reasonable diligence and without unnecessary delay. Any voluntary departure, without necessity or reasonable cause, from the regular and usual course of the voyage insured, any unusual or unnecessary delay, or any act of the insured or his agents which, without necessity or just cause, changes the risk included in the policy, is termed a "deviation," and, since it alters the nature of the risk assumed by the underwriters, is held to instantly terminate it. The doctrine rests on the theory that the risk is altered, the question of increase of risk being deemed immaterial.

The following cases are deemed sufficient illustrations of the above principles: *Maryland Ins. Co. v. Le Roy*, 7 Cranch, 26, 8 L. Ed. 257; *Bond v. The Cora*, 3 Fed. Cas. 838; *Coles v. Marine Ins. Co.*, 6 Fed. Cas. 65; *Hearn v. New England Mutual Marine Ins. Co.*, 11 Fed. Cas. 969; *Martin v. Delaware Ins. Co.*, 16 Fed. Cas. 894; *Stetson v. Mass. Fire Ins. Co.*, 4 Mass. 330, 3 Am. Dec. 217; *Coffin v. Newburyport Marine Ins. Co.*, 9 Mass. 436; *Kettell v. Wiggin*, 13 Mass. 68; *Wiggin v. Amory*, 13 Mass. 118; *Ward v. Wood*, 13 Mass. 539; *Burgess v. Equitable Marine Ins. Co.*, 126 Mass. 70, 80 Am. Rep. 654; *Amsinck v. American Ins. Co.*, 129 Mass. 189; *Natchez Ins. Co. v. Stanton*, 2 Smedes & M. (Miss.) 340, 41 Am. Dec. 592; *Foster v. Jackson Marine Ins. Co.*, 1 Edm. Sel. Cas. (N. Y.) 290; *Reade v. Commercial Ins. Co.*, 3 Johns. (N. Y.) 352,

3 Am. Dec. 495; *Firemen Ins. Co. v. Lawrence*, 14 Johns. (N. Y.) 46; *Stevens v. Commercial Ins. Co.*, 26 N. Y. 397; *Fernandez v. Great Western Ins. Co.*, 48 N. Y. 571, 8 Am. Rep. 571; *Audenreid v. Mercantile Mut. Ins. Co.*, 60 N. Y. 482, 19 Am. Rep. 204; *Snyder v. Atlantic Ins. Co.*, 95 N. Y. 196, 47 Am. Rep. 29; *Miller v. Russell*, 1 Bay (S. C.) 309; *Marine Ins. Co. v. Stras*, 1 Munf. (Va.) 408.

It is true that the court, in *Bell v. Western Marine & Fire Ins. Co.*, 5 Rob. (La.) 423, 39 Am. Dec. 542, in deciding that the seizure of a boat by a court officer, and its transportation across the river by him, did not amount to a deviation, relies upon the fact that the risk was not increased thereby. But the policy in that case was a time policy, under which, as will afterwards appear, there can be, properly speaking, no deviation, at least without an express warranty.

It follows, as a corollary from such principles, that no importance is attached to the degree or extent of a voluntary deviation. The shortness of the time or distance of a deviation will make no difference in its effect.

Such is the principle enunciated in *Maryland Ins. Co. v. Le Roy*, 7 Oranch, 26, 3 L. Ed. 257; *Martin v. Delaware Ins. Co.*, 16 Fed. Cas. 894; *Hermann v. Western Marine & Fire Ins. Co.*, 13 La. 516; *Coffin v. Newburyport Marine Ins. Co.*, 9 Mass. 436; *Wiggin v. Amory*, 13 Mass. 118; *Snyder v. Atlantic Ins. Co.*, 95 N. Y. 196, 47 Am. Rep. 29; *Fernandez v. Great Western Ins. Co.*, 48 N. Y. 571, 8 Am. Rep. 571; *Marine Ins. Co. v. Stras*, 1 Munf. (Va.) 408.

(b) Intent to deviate—Noninception and abandonment of voyage.

The question whether a stated change in the voyage amounts to only a deviation, or is an entire abandonment of the voyage insured, and the substitution of another in its stead, is often one of great practical importance. If, prior to the inception of the voyage, it is abandoned, and the vessel sails on some other voyage, the policy never attaches, and there can be no recovery, though the vessel is lost before she has reached the point where the routes of the two voyages separate. So, also, if, after the risk has attached, the voyage be entirely abandoned, the risk at once ceases, and there can be no recovery for a future loss. On the other hand, a mere intended deviation will not affect the insurance, and the vessel remains covered thereby until she reaches the point of divergence and actually departs from the due course of the voyage insured.

Reference may be made to the following: *Marine Ins. Co. v. Tucker*, 8 Oranch, 357, 2 L. Ed. 466; *Maryland Ins. Co. v. Woods*, 6 Cranch,

29, 3 L. Ed. 143; *Clark v. Protection Ins. Co.*, 5 Fed. Cas. 909; *New Haven Steam Sawmill Co. v. Security Ins. Co.* (D. C.) 7 Fed. 847; *Thompson v. Alsop*, Root (Conn.) 64; *Richardson v. Maine Fire & Marine Ins. Co.*, 6 Mass. 102, 4 Am. Dec. 92; *Lee v. Gray*, 7 Mass. 349; *Coffin v. Newburyport Marine Ins. Co.*, 9 Mass. 436; *Wiggin v. Amory*, 13 Mass. 118; *Hobart v. Norton*, 8 Pick. (Mass.) 159; *Merrill v. Boylston Fire & Marine Ins. Co.*, 3 Allen (Mass.) 247; *Bearns v. Columbian Ins. Co.*, 48 Barb. (N. Y.) 445; *Lawrence v. Ocean Ins. Co.*, 11 Johns. (N. Y.) 241; *New York Firemen Ins. Co. v. Lawrence*, 14 Johns. (N. Y.) 46; *Silva v. Low*, 1 Johns. Cas. (N. Y.) 184; *Arnold v. Pacific Mut. Ins. Co.*, 78 N. Y. 7; *Winter v. Delaware Mut. Safety Ins. Co.*, 30 Pa. 334.

The case of *Stocker v. Harris*, 3 Mass. 409, seems an exception to this rule. It appears from the statement of the case that the policy provided for a voyage to Vera Cruz, at and thence to a port of discharge in the United States. The vessel was lost while on the way from Vera Cruz to Havana, but before reaching the point of deviation, and the court, without noticing this, held the company discharged. It is true, it is said in *Merrill v. Boylston Fire & Marine Ins. Co.*, 3 Allen (Mass.) 247, that it was decided in the *Stocker* Case that the voyage insured had been abandoned, but the court did not so treat the intended departure, using rather the term "deviation," and considering the merits of an attempt to excuse it on the ground of necessity. Furthermore, the court assumed that the master's statement that he intended to proceed from Havana to the United States was true, thus leaving the terminus ad quem unchanged, and indicating a deviation rather than an abandonment of the voyage.

It may, indeed, be stated as a rule that if the ship sail from the port mentioned in the policy, with an intention to go to the port or ports also described therein, a determination to call at an intermediate port is not such a change of the voyage as to prevent the policy from attaching, but is merely a case of intended deviation.

Marine Ins. Co. v. Tucker, 3 Cranch, 357, 2 L. Ed. 466; *Henshaw v. Marine Ins. Co.*, 2 Caines (N. Y.) 274; *Silva v. Low*, 1 Johns. Cas. (N. Y.) 184; *Firemen Ins. Co. v. Lawrence*, 14 Johns. (N. Y.) 46; *Merrill v. Boylston Fire & Marine Ins. Co.*, 3 Allen (Mass.) 247.

But where the terminus a quo of the voyage is changed, or the terminus ad quem, prior to the time of sailing, the voyage insured is never commenced, and no recovery can be had.

Such was the case in the following: *Glidden v. Manufacturers' Ins. Co.*, 10 Fed. Cas. 476; *Murray v. Columbian Ins. Co.*, 4 Johns. (N. Y.)

443; *Dallam v. Ins. Co.*, 6 Phila. (Pa.) 15. But it would seem that the court in *Graham v. Pennsylvania Ins. Co.*, 10 Fed. Cas. 935, would have considered a departure from a port not within the contract a deviation, had the decision not been that in fact the port used was within the policy.

This is true though the vessel sailed for a port without the policy, with an intention to proceed a short distance out of her way to such port, to see if a certain other port within the policy was blockaded, and, in case it was blockaded, then to enter that port; and though she did so proceed to the port within the policy, such voyage would not be the voyage insured (*Maryland Ins. Co. v. Wood*, 6 Cranch, 29, 3 L. Ed. 143). So, also, though a policy reads "at and from," it has been held that if the insured unreasonably delays to commence the voyage it amounts to a noninception of the voyage insured, rather than a deviation (*Seamans v. Loring*, 21 Fed. Cas. 920).

But where a vessel was chartered for a voyage to New York, Philadelphia, or Baltimore via Hampton Roads, while the insurance reported to the company was on a voyage to New York, Baltimore, or Boston via Hampton Roads, it was held that since the insured was not bound, either under the charter party or the policy, to choose the port of discharge until the arrival at Hampton Roads, it was a case where the determination as to a change in the terminus ad quem could not be considered as made until that time, and a mere intention, before arrival at that place, to go to Philadelphia, would be only an intended deviation (*Arnold v. Pacific Mut. Ins. Co.*, 78 N. Y. 7). The court, however, in *Merrill v. Boylston Fire & Marine Ins. Co.*, 3 Allen (Mass.) 247, where the charter party, entered into before leaving port, gave the charterer the election of requiring the vessel to go to a port not specified in the policy, and where such election was exercised after the commencement of the voyage, and the vessel was subsequently lost, but while still in waters where she might have been had she pursued the voyage described in the policy, held that the case was distinguishable from *Lawrence v. Ocean Ins. Co.*, 11 Johns. (N. Y.) 241, and *New York Firemen Ins. Co. v. Lawrence*, 14 Johns. (N. Y.) 46, where the intention to substitute another terminus ad quem was entirely formed after the commencement of the voyage. In the *Merrill Case*, as the court points out, the purpose to embark on the new voyage was fully formed, and obligations were assumed in reference to it, before leaving port. What was uncertain or fluctuating before the election of the charterer was made certain by his action.

The authorities are not harmonious as to whether a change in the terminus ad quem, made after the commencement of the voyage, amounts to a deviation or an abandonment of the insured voyage. The supreme court of New York in *Lawrence v. Ocean Ins. Co.*, 11 Johns. 241, and the court of errors in *Firemen Ins. Co. v. Lawrence*, 14 Johns. 46, as above intimated, held that a change in the intended terminus ad quem of the voyage, such change being made entirely after the commencement of the voyage, would not operate as a substitution of voyage, but only as an intended deviation. The position of the majority of the court is based upon the begging of the question implied in the assumption that the legal effect of an alteration of the voyage upon the policy is that it never attaches, and that, where the intention is formed after the commencement of the voyage, the policy has attached. Evidently the first statement is only true when the word "alteration" is confined to alteration before the voyage commences, which is the very point in issue. Van Ness, J., dissented in the supreme court, and the Chancellor in the court of errors, holding that if the original place of destination be abandoned, in order to go to another, the voyage is abandoned, and that it makes no difference whether such substitution takes place before or after the commencement of the voyage. In *Lee v. Gray*, 7 Mass. 349, there is an obiter dictum in which it is said that a determination of the master to change the port of discharge, formed after the commencement of the voyage, was a mere intention to deviate, and did not forfeit the policy as to losses occurring before the vessel left the waters in which she was protected. So, also, in *Richardson v. Maine Fire & Marine Ins. Co.*, 6 Mass. 102, 4 Am. Dec. 92, a return to the port of departure by reason of a blockade, and without intent to further prosecute the voyage, was spoken of as a "deviation," as well as an entire "abandonment of the voyage." And in *Tenet v. Phoenix Ins. Co.*, 7 Johns. (N. Y.) 363, and *Murden v. South Carolina Ins. Co.*, 1 Mills, Const. (S. C.) 200, the term "deviation" was used in reference to departure for a port without the policy, without intent to eventually complete the insured voyage. But in none of these except the *Lawrence Cases* was there any need to distinguish between abandonment of voyage and deviation, the loss not having occurred while the vessel was in permitted waters.

The Massachusetts court seems, indeed, to have reached the contrary conclusion. The case of *Stocker v. Harris*, 3 Mass. 409, has already been discussed as an exception to the rule in regard to in-

tended deviation, but if it be considered as deciding that the intended voyage to Havana was an abandonment of the insured voyage, and that an intention formed at Vera Cruz was an intention formed during a voyage to Vera Cruz, at and from thence to a port of discharge, etc., both of which decisions the court, in *Merrill v. Boylston Fire & Marine Ins. Co.*, 3 Allen (Mass.) 247, considers involved in such case, it is certainly contradictory of the proposition in the *Lawrence Cases*, that in order that the intended alteration constitute an abandonment it is necessary that the change in the intended terminus be made prior to the commencement of the voyage. And while the court in the *Merrill Case* distinguished the circumstances before it from those of the *Lawrence Cases* as above noted, yet the fact remains that the final determination, by which the terminus ad quem was changed, was not made until after the commencement of the voyage, rendering it difficult to reconcile the decision with the principle governing the majority opinions in the *Lawrence Cases*. So, also, in *Savage v. Pleasants*, 5 Bin. 403, 6 Am. Dec. 424, where the terminus ad quem was found blockaded, and the master departed for another port without intent to return to the port of destination if he was able, it was held that the voyage was abandoned. Under similar principles a delay of a month after the sale of a vessel by a consul, a transferring of the cargo to another vessel, and an abandonment by the master of all attempt to further prosecute the voyage, will constitute an absolute termination of the risk, so that there can be no recovery for a loss to the cargo occurring before the sailing of the vessel to which it was transferred (*Pad-dock v. Commercial Ins. Co.*, 2 Allen [Mass.] 93).

(c) Time policies.

Ordinarily, there can be no deviation under a time policy (*Auden-reid v. Mercantile Mut. Ins. Co.*, 60 N. Y. 482, 19 Am. Rep. 204). Where, for example, the insured vessel, under the terms of the policy, is at liberty to go anywhere, it is difficult to conceive how mere delay or sailing in one direction rather than another can amount to a deviation (*Cleveland v. Union Ins. Co.*, 8 Mass. 308). Even where the vessel is confined by the policy to certain waters, a departure therefrom, in the absence of an express stipulation, will result in only a suspension of the risk. Indeed, as above noted, the continuing effect of a deviation, whereby it entirely forfeits the policy, rests on the theory that the entire subsequent risk is changed; and where the risk as described in the policy depends, not upon the contingen-

cies of a voyage, but upon the presence of the vessel for a certain time in certain waters, all reason for an absolute forfeiture disappears. The departure from the specified waters is treated by the courts as an exception to the risk, rather than alteration thereof.

Reference may be made to the following: *New Haven Steam Sawmill Co. v. Security Ins. Co.* (D. C.) 7 Fed. 847; *Williams v. Providence Washington Ins. Co.* (D. C.) 56 Fed. 159; *Greenleaf v. St. Louis Ins. Co.*, 37 Mo. 25; *Bearns v. Columbian Ins. Co.*, 48 Barb. (N. Y.) 445; *Wilkins v. Tobacco Ins. Co.*, 30 Ohio St. 317, 27 Am. Rep. 455; *Hume, Small & Co. v. Insurance Co.*, 23 S. C. 190.

The case of *Moser v. Providence Washington Ins. Co.*, 10 Misc. Rep. 40, 30 N. Y. Supp. 814, affirmed 12 Misc. Rep. 104, 33 N. Y. Supp. 85, is easily distinguishable. Permission was given by the underwriter of a time policy for a particular voyage outside the specified waters, and it was held that, had the insured acted on the permission, a departure from the voyage as described in the permit would have been a deviation. There is, however, a class of cases which have arisen on time policies on river steamers, in which a departure from the usual channel, or from the usual method of conducting the voyage undertaken, is spoken of as a "deviation." In all such cases, however, the loss has arisen during the so-called "deviation," and hence the exact nature of the departure has not been a necessary issue. Furthermore, the decision as to the liability of the underwriter is always based on the determination of the question of increase of risk, or on the fact that the loss was caused by the departure, circumstances which have no bearing in cases of strict deviation. Thus, in *Bell v. Fire Ins. Co.*, 5 Rob. (La.) 423, 39 Am. Dec. 542, a removal of the boat to the other side of the river by an officer of the court in which she had been libeled was held not to forfeit the policy, it not having been shown that the risk was thereby increased. But in *Hermann v. Western Marine Fire Ins. Co.*, 13 La. 516, where taking a vessel in tow was held to constitute an increase in the risk, the company was held discharged from the ensuing loss, as also in *Jolly's Ex'rs v. Ohio Ins. Co.*, *Wright* (Ohio) 539, where the use of a cut-off in the river was considered more dangerous than the use of the main channel. In the latter case, indeed, it is directly stated that such a departure is at the risk of the insured. That such conduct cannot be considered as a deviation under a time policy is rendered more certain by *Firemen's Ins. Co. v. Powell*, 13 B. Mon. (Ky.) 311, where the underwriter was held responsible for a loss caused by an accidental grounding of the boat in a cut-

off, it being shown that the cut-off was navigable, but less used than the main channel; and also by *Keeler v. Firemen's Ins. Co.*, 3 Hill (N. Y.) 250, where the court said that it would be difficult to show how there could be a deviation by pursuing any track within the limits fixed, and that certainly there was no deviation though the vessel, in sailing up the river, departed from the usual channel, so long as she kept the usual course of the river.

There may be in a time policy an express warranty against the use of certain waters, in which event a departure into such waters will render the policy void, the same as the breach of any other warranty.

Such was the basis of the decision in the following: *Cobb v. Lime Rock Fire & Marine Ins. Co.*, 58 Me. 326; *Odlorne v. New England Mut. Marine Ins. Co.*, 101 Mass. 551, 8 Am. Rep. 401; *Friend v. Gloucester Mut. Fishing Ins. Co.*, 118 Mass. 326; *Lovett v. China Mut. Ins. Co.*, 54 N. E. 338, 174 Mass. 108; *Cogswell v. Ohubb*, 157 N. Y. 709, 58 N. E. 1124, affirming 1 App. Div. 93, 86 N. Y. Supp. 1076; *Day v. Orient Ins. Co.*, 1 Daly (N. Y.) 13; *Kirk v. Home Ins. Co.*, 86 N. Y. Supp. 980, 92 App. Div. 26; *Wheeler v. New York Mut. Ins. Co.*, 35 N. Y. Super. Ct. 247; *Stevens v. Commercial Mut. Ins. Co.*, 18 N. Y. Super. Ct. 594, affirmed 26 N. Y. 397; *Snow v. Columbian Ins. Co.*, 48 N. Y. 624, 8 Am. Rep. 578.

And where the warranty has been thus violated, a subsequent return in safety does not restore the original obligation of the insurers, and no recovery for a loss can be had thereafter.

Reference may be made to *Odlorne v. New England Mut. Marine Ins. Co.*, 101 Mass. 551, 8 Am. Rep. 401; *Cogswell v. Ohubb*, 1 App. Div. 93, 86 N. Y. Supp. 1076; *Day v. Orient Mut. Ins. Co.*, 1 Daly (N. Y.) 13.

No particular words are needed to constitute such a warranty. Thus, the clause, "Prohibited from" certain waters, has been held to constitute a warranty that the vessel will not enter such waters. The clause amounts to a statement that the vessel insured shall not be allowed to enter the waters specified, and such a statement comes within the proper definition of a warranty, and must be regarded as such.

Cobb v. Lime Rock Fire & Marine Ins. Co., 58 Me. 326; *Odlorne v. New England Mut. Marine Ins. Co.*, 101 Mass. 551, 8 Am. Rep. 401; *Lovett v. China Mut. Ins. Co.*, 174 Mass. 108, 54 N. E. 338.

But a mere exception in a permission to navigate certain waters will not amount to a prohibition, or a condition, or a warranty. The exception has only the effect of suspending the liability of the

underwriters in a certain event. If the intention is that the policy shall be defeated by making voyages on any of the excepted waters, such intention should be expressed. (*Greenleaf v. St. Louis Ins. Co.*, 37 Mo. 25.) And of course a mere permission to navigate certain waters will not amount to an express prohibition as to waters not mentioned (*Wilkins v. Tobacco Ins. Co.*, 30 Ohio St. 317, 27 Am. Rep. 455). The same case further decided that a stipulation in a warranty that the vessel should be run and navigated upon the privileged waters "as is usual for vessels of her class in the usual prosecution of business" related solely to the mode and manner of navigating the vessel within the permitted waters, and had no reference to a deviation from the permitted waters.

A warranty not to use a certain port means not to go into it. "To use" a port means to go into it for shelter, for commerce, or for pleasure. Going near a harbor, sailing past, or going in the direction of it is not the use of it. It is the act, and not the intention, that works a forfeiture.

New Haven Steam Sawmill Co. v. Security Ins. Co. (D. C.) 7 Fed. 847; *Snow v. Columbian Ins. Co.*, 48 N. Y. 624, 8 Am. Rep. 578, reversing 48 Barb. 469; *Wheeler v. New York Mut. Ins. Co.*, 35 N. Y. Super. Ct. 247.

In *Thames & Mersey Marine Ins. Co. v. O'Connell*, 86 Fed. 150, 29 C. C. A. 624, however, emphasis is placed on the word "using" in the prohibitory clause, and the court says the fact that the schooner sailed "right up to the pier" in her endeavor to get into the river, and afterwards anchored a short distance therefrom, was a "using" of the place. It would seem, however, that this was rather a case of excepted risk; the policy providing, "Not to use any port or place," etc., and on the margin a stipulation being written, "It is understood and agreed that this company is not liable for any claim resulting from using the port or place not allowed by this policy." But where a "sailing on any voyage" to certain localities is prohibited, a sailing with intent to make such localities the ultimate destination of the voyage is a violation of the clause, and prevents a recovery for a loss which happened before the vessel was in the prohibited locality (*Friend v. Gloucester Mut. Fishing Ins. Co.*, 113 Mass. 326).

The districts embraced in specific prohibitive warranties are considered in *Lovett v. China Mut. Ins. Co.*, 174 Mass. 108, 54 N. E. 338, and *Kirk v. Home Ins. Co.*, 86 N. Y. Supp. 980, 92 App. Div. 26. See, also, *Reck v. Phenix Ins. Co.*, 130 N. Y. 160, 29 N. E. 137.

Where there is a strict limitation against all the ports of a certain country except one, an entry into any other port will forfeit the policy, though such entry is necessary, under the commercial regulations of the country, to secure admission into the permitted port (*Stevens v. Commercial Mut. Ins. Co.*, 13 N. Y. Super. Ct. 594, affirmed without opinion 26 N. Y. 397). And a usage, in order to affect the warranty, must be definite and brought home to the knowledge of the parties to be affected, or so general and well established that there must be ground to presume that the parties had knowledge thereof. Therefore a local usage of another place than where the contract was made will not bind the parties where it is not referred to or made a part of the contract. (*Cobb v. Lime Rock Fire & Marine Ins. Co.*, 58 Me. 326.) Nor will a usage directly contradictory to the express terms of the warranty vary its effect.

Odiorne v. New England Mut. Marine Ins. Co., 101 Mass. 551, 8 Am. Rep. 401; *Cogswell v. Chubb*, 1 App. Div. 93, 36 N. Y. Supp. 1076, affirmed in memorandum opinion 157 N. Y. 700, 53 N. E. 1124.

(d) Preparation—Trial trip.

If the policy covers the period of a vessel's stay in port, she has no right during that period to engage in any business except the making of preparations for her voyage, and, when those preparations are completed, to sail without delay, by the ordinary and usual course, for the port of destination.

The above rule is found in *Fernandez v. Great Western Ins. Co.*, 48 N. Y. 571, 8 Am. Rep. 571, reversing 26 N. Y. Super. Ct. 457; *Snyder v. Atlantic Mut. Ins. Co.*, 95 N. Y. 196, 47 Am. Rep. 29; *Augusta Ins. & Banking Co. v. Abbott*, 12 Md. 348; *Himely v. South Carolina Ins. Co.*, 1 Mill, Const. (S. C.) 154, 12 Am. Dec. 623; *Amsinck v. American Ins. Co.*, 129 Mass. 185.

A reasonable time is, however, allowed for preparation, and this will vary according to the circumstances of the case, and be for the jury to determine.

Thebaud v. Great Western Ins. Co., 155 N. Y. 516, 50 N. E. 284, affirming 84 Hun, 1, 31 N. Y. Supp. 1084; *Earl v. Shaw*, 1 Johns. Cas. 313, 1 Am. Dec. 117.

Trial trips may under some circumstances constitute a proper part of the preparation of the voyage insured (*Thebaud v. Great Western Ins. Co.*, 155 N. Y. 516, 50 N. E. 284, affirming 84 Hun, 1, 31 N. Y. Supp. 1084). But a trial trip which is unnecessarily extended beyond the limits of the port cannot be so excused (*Fernan-*

dez v. Great Western Ins. Co., 48 N. Y. 571, 8 Am. Rep. 571, reversing 26 N. Y. Super. Ct. 457).

A principle similar to that underlying the rules governing delay and side voyages prior to the voyage insured is involved in *Mosher v. Washington Ins. Co.*, 12 Misc. Rep. 104, 33 N. Y. Supp. 85, affirming 10 Misc. Rep. 40, 30 N. Y. Supp. 814, where permission had been given under a time policy for a specific voyage with a certain load, and it was held that the mere taking on of a larger load, prior to the commencement of the voyage, would not constitute a deviation, though, had the permission taken effect "at and from" the port, such result would have followed.

An insurance on a cargo "at and from" a certain port does not, however, attach until the goods leave the shore to be laden on board the vessel. Therefore, it is no deviation for the vessel to leave the port for another, to dispose of its inward bound cargo before taking on board the cargo insured. (*Patrick v. Ludlow*, 3 Johns. Cas. [N. Y.] 10, 2 Am. Dec. 130.)

(c) Other voyage and change in method of conducting voyage.

The effect of a change in the terminus ad quem has been considered under the distinction between an abandonment of the voyage and deviation; but it will sometimes happen that, without a change of the final port, an independent voyage to some other port will be undertaken in the course of the voyage insured. Such an independent voyage constitutes a deviation.

Martin v. Delaware Ins. Co., 16 Fed. Cas. 894; *Kettell v. Wiggin*, 18 Mass. 68; *Vos v. Robinson*, 9 Johns. (N. Y.) 192.

And where the voyage was a distinct and independent voyage, having no connection with the general objects and purposes of the voyage insured, it was held to constitute a deviation, though the vessel had "liberty to deviate by going to port or ports in Europe." Nor could the meaning of such clause be extended by evidence of a conversation between one of the plaintiffs and the company's agent, at the time the indorsements were made on the policy (*Seccomb v. Provincial Ins. Co.*, 10 Allen [Mass.] 305).

Any unnecessary change in the ordinary method of conducting the voyage, and which varies the risk, constitutes a deviation.

Reference may be made to *Catlin v. Springfield Fire Ins. Co.*, 5 Fed. Cas. 810; *Hermann v. Western Marine Fire Ins. Co.*, 13 La. 516; *Natches Ins. Co. v. Stanton*, 2 Smedes & M. (Miss.) 840, 41 Am. Dec. 592; *Merchants' Ins. Co. v. Algeo*, 32 Pa. 330; *Stewart v. Tennessee Marine & Fire Ins. Co.*, 1 Humph. (Tenn.) 242.

Where the evidence as to the variation of risk is all on one side, or where the point depends upon the construction of the policy, the question of deviation resulting therefrom is one of law; otherwise it is a question of fact for the jury (*Child v. Sun Mut. Ins. Co.*, 5 N. Y. Super. Ct. 26).

(f) Change in order or omission of specified ports—Touching at ports not specified.

It seems the better rule that a vessel insured to several ports in succession may go to any one, without beginning the series. It would benefit neither party that the vessel should be obliged to go to more ports than the purposes of the voyage made necessary.

Houston v. New England Ins. Co., 5 Pick. (Mass.) 89; *Hale v. Mercantile Marine Ins. Co.*, 6 Pick. (Mass.) 172; *Kane v. Columbian Ins. Co.*, 2 Johns. (N. Y.) 264.

Where a voyage has been insured to either or both of two ports, and the master has elected to go to the first-mentioned port, and been prevented by temporary causes insured against, it is not a deviation to put into a third port, to gain information as to which of the two ports should be used (*Clark v. United States Fire & Marine Ins. Co.*, 7 Mass. 365, 5 Am. Dec. 50).

In *Cross v. Shutliffe*, 2 Bay (S. C.) 220, 1 Am. Dec. 645, the court based its decision that there was no deviation upon the theory that the mention of the port which was omitted was only permissive. But in *Marine Ins. Co. v. Stras*, 1 Munf. (Va.) 408, it was directly decided that the omission of a named port constituted a deviation. In that case, however, the insured's contention was that the order of visiting specified ports might be changed, and the court seems to confuse this question with the omission of a specified port. The case of *Akin v. Mississippi Marine & Fire Ins. Co.*, 4 Mart. N. S. (La.) 661, also contains a dictum that if the vessel had unnecessarily gone to the second-named port without first touching at the first-named port, it would have constituted a deviation.

The authorities, however, agree that a failure to visit a specified port in its order, followed by a return to it, will constitute a deviation.

Houston v. New England Ins. Co., 5 Pick. (Mass.) 89; *Stevens v. Commercial Ins. Co.*, 26 N. Y. 397; *Marine Ins. Co. v. Stras*, 1 Munf. (Va.) 408.

Any touching at a port not specified, or any departure from the voyage insured for the purpose of so doing, without necessity or reasonable cause, will constitute a deviation.

Maryland Ins. Co. v. Woods, 6 Cranch, 29, 3 L. Ed. 143; *Bulkley v. Protection Ins. Co.*, 4 Fed. Cas. 614; *Coles v. Marine Ins. Co.*, 6 Fed. Cas. 65; *Glidden v. Manufacturers' Ins. Co.*, 10 Fed. Cas. 476; *Hearn v. Equitable Safety Ins. Co.*, 11 Fed. Cas. 963, tried as an action for reformation 11 Fed. Cas. 965, affirmed 20 Wall. 488, 22 L. Ed. 395; *Hearn v. New England Mut. Marine Ins. Co.*, 11 Fed. Cas. 969, tried as an action for reformation 11 Fed. Cas. 973, affirmed 20 Wall. 488, 22 L. Ed. 395; *Folsom v. Mercantile Marine Ins. Co.*, 38 Me. 414; *National Traders' Bank v. Ocean Ins. Co.*, 62 Me. 519; *Lee v. Gray*, 7 Mass. 349; *Amsinck v. American Ins. Co.*, 129 Mass. 185; *Henshaw v. Marine Ins. Co.*, 2 Caines (N. Y.) 274; *McColl v. Sun Mut. Ins. Co.*, 39 N. Y. Super. Ct. 330; *Duerhagen v. United States Ins. Co.*, 2 Serg. & R. (Pa.) 309; *Marine Ins. Co. v. Stras*, 1 Munf. (Va.) 408.

To determine what ports are permitted the insured vessel, a construction of the provisions of the policy is often necessary. Thus, it has been held that a permission to stop and trade in any port or place does not given permission to go out of the usual course of the voyage between the termini for the purpose of trading. *Coles v. Marine Ins. Co.*, 6 Fed. Cas. 65. An election to go to one port, under a right to go to one of two or more, is binding, so that a subsequent departure to any other port will be a deviation (*Maryland Ins. Co. v. Woods*, 6 Cranch, 29, 3 L. Ed. 143; *Bulkley v. Protection Ins. Co.*, 4 Fed. Cas. 614; *McColl v. Sun Mut. Ins. Co.*, 39 N. Y. Super. Ct. 330). But a voyage to a certain port "and a market" is the same substantially as though all the market ports had been named in succession (*Houston v. New England Ins. Co.*, 5 Pick. [Mass.] 89). Such a policy also gives liberty to return to a proper port once and again, in an honest effort to find a market (*Deblois v. Ocean Ins. Co.*, 16 Pick. [Mass.] 303, 28 Am. Dec. 245). So, also, a policy reading to a "port of discharge" in a certain country gives liberty to depart from the port of arrival for another port, after having received advice at the first port (*King v. Middletown Ins. Co.*, 1 Conn. 184; *Coolidge v. Gray*, 8 Mass. 527; *Lapham v. Atlas Ins. Co.*, 24 Pick. [Mass.] 1). Where an entry was made on an open policy, which by mistake omitted to mention a certain port, and where the object of the entry was to identify the property, the contract being complete without it, the contract was treated as though the entry had been properly made (*Arnold v. Pacific Mut. Ins. Co.*, 78 N. Y. 7, reversing 14 Hun, 83). Nor will a mere representation as to the destination of the vessel, contained in the memorandum submitted to the company, be permitted to control the broader liberty given in the policy itself (*Andrews v. Essex Fire & Marine Ins. Co.*, 1 Fed. Cas. 885). Construction of clauses in relation to permitted ports, not deemed of special interest, are

contained in the following: *Graham v. Pennsylvania Ins. Co.*, 10 Fed. Cas. 885; *Duerhagen v. United States Ins. Co.*, 2 Serg. & R. (Pa.) 309; *Perkins v. Augusta Ins. & Banking Co.*, 10 Gray (Mass.) 812, 71 Am. Dec. 654; *Grant v. Lexington Fire, Life & Marine Ins. Co.*, 5 Ind. 23, 61 Am. Dec. 74; *De Peyster v. Sun Mut. Ins. Co.*, 19 N. Y. 272, 75 Am. Dec. 331; *Commonwealth Ins. Co. v. Cropper*, 21 Md. 311.

A newspaper is not competent evidence to prove that the vessel is at a port out of her course (*Child v. Sun Mut. Ins. Co.*, 5 N. Y. Super. Ct. 26).

(g) Delay in general.

Any unnecessary delay not within the purpose of the voyage, or any unreasonable delay within such purpose, is tantamount to a deviation and followed by the same consequence.

The rule is supported by the following: *Kingston v. Girard*, 4 Dall. 274, 1 L. Ed. 831; *Oliver v. Maryland Ins. Co.*, 7 Cranch, 487, 8 L. Ed. 414; *West v. Columbian Ins. Co.*, 29 Fed. Cas. 713; *Wood v. Pleasants*, 30 Fed. Cas. 473; *Augusta Ins. & Banking Co. v. Abbott*, 12 Md. 348; *Coffin v. Newburyport Marine Ins. Co.*, 9 Mass. 436; *Amsinck v. American Ins. Co.*, 129 Mass. 185; *Roget v. Thurston*, 2 Johns. Cas. (N. Y.) 248; *Arnold v. Pacific Mut. Ins. Co.*, 78 N. Y. 7.

Where, however, the delay is reasonable and within the purpose of the insured voyage, it will not amount to a deviation.

Such was the rule applied in *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383, 6 L. Ed. 664; *Coles v. Marine Ins. Co.*, 6 Fed. Cas. 65; *Coffin v. Newburyport Marine Ins. Co.*, 9 Mass. 436; *Gilfert v. Hallet*, 2 Johns. Cas. (N. Y.) 296; *Suydam v. Marine Ins. Co.*, 2 Johns. (N. Y.) 138; *Arnold v. Pacific Mut. Ins. Co.*, 78 N. Y. 7.

The reasonableness of the delay is a question for the jury.

Columbian Ins. Co. v. Catlett, 12 Wheat. 383, 6 L. Ed. 664; *Coffin v. Newburyport Marine Ins. Co.*, 9 Mass. 436; *Foster v. Jackson Marine Ins. Co.*, 1 Edm. Sel. Cas. (N. Y.) 290; *Lawrence v. Ocean Ins. Co.*, 11 Johns. (N. Y.) 241.

The apparent dissent from this doctrine found in the opinions of Marshall, C. J., and Livingston and Story, JJ., in *Oliver v. Maryland Ins. Co.*, 7 Cranch, 487, 3 L. Ed. 414, goes rather to the question of the necessity of any delay than the reasonable length thereof.

The burden, however, of showing the delay to have been reasonable, is on plaintiff.

Wood v. Pleasants, 80 Fed. Cas. 473; *Amsinck v. American Ins. Co.*, 129 Mass. 185.

(h) Trading, selling, or taking cargo—Transshipment of cargo.

If the vessel is properly within a certain port, neither a trading, nor a discharge of a portion of her cargo, nor a taking on of an additional cargo, will amount to deviation, if no delay or increase of risk results therefrom.

The following cases illustrate the rule: *Hughes v. Union Ins. Co.*, 3 Wheat. 159, 4 L. Ed. 357; *Sage v. Middletown Ins. Co.*, 1 Conn. 239; *Chase v. Eagle Ins. Co.*, 5 Pick. (Mass.) 51; *Deblois v. Ocean Ins. Co.*, 16 Pick. (Mass.) 303, 28 Am. Dec. 245; *Lapham v. Atlas Ins. Co.*, 24 Pick. (Mass.) 1; *Perkins v. Augusta Ins. & Banking Co.*, 10 Gray (Mass.) 312, 71 Am. Dec. 654; *Foster v. Jackson Marine Ins. Co.*, 1 Edm. Sel. Cas. (N. Y.) 290; *Kane v. Columbian Ins. Co.*, 2 Johns. (N. Y.) 264; *Phoenix Fire Ins. Co. v. Cochran*, 51 Pa. 143.

It is true this distinction was not distinctly drawn in *Maryland Ins. Co. v. Leroy*, 7 Cranch, 26, 3 L. Ed. 257, where the policy was held forfeited by taking on board certain unspecified cargo, but it was afterwards pointed out in *Hughes v. Union Ins. Co.*, 3 Wheat. 159, 4 L. Ed. 357, that there was in the *Leroy* Case an actual delay. But in *Thorndike v. Bordman*, 4 Pick. (Mass.) 47, while emphasis was placed on the fact that there was no delay, yet it was intimated that, had the sale been for any other purpose than facilitating the completion of the voyage, the rule would have been different; distinguishing the case in that particular from *Kettell v. Wiggin*, 13 Mass. 68, where the going on an independent enterprise for the sake of eventually facilitating the lading of the cargo was held to constitute a deviation. This doctrine intimated in the *Thorndike* Case was, however, definitely abandoned in *Perkins v. Augusta Ins. & Banking Co.*, 10 Gray (Mass.) 312, 71 Am. Dec. 654, where the purpose of the voyage was expressly excluded as a factor in determining whether the trading amounted to a deviation.

It has been held that liberty to touch at a place does not justify trading at that place (*United States v. The Paul Shearman*, 27 Fed. Cas. 467). Indeed, in *Maryland Ins. Co. v. Leroy*, 7 Cranch, 26, 3 L. Ed. 257, it is said that the word "touching" in its nautical sense is the most restrictive word that can be adopted. But per-

mission to trade at certain ports gives permission to buy and sell at them, not in any limited manner, but by repeated acts (*Winthrop v. Union Ins. Co.*, 30 Fed. Cas. 376).

The question as to whether there has been any delay or increased risk resulting from the additional cargo was held to be for the jury in *Perkins v. Augusta Ins. & Banking Co.*, 10 Gray (Mass.) 312, 71 Am. Dec. 654, and *Lapham v. Atlas Ins. Co.*, 24 Pick. (Mass.) 1.

Any unnecessary transshipment of the goods insured, not provided for in the policy, will amount to a deviation.

The following cases were decided under such principle: *Schroeder v. Schweizer Lloyd Transport Versicherungs Gesellschaft*, 60 Cal. 467, 44 Am. Rep. 61, reported on second appeal in 66 Cal. 294, 5 Pac. 478; *Malinckrodt v. Jefferson Mut. Fire Ins. Co.*, 1 Mo. App. 205; *Salisbury v. Marine Ins. Co.*, 23 Mo. 553, 66 Am. Dec. 687.

But where, as in *Fletcher v. St. Louis Marine Ins. Co.*, 18 Mo. 193, express provision is made in the policy for transshipment, no such result will follow.

(1) Taking prizes.

It is held in *Wiggin v. Amory*, 13 Mass. 118, that while an insured vessel has a right to beat off an attack, yet there will be a deviation, if she goes further and effects a capture, and delays to man it. On the other hand, it is held by Story, Circuit Justice, in *Haven v. Holland*, 11 Fed. Cas. 846, that the master has a large discretion on this subject. He is not bound to attempt an escape in the first instance, and only to repel an attack when made. On the contrary, he is at liberty to lie to or attack the enemy's ship or chase her, if he deems that the best means of self-defense. The only question in cases of this nature is whether what is done is fairly attributable to an intention of self-defense, or to motives of another nature, such as the desire of profit. If the former, then the act is justifiable; if the latter, then it is a deviation. Furthermore, if a vessel in self-defense capture a hostile vessel, she has a right to take possession, and man out the prize; for she has a right to make her victory effectual, and the delay will be no deviation if thereby her own crew be not injuriously weakened.

It is also stated in the *Haven Case* that while a vessel armed as a letter of marque, and insured as such, has no right to cruise at large for prizes, yet she may chase and capture hostile vessels coming in sight, in the course of her voyage, without its being a deviation. Judge Story was further of opinion, though he does not so

decide, that there would be no difference in the law if the vessel were not described in the policy as a letter of marque, provided that fact had been made known to the underwriter prior to the execution of the policy.

The Massachusetts courts, on the contrary, have held that while the taking of a commission as a letter of marque after a policy has been effected on goods shipped on board a merchant vessel, without knowledge or consent of the underwriter, will have no effect on the policy, and while an expression in the policy that the ship might take a letter of marque will give liberty to capture any ship of the enemy that may fall in her way, yet, when no mention is made in the policy of the letter of marque, the use of it for the profit of the owners and the taking of a prize constitute a deviation, though at the time of insurance it was known to the underwriter that the ship was commissioned with such letter. It might be that the vessel would only use her letter in case she was attacked, and that she was armed only for defense.

Wiggin v. Amory, 18 Mass. 118; *Wiggin v. Boardman*, 14 Mass. 12.

Where the policy was "with liberty to cruise and capture," conveying prizes was held not a deviation, it not appearing that the voyage insured was delayed, or that the vessel went out of her course on account of acting as convoy (*Ward v. Wood*, 13 Mass. 539).

(j) Agency.

In *Wiggin v. Amory*, 14 Mass. 1, 7 Am. Dec. 175, where the delay incident to manning a captured vessel constituted the deviation, and in *Hood v. Nesbitt*, 1 Yeates (Pa.) 114, 1 Am. Dec. 265, where the deviation was the pursuit of a vessel which had been piratically taken by its crew, it was contended that the conduct of the master amounted to barratry, for which the insured was not responsible. The court, however, in each instance, pointed out that the conduct of the master was impelled by hope of gain both for himself and the owners, and that therefore the element of fraud, necessary to barratry, was absent.

It is pointed out in *Natchez Ins. Co. v. Stanton*, 2 Smedes & M. (Miss.) 340, 41 Am. Dec. 592, that the officers and crew of a vessel are the agents of the owners of the cargo, as well as of the owners of the vessel, and that therefore a deviation in the voyage avoids the policy on the goods.

Where, however, the act relied on as constituting deviation was done under the direction of a consul, who received his authority, not as an agent of the owners, but from the necessities of the case and his official character as commercial agent of the country to which the vessel belonged, such act did not amount to a deviation (*Winthrop v. Union Ins. Co.*, 30 Fed. Cas. 376).

(k) Necessity which will excuse deviation.

The necessity or danger which will justify a deviation must be obvious, immediate, directly applied to the interruption of the voyage, and imminent; not distant, contingent, and indefinite.

It is sufficient to refer to *Oliver v. Maryland Ins. Co.*, 7 Cranch, 487, 8 L. Ed. 414; *King v. Delaware Ins. Co.*, 14 Fed. Cas. 516; *Stocker v. Harris*, 3 Mass. 409; *Lee v. Gray*, 7 Mass. 349; *Burgess v. Equitable Marine Ins. Co.*, 126 Mass. 70, 30 Am. Rep. 654; *Malinckrodt v. Jefferson Mut. Fire Ins. Co.*, 1 Mo. App. 205; *Salisbury v. Marine Ins. Co.*, 23 Mo. 553, 66 Am. Dec. 687; *Neilson v. Columbian Ins. Co.*, 1 Johns. (N. Y.) 301; *Robertson v. Columbian Ins. Co.*, 8 Johns. (N. Y.) 491; *Riggin v. Patapsco Ins. Co.*, 7 Har. & J. (Md.) 279, 16 Am. Dec. 303; *Murden v. South Carolina Ins. Co.*, 1 Mill, Const. (S. C.) 200.

It is also a general rule that the deviation, to be excusable, must be strictly commensurate with vis major producing it.

To this effect are *Wood v. Pleasants*, 30 Fed. Cas. 473; *Coles v. Marine Ins. Co.*, 6 Fed. Cas. 65; *King v. Delaware Ins. Co.*, 14 Fed. Cas. 516; *Turner v. Protection Ins. Co.*, 25 Me. 515, 43 Am. Dec. 294; *Riggin v. Patapsco Ins. Co.*, 7 Har. & J. (Md.) 279, 16 Am. Dec. 303; *Murden v. South Carolina Ins. Co.*, 11 Mill, Const. (S. C.) 200; *Stewart v. Tennessee Marine & Fire Ins. Co.*, 1 Humph. (Tenn.) 242.

These rules, however, should be considered in connection with the other rule that if the captain or owner, in departing from the usual course of voyage, acts fairly and bona fide and according to his best judgment to avoid the threatened danger, and thereby promote the benefit of all parties concerned, and has no other view but to conduct the ship and cargo to the port of destination, the policy still continues,

Such is the doctrine of *Winthrop v. Union Ins. Co.*, 30 Fed. Cas. 376; *Oruder v. Pennsylvania Ins. Co.*, 6 Fed. Cas. 921, 922; *Byrne v. Louisiana State Ins. Co.*, 7 Mart. N. S. (La.) 126; *Turner v. Protection Ins. Co.*, 25 Me. 515, 43 Am. Dec. 294; *Brazier v. Clap*, 5 Mass. 1; *Wiggin v. Amory*, 13 Mass. 118; *Burgess v. Equitable Marine*

Ins. Co., 126 Mass. 70, 80 Am. Rep. 654; *Foster v. Jackson Marine Ins. Co.*, 1 Edm. Sel. Cas. (N. Y.) 290; *Graham v. Commercial Ins. Co.*, 11 Johns. (N. Y.) 352; *Thebaud v. Great Western Ins. Co.*, 155 N. Y. 516, 50 N. E. 284; *American Ins. Co. v. Francia*, 9 Pa. 390.

The circumstances under which a necessity for deviation has arisen are as varied as the exigencies of a sea voyage. Deviations caused by a specific sea peril, or by a necessity of repairs, are probably the most numerous.

Such were the following: *Akin v. Mississippi Ins. Co.*, 4 Mart. N. S. (La.) 661; *Byrne v. Louisiana State Ins. Co.*, 7 Mart. N. S. (La.) 126; *Turner v. Protection Ins. Co.*, 25 Me. 515, 43 Am. Dec. 294; *Clark v. United States Fire & Marine Ins. Co.*, 7 Mass. 365, 5 Am. Dec. 50; *Coffin v. Newburyport Marine Ins. Co.*, 9 Mass. 436; *Wiggin v. Amory*, 18 Mass. 118; *Deblois v. Ocean Ins. Co.*, 16 Pick. (Mass.) 303, 28 Am. Dec. 245; *Burgess v. Equitable Marine Ins. Co.*, 126 Mass. 70, 80 Am. Rep. 654; *Kane v. Columbian Ins. Co.*, 2 Johns. (N. Y.) 264; *Watson v. Marine Ins. Co.*, 7 Johns. (N. Y.) 57; *Graham v. Commercial Ins. Co.*, 11 Johns. (N. Y.) 352; *New Jersey Lighterage Co. v. New York Mut. Ins. Co.*, 49 N. Y. Super. Ct. 165; *American Ins. Co. v. Francia*, 9 Pa. 390; *Miller v. Russell*, 1 Bay (S. C.) 309; *Campbell v. Williamson*, 2 Bay (S. C.) 237.

A need of provisions, or of more men to render the boat seaworthy, has often been held to justify a deviation.

Coles v. Marine Ins. Co., 6 Fed. Cas. 65; *Oruder v. Pennsylvania Ins. Co.*, 6 Fed. Cas. 921; *Winthrop v. Union Ins. Co.*, 30 Fed. Cas. 376; *Wood v. Pleasants*, 30 Fed. Cas. 473; *Lapene v. Sun Ins. Co.*, 8 La. Ann. 1, 58 Am. Dec. 668; *Kettell v. Wiggin*, 13 Mass. 68; *Burgess v. Equitable Marine Ins. Co.*, 126 Mass. 70, 80 Am. Rep. 654.

The necessity frequently arises from the danger of capture by the enemy.

This was the fact in *Coles v. Marine Ins. Co.*, 6 Fed. Cas. 65; *Goyon v. Pleasants*, 10 Fed. Cas. 891; *Whitney v. Haven*, 13 Mass. 172; *Suydam v. Marine Ins. Co.*, 2 Johns. (N. Y.) 138.

Of like nature is a deviation to rescue the cargo after seizure by a foreign government, or a departure forced on a neutral vessel by the action of belligerents.

This cause was recognized in *Stocker v. Harris*, 3 Mass. 409; *Lee v. Gray*, 7 Mass. 849; *Patrick v. Ludlow*, 3 Johns. Cas. (N. Y.) 10, B.B.Ins.—100

2 Am. Dec. 130; *Robinson v. Marine Ins. Co.*, 2 Johns. (N. Y.) 89; *Reade v. Commercial Ins. Co.*, 3 Johns. (N. Y.) 352, 3 Am. Dec. 495; *Post v. Phoenix Ins. Co.*, 10 Johns. (N. Y.) 79; *Snowden v. Phoenix Ins. Co.*, 3 Bin. (Pa.) 457; *Marine Ins. Co. v. Stras*, 1 Munf. (Va.) 408.

While, as before noted, a change in the terminus ad quem is sometimes spoken of as a deviation, yet such change, induced by a blockade of the original terminus, will terminate the policy, while a mere delay induced thereby will be excused.

Richardson v. Maine Fire & Marine Ins. Co., 6 Mass. 102, 4 Am. Dec. 92; *Savage v. Pleasants*, 5 Bin. (Pa.) 403, 6 Am. Dec. 424.

Of course, a deviation to avoid the effect of an illegal act of the master or owner will not be excused.

Breed v. Eaton, 10 Mass. 21; *Murden v. South Carolina Ins. Co.*, 1 Mill, Const. (S. C.) 200.

In *Riggin v. Patapsoo Ins. Co.*, 7 Har. & J. (Md.) 279, 16 Am. Dec. 302, the defendant contended that a deviation to avoid a peril not insured against absolved the insurers, but the court held otherwise. Oftentimes the cargo is insured by various persons against various risks, and to attempt to escape one risk would, under the contention raised, avoid many of the other policies on the cargo. So, also, in *Robinson v. Marine Ins. Co.*, 2 Johns. (N. Y.) 89, it was decided (Livingston, J., dissenting) that a deviation from necessity will excuse the insured in case of an insurance against a particular risk as well as in a case of general insurance. And in *Savage v. Pleasants*, 5 Bin. (Pa.) 403, 6 Am. Dec. 424, the majority of the court held that a delay caused by a blockade was excusable, though there was no insurance against illicit trade.

The case of *Breed v. Eaton*, 10 Mass. 21, is so imperfectly reported that it is impossible to determine whether the court's decision that the deviation was not excused was based upon the fact that the underwriters would not have been liable had a loss resulted from an attempted completion of the insured voyage, or upon the fact that the deviation was to avoid the effect of an intended violation of law. But in *Roget v. Thurston*, 2 Johns. Cas. (N. Y.) 248, where the policy read "French risks excepted," and the vessel was captured by a French privateer and recaptured by a British frigate, after being detained by the French vessel for several days, it was held that it was sufficient that the voyage was

interrupted, and the vessel stopped, for at least four days, by an event the risk of which was undertaken by the insured. This detention, like a deviation for that period, altered the risk, and must be considered as discharging the policy. *Augusta Ins. & Bank Co. v. Abbott*, 12 Md. 348, was somewhat similar. In that case a delay was caused by proceedings in the admiralty court against the vessel for debts due for repairs and supplies, and it was held that such proceedings did not constitute a sufficient excuse, since the underwriter did not run the risk of obstructions occasioned by debts, or neglect to pay debts, of the insured. The better reason for the decision would seem to be the general doctrine in relation to a deviation caused by the insured's negligence. In like manner the cases of *Post v. Phoenix Ins. Co.*, 10 Johns. (N. Y.) 79, and *Richardson v. Maine Fire & Marine Ins. Co.*, 6 Mass. 102, 4 Am. Dec. 92, while not directly involving a deviation to avoid a peril not covered by the policy, seem to connect the decision that a deviation is excused by necessity with the fact or assumption that the peril was one insured against.

That the master of a vessel had already determined to depart from the voyage insured will not forfeit the policy as for a deviation, if, when the departure was actually made, it was caused solely by the necessities of the case.

Hobart v. Norton, 8 Pick. (Mass.) 159; *Snowden v. Phoenix Ins. Co.*, 3 Bin. (Pa.) 457.

A necessity, however, not arising from the exigencies of the voyage, but from events antedating the inception of the risk or from the negligence of the master, will not justify a deviation.

Reference may be made to *Cruder v. Philadelphia Ins. Co.*, 6 Fed. Cas. 921, 922; *Lapene v. Sun Ins. Co.*, 8 La. Ann. 1, 58 Am. Dec. 668; *Augusta Ins. & Bank Co. v. Abbott*, 12 Md. 348; *Kettell v. Wiggin*, 13 Mass. 68; *Audenreid v. Mercantile Mut. Ins. Co.*, 60 N. Y. 482, 19 Am. Rep. 204; *Merchants Ins. Co. v. Algeo*, 32 Pa. 330.

It is nevertheless decided in *Lapene v. Sun Ins. Co.*, 8 La. Ann. 1, 58 Am. 668, that a deviation occasioned by the negligence of a seaman, unaccompanied by fault in the master, will not forfeit the policy. And in *Reade v. Commercial Ins. Co.*, 3 Johns. (N. Y.) 352, 3 Am. Dec. 495, a departure from the usual course of a voyage to France, rendered necessary by the presence of French passengers and cargo, was considered justifiable.

Whether the necessity of a deviation is a question of fact or of law is not entirely free from difficulty. It is asserted on the one hand that since the question must be determined by the motive, consequences, and circumstances of the act, it is in its nature a question of fact for the jury.

Foster v. Jackson Marine Ins. Co., 1 Edm. Sel. Cas. (N. Y.) 290; *Thebaud v. Great Western Ins. Co.*, 155 N. Y. 516, 50 N. E. 284.

On the other hand, it is stated that while the actual causes of the departure from the voyage constitute a question of fact for the jury, yet the legal sufficiency of such causes to excuse the deviation is a question for the court.

Augusta Ins. & Banking Co. v. Abbott, 12 Md. 848; *Riggin v. Patapsco Ins. Co.*, 7 Har. & J. 279, 16 Am. Dec. 808.

Livingston, J., with whom concurred Story, J., in a concurring opinion in *Oliver v. Maryland Ins. Co.*, 7 Cranch, 487, 3 L. Ed. 414, states, as an invariable rule, that what will excuse a delay, apparently unreasonable, so as to repel the charge of deviation on that account, must ever be a question of law to be decided by the court. Marshall, C. J., who wrote the opinion of the court, expressed his view to be that it was for the jury to determine whether there was danger, and that they should have been instructed that the delay was justified if the danger existed; otherwise not. It was, however, pointed out in the opinion of the court that no cruisers (from which the danger was apprehended) were shown to have been interposed between the two ports.

The burden is upon plaintiff to show that the deviation was caused by necessity.

Cruder v. Pennsylvania Ins. Co., 6 Fed. Cas. 922; *Amstreck v. American Ins. Co.*, 129 Mass. 185.

A protest is admissible in evidence to show the necessity of the deviation.

Brown v. Girard, 1 Bin. (Pa.) 40, 2 Am. Dec. 400; *Campbell v. Williamson*, 2 Bay (S. C.) 237. See, however, *Marine Ins. Co. v. Stras*, 1 Munf. (Va.) 408.

(1) Usage.

A departure from the most direct course of the voyage, or from the most expeditious method of conducting it, though it might otherwise constitute a deviation, will not be so considered if shown to

be a usage, for usages of trade are supposed to be known to underwriters, and are impliedly made part of the contract.

Reference to the following cases is deemed sufficient: *Bentaloe v. Pratt*, 3 Fed. Cas. 241; *Bulkley v. Protective Ins. Co.*, 4 Fed. Cas. 614; *Pouverin v. Louisiana Ins. Co.*, 4 Rob. (La.) 234; *Lockett v. Merchants' Ins. Co.*, 10 Rob. (La.) 339; *Parsons v. Manufacturers' Ins. Co.*, 16 Gray (Mass.) 463; *Walsh v. Homer*, 10 Mo. 6, 45 Am. Dec. 342; *Child v. Sun Mut. Ins. Co.*, 5 N. Y. Super. Ct. 26; *McCall v. Sun Mut. Ins. Co.*, 66 N. Y. 505, reversing (1875) 39 N. Y. Super. Ct. 330; *Child v. Sun Mut. Ins. Co.*, 5 N. Y. Super. Ct. 26; *Gazzan v. Ohio Ins. Co.*, *Wright (Ohio)* 202; *Pittsburgh Ins. Co. v. Dravo*, 2 Wkly. Notes Cas. (Pa.) 194; *Cross v. Shutliffe*, 2 Bay (S. C.) 220, 1 Am. Dec. 645; *Mey v. South Carolina Ins. Co.*, 1 Tread. Const. (S. C.) 339.

But a usage cannot contradict the express terms in which the voyage is described. Thus, in *Stevens v. Commercial Ins. Co.*, 26 N. Y. 397, where liberty was given in the policy to touch at any one specified intermediate point, it was held that it constituted a deviation to put into any other port than that named in the policy, though calling at such other port might be equally sanctioned by general usage, independent of the policy, and though neither the risk nor premium would have been increased had such port been substituted for that named in the clause. Nor can the terms of a policy reading "to port in Cuba, and at and thence to port of advice and discharge in Europe," be enlarged by parol evidence of a usage of vessels making the trip to Cuba to enter a second port in that island to take on their return cargoes.

Hearn v. New England Mut. Marine Ins. Co., 11 Fed. Cas. 969, tried as an action for reformation, 11 Fed. Cas. 973, and affirmed 20 Wall. 488, 22 L. Ed. 395; *Hearn v. Equitable Safety Ins. Co.*, 11 Fed. Cas. 963, tried as an action for reformation 11 Fed. Cas. 965, and affirmed without reference to point of usage 20 Wall. 494, 22 L. Ed. 398.

So, also, in *Malinckrodt v. Jefferson Mut. Fire Ins. Co.*, 1 Mo. App. 205, evidence offered to prove a custom to reship cargo, and to show that the insertion of a clause in the bill of lading authorizing a reshipment was in pursuance of an established custom of the trade, was held inadmissible, a shipment on a particular vessel having been reported on the open policy. It was intimated, however, that the rule might have been different had a custom of sanctioning such reshipments been shown on the part of the underwriters.

Under a similar principle the length of time a vessel may wait to take in her cargo without discharging the underwriters will not depend on the usage of the trade, but on the necessities of the case.

Oliver v. Maryland Ins. Co., 7 Cranch, 487, 3 L. Ed. 414; *Himeley v. South Carolina Ins. Co.*, 1 Mill, Const. (S. C.) 154, 12 Am. Dec. 623.

Nevertheless, a delay which is necessary to accomplish the objects of the voyage, according to the course of trade by which a minimum limit is fixed on the price for which the cargo may be sold, will not be a deviation to avoid a policy (*Columbian Ins. Co. v. Catlett*, 12 Wheat. 383, 6 L. Ed. 664).

A usage, in order to justify what would otherwise have been a deviation, must be so uniform as to warrant the presumption that it was known to both of the parties as the law of the trade.

This rule is supported by *Martin v. Delaware Ins. Co.*, 16 Fed. Cas. 894; *Bulkley v. Protection Ins. Co.*, 4 Fed. Cas. 614; *Schroeder v. Schweizer Lloyd Transport Versicherung's Gesellschaft*, 66 Cal. 294, 5 Pac. 478; *Hermann v. Western Marine Fire Ins. Co.*, 13 La. 516; *Folsom v. Mercantile Mut. Marine Ins. Co.*, 38 Me. 414; *Vos v. Robinson*, 9 Johns. (N. Y.) 192.

In accordance with this principle it has been held that the usage must be one which is in effect where the policy is written.

Natchez Ins. Co. v. Stanton, 2 Smedes & M. (Miss.) 340, 41 Am. Dec. 592; *Child v. Sun Mut. Ins. Co.*, 5 N. Y. Super. Ct. 28.

The question of usage has been considered a question of fact for the jury (*Bentaloe v. Pratt*, 3 Fed. Cas. 241), but no evidence can be given of a usage which is unreasonable (*Seccomb v. Provincial Ins. Co.*, 10 Allen [Mass.] 305).

(m) Deviation to save life or property.

A master does not violate his trust or exceed his authority by using efforts to give aid and succor to those he may find in the course of his voyage in danger and suffering on the high seas, and an exposure of the vessel and the property on board to new risks consequent upon such action will not constitute a deviation.

This rule is stated in *Bond v. The Cora*, 3 Fed. Cas. 838; *The Boston*, 3 Fed. Cas. 932; *Crocker v. Jackson*, 6 Fed. Cas. 829; *The Iroquois*, 118 Fed. 1003, 55 O. C. A. 497; *The Henry Ewbank*, 11 Fed. Cas. 1166; *Perkins v. Augusta Ins. & Banking Co.*, 10

Gray (Mass.) 312, 71 Am. Dec. 654; Dabney v. New England Mut. Marine Ins. Co., 14 Allen (Mass.) 800; Burgess v. Equitable Marine Ins. Co., 126 Mass. 70, 30 Am. Rep. 654.

The exigency, however, which demands relief, must be equal in importance to the deviation which is required. Whether the exigency exists, and how great it is, are questions of fact. (Perkins v. Augusta Ins. & Banking Co., 10 Gray [Mass.] 312, 71 Am. Dec. 654.)

It is also a general rule that a deviation will not be excused when made merely for the purpose of saving property other than that on board.¹

It was so held in the following: Bond v. The Oora, 3 Fed. Cas. 838, affirming (1806) 3 Fed. Cas. 835; The Boston, 3 Fed. Cas. 932; Crocker v. Jackson, 6 Fed. Cas. 829; The Henry Ewbank, 11 Fed. Cas. 1166; Dabney v. New England Mut. Marine Ins. Co., 14 Allen (Mass.) 800; Settle v. St. Louis Perpetual Marine Fire & Life Ins. Co., 7 Mo. 379; Hood v. Nesbitt, 1 Yeates (Pa.) 114, 1 Am. Dec. 265.

Under the same principle a departure from the usual course of a fishing voyage, to secure bait or a sufficient fishing crew, will forfeit the policy.

Folsom v. Mercantile Mut. Marine Ins. Co., 38 Me. 414; Burgess v. Equitable Marine Ins. Co., 126 Mass. 70, 30 Am. Rep. 654.

No distinction as to the application of this principle to river navigation was drawn in Settle v. St. Louis Perpetual Marine Fire & Life Ins. Co., 7 Mo. 379, but in Walsh v. Horner, 10 Mo. 6, 45 Am. Dec. 342, it was held that in a river voyage it was no deviation for a steamboat to stop to aid another boat in distress, even though there might be no danger of any loss of life. The argument was that river boats may be in danger when the lives of the crew and passengers are entirely safe; the circumstances differing in this respect from those of an ocean voyage.

¹ As to effect of deviation in determining amount of salvage, see Cent. Dig. vol. 43, "Salvage," col. 1858, § 63.

8. ILLEGALITY OF VOYAGE AS GROUND OF FORFEITURE.

- (a) In general.
- (b) Illicit or prohibited trade.
- (c) Same—License.
- (d) Breach of neutrality laws.
- (e) Noncompliance with governmental regulations.
- (f) Violation of embargo or nonintercourse act.

(a) In general.

The law is settled that an insurance does not cover an illegal voyage, unless by the terms of the contract the intention to do so is expressed, or unless the voyage insured is known to the insurer to be illegal, at the time when he makes the contract, in which latter case the intention is implied (*Archibald v. Mercantile Ins. Co.*, 3 Pick. [Mass.] 70).

While an act or the general conduct of the insured may be very reprehensible and illegal in the sense that it renders him liable to an action for damages, yet there must be an actual illegality in contravention of the law of the land or of nations to justify a forfeiture for illegality (*Ward v. Wood*, 13 Mass. 539). That illegality is dependent on a contingency does not affect the question if the probability is known (*Gray v. Sims*, 10 Fed. Cas. 1039).

If a voyage, as originally insured, be valid, any subsequent illegality in the course of the voyage will not affect the policy, so far as concerns losses on property not tainted with such illegality, though connected with the *res gestæ* (*Clark v. Protection Ins. Co.*, 5 Fed. Cas. 909). But even if the illegality attaches only to the latter part of the voyage, if it was known at the inception of the risk that the return voyage would be illegal, the illegality affects the whole voyage (*Gray v. Sims*, 10 Fed. Cas. 1039); and where only the latter part of the voyage is illegal, if the loss occur by reason thereof, there can be no recovery, though the voyage was legal in its inception (*Archibald v. Mercantile Ins. Co.*, 3 Pick. [Mass.] 70).

(b) Illicit or prohibited trade.

A warranty against illicit or prohibited trade has in view the municipal laws and ordinances of the country where the trade is to be carried on; and foreigners going there are bound to know and to observe those laws. It amounts to a stipulation that the trade in which the insured shall engage shall be lawful to the purpose of protecting the property insured, and that it shall not become unlaw-

ful by the misconduct or neglect of the insured. (*Smith v. Delaware Ins. Co.*, 22 Fed. Cas. 509.) Generally speaking, if the trade in which a vessel is to be engaged during the voyage be contrary to the laws of the country or the law of nations, a policy upon the ship, equally with one on the cargo—the peculiar subject of interdiction—is void (*Gray v. Sims*, 10 Fed. Cas. 1039). Where the trade laws of the foreign country prohibit the particular trade, but the laws of the country of origin of the voyage do not, the policy is not necessarily void (*McFee v. South Carolina Ins. Co.*, 2 McCord [S. C.] 503, 13 Am. Dec. 757). And even if the sovereign of a neutral give notice to his subjects as to the prohibited trade, he does not necessarily so prohibit them as to render the insurance in and of itself void. But if the country to which a ship belongs prohibits its subjects from trading with a foreign country, a voyage to that country is illicit, and all insurances on such voyages by its subjects are forfeited, whether insurers had knowledge of the prohibition or not (*Richardson v. Maine Fire & Marine Ins. Co.*, 6 Mass. 102, 4 Am. Dec. 92). The fact that neither party knew that the trade was prohibited does not excuse the forfeiture.

Andrews v. Essex Fire & Marine Ins. Co., 1 Fed. Cas. 885; *Archibald v. Mercantile Ins. Co.*, 3 Pick. (Mass.) 70.

The rule has been asserted that, under an express promissory warranty against illicit trade, a breach forfeits the insurance, irrespective of the cause of loss (*Goicoechea v. Louisiana State Ins. Co.*, 6 Mart. N. S. [La.] 51, 17 Am. Dec. 175); but it has also been held that illicit trade carried on barratrously by the master does not forfeit the policy (*Suckley v. Delafield*, 2 Caines [N. Y.] 222).

The warranty against illicit trade may be regarded as an express promissory warranty or as an exception of risk (*Goicoechea v. Louisiana State Ins. Co.*, 6 Mart. N. S. [La.] 51, 17 Am. Dec. 175; *Richardson v. Maine Fire & Marine Ins. Co.*, 6 Mass. 102, 4 Am. Dec. 92).

The conduct of the master in not delivering a letter of instructions when captured, where it showed an innocent voyage, though imprudent, would not prevent a recovery by the insured (*Sperry v. Delaware Ins. Co.*, 22 Fed. Cas. 923).

(c) *Same—License.*

During the War of 1812 it was the custom of shipowners, in order to avoid capture and condemnation by British cruisers, to obtain a British license to trade. In the New England states, where the war was unpopular, the presence of such a license on

board the vessel was not regarded as rendering the voyage illegal so as to forfeit the policy, though it was conceded that, had the vessel been overhauled by an American cruiser, the presence of the license would have resulted in condemnation.

Hayward v. Blake, 12 *Mass.* 176; *Bulkley v. Derby Fishing Co.*, 1 *Conn.* 572.

In the Connecticut case, however, the court drew a distinction on the fact that the license in that case was procured through a neutral nation, and conceded that, had the license been obtained directly from the enemy, the voyage would have been illegal.

On the other hand, in New York, in view of the fact that the supreme court of the United States had repeatedly decided that the mere sailing under an enemy's license, without regard to the object of the voyage or the port of destination, constitutes of itself an act of illegality which subjects a ship and cargo to confiscation, it was held that the taking of such a license was unlawful, forfeiting the insurance (*Colquhoun v. New York Firemen Ins. Co.*, 15 *Johns.* 352).

An interesting case is *Craig v. United States Ins. Co.*, 6 *Fed. Cas.* 733, where there was a warranty that the vessel should have a Sidmouth license on board. The Sidmouth license referred to was a license issued by Lord Sidmouth, representing the British government, which was used in some instances to avoid detention by the British cruisers. The vessel was turned back by a British cruiser at the mouth of Chesapeake Bay, and finally compelled to abandon the voyage. The underwriter defended on the ground that the voyage was illegal because the vessel had a Sidmouth license on board. Plaintiffs in reply denied that there was a Sidmouth license on board, since the license which they had was not proved to be in the handwriting of Lord Sidmouth. The court says that if, as a matter of fact, there was no license, the warranty was broken so as to avoid the policy. If there was a license, the voyage was illegal as sailing with an enemy's license, and the policy void.

(d) Breach of neutrality laws.

It is a general rule that a breach of blockade by which the vessel is seized and condemned effects a forfeiture of the insurance.

Maryland Ins. Co. v. Woods, 6 *Cranch*, 29, 3 *L. Ed.* 143; *Croudson v. Leonard*, 4 *Cranch*, 434, 2 *L. Ed.* 670.

But there is a breach of blockade only when the blockading force is actually before the port. The departure of the force *animo revertendi* does not continue the blockade, though the insured be warned not to enter (*Williams v. Smith*, 2 Caines [N. Y.] 1, 2 Am. Dec. 209).

Merely sailing for a port understood to be blockaded is not a breach of neutrality, so as to affect the warranty in a policy of insurance (*Vos v. United Ins. Co.*, 2 Johns. Cas. [N. Y.] 469). So, a vessel may lawfully sail for a port in the West Indies known to be blockaded, until she was warned off. She is not bound to make inquiry elsewhere than of the blockading force. (*Maryland Ins. Co. v. Woods*, 6 Cranch, 29, 3 L. Ed. 143.) Even persisting in an intention to enter a blockaded port after warning is not attempting to enter it.

Fitzsimmons v. Newport Ins. Co., 4 Cranch, 185, 2 L. Ed. 591; *Vos v. United Ins. Co.*, 1 Caines, Cas. (N. Y.) vii; *s. c.*, 2 Johns. Cas. (N. Y.) 469.

(e) **Noncompliance with governmental regulations.**

Noncompliance with governmental regulations relating to matters not in themselves illegal will not forfeit the policy. Thus, since the statute regulating the conduct of private armed vessels is directory merely, noncompliance therewith, though reprehensible, will not forfeit the policy (*Ward v. Wood*, 13 Mass. 539). Even a breach of the laws against smuggling will not of itself forfeit the policy unless there is an actual seizure and confiscation (*Clark v. Protection Ins. Co.*, 5 Fed. Cas. 909). The noncompliance by the owners of a vessel with a statute prohibiting, under a pecuniary penalty, the carrying of certain material without special license, cannot affect the insurance on vessel or cargo (*Sherlock v. Globe Ins. Co.*, 1 Cin. R. 193, 13 Ohio Dec. 495). Failure to comply with Acts July 20, 1790, and March 2, 1819, 1 Stat. 131, c. 29, 3 Stat. 488, c. 46, providing that every vessel bound on a voyage across the Atlantic shall have on board a certain quantity of water, well secured under deck, does not render the voyage illegal (*Warren v. Manufacturers' Ins. Co.*, 13 Pick. [Mass.] 518, 25 Am. Dec. 341).

The failure of a vessel to comply with a statute providing that either pilots shall be employed, or one-half pilotage fees paid, will not forfeit the policy; such statute not being obligatory, but rather for the purpose of encouraging the industry of pilotage (*Flanigen v. Washington Ins. Co.*, 7 Pa. 306). A defense based on noncom-

pliance with Rev. St. U. S. § 4463 [U. S. Comp. St. 1901, p. 3045], providing that no boat carrying passengers shall depart unless she has a full complement of officers, in that there was no licensed pilot on board, must be pleaded, and it must be alleged and proved that the boat was carrying passengers (*Old Dominion Ins. Co. v. Frank*, 7 Ohio Dec. 302, 2 Wkly. Law Bul. 93).

(2) Violation of embargo or nonintercourse act.

To render the commencement of the voyage illegal, by reason of violation of an embargo, so as to discharge the insurer, a knowledge of the embargo having been laid must be brought home to the masters or owners. A vague rumor or knowledge by the pilot of the embargo previous to the sailing of the vessel will not be sufficient to charge the assured with notice that such act had been passed. (*Walden v. Phoenix Ins. Co.*, 5 Johns. [N. Y.] 310, 4 Am. Dec. 359.) But where insurance was effected upon a voyage from New York to Calcutta and return, shortly prior to the taking effect of an act prohibiting importation from British colonies, and it appeared that it was known that such act might take effect on a certain date, before which it was impossible for the voyage to be completed, the court held that since, if it had been known, at the time the insurance was effected, that the return voyage would carry an illegal cargo, it would have affected the whole voyage with illegality, so that the policy would be void, the fact that the legality of the voyage depended on the known contingency justified the forfeiture (*Gray v. Sims*, 10 Fed. Cas. 1039).

A vessel driven by distress into a French port, where part of her cargo is taken by the government, and she is prevented from taking away her original lading, may, without incurring the penalties of the acts forbidding intercourse with dependencies of France, purchase and load with the produce of the country, and a warranty against illegal trade is not thereby violated.

Jenks v. Hallett, 1 Caines (N. Y.) 60; *Hallett v. Jenks*, 3 Cranch, 210, 2 L. Ed. 414.

9. CHANGE IN GENERAL CONDITION AND LOCATION OF THE PROPERTY INSURED.

- (a) Change in condition in general.
- (b) Repairs, alterations, and additions.
- (c) Same—"Builder's risk."
- (d) Same—Increase of risk.
- (e) Same—Person making alterations.
- (f) Falling of building.
- (g) Erection of building on adjacent premises.
- (h) Same—Increase of risk.
- (i) Change in condition or use of adjacent premises.
- (j) Violation of "clear-space clause."
- (k) Change in location of personal property insured.
- (l) Same—Consent to removal of property.
- (m) Same—Effect of removal.
- (n) Same—Increase of risk.

(a) Change in condition in general.

The changes in the insured property which may have the effect of forfeiting the policy may consist in the occurrence of defects, in the making of alterations or repairs, in changes in adjoining premises, in the location of the property, in its use and occupancy, in the nature and kind of the articles contained in the building or associated with the goods insured, and various other changes. Some of these changes and the effects thereof are treated separately in special briefs. The present discussion relates only to changes in the general condition of the insured property, its location, and the surrounding exposures.

The law declares that in every contract of insurance against fire there is an implied promise on the part of the insured that he will not, after the making of the policy, alter or change the property so as to increase the risk.

Lattomus v. Farmers' Mutual Fire Ins. Co., 3 *Houst. (Del.)* 404;
Hoffecker v. Newcastle County Mut. Ins. Co., 5 *Houst. (Del.)* 101.

Conditions prohibiting changes in the insured property must be liberally construed to prevent forfeiture.

Security Ins. Co. v. Mette, 27 *Ill. App.* 324; *Summerfield v. Phoenix Assur. Co.* (C. C.) 65 *Fed.* 292.

Where there is a specific stipulation against change, the fact that material changes were contemplated when policy was issued does not affect the forfeiture (*Frost's Detroit L., etc., Works v.*

Millers', etc., M. Ins. Co., 37 Minn. 300, 34 N. W. 35, 5 Am. St. Rep. 846). But when the intention to make a change is communicated to the insurer at the issuance of the policy, the changes made must conform thereto (Perry County Ins. Co. v. Stewart, 19 Pa. 45). Thus, where the policy provided that the building insured was to be completed and occupied within 30 days from a certain date, a violation thereof, if not waived, invalidates the contract (Burnham v. Royal Ins. Co., 75 Mo. App. 394). Nevertheless, a clause in a policy of fire insurance that "it is a condition of this insurance that the following improvements shall be completed within 60 days of date hereof, or policy will be null and void," does not render the policy absolutely void at the end of 60 days, upon failure to make the required improvements, but voidable only (Manufacturers' & Merchants' Mut. Ins. Co. v. Armstrong, 145 Ill. 469, 34 N. E. 553).

The failure of the insured to repair a defect in the property, arising after the contract was made, unless he be guilty of gross neglect, does not work a forfeiture of the right to recover on the policy (Whitehurst v. Fayetteville Mut. Ins. Co., 51 N. C. 352); and, where the defective condition of the roof was averred in the answer, the condition of the building as a whole could not be shown (Newman v. Springfield Fire & Marine Ins. Co., 17 Minn. 123 [Gil. 98]).

A clause providing that a change in the risk not notified to the insurer will render the policy void refers to changes which increase the risk. No notice is required of a change which does not increase the risk.

Lattomus v. Farmers' Mutual Fire Ins. Co., 3 Houst. (Del.) 404; *Meyer v. Queen Ins. Co.*, 41 La. Ann. 1000, 6 South. 899; *Griswold v. American Central Ins. Co.*, 70 Mo. 654; *Parker v. Arctic Fire Ins. Co.*, 59 N. Y. 1.

And when notice is required it is sufficient if the notice is oral (*Planters' Mut. Ins. Co. v. Rowland*, 66 Md. 236, 7 Atl. 257).

It is not every change that comes within the terms of the condition. **Changes consistent with the due and customary use of the property are of course allowable.**

Crane v. City Ins. Co. (C. C.) 3 Fed. 558; *James v. Lycoming Ins. Co.*, 13 Fed. Cas. 809; *Washington Fire Ins. Co. v. Davison*, 30 Md. 91.

To constitute an increase of risk, and thus come within the terms of the condition, it is not necessary that the change should

contribute to the loss (*Newport Imp. Co. v. Home Ins. Co.*, 163 N. Y. 237, 57 N. E. 475). The fact that a higher rate of premium is charged under the changed conditions is an element in determining an increase of risk (*Planters' Mut. Ins. Co. v. Rowland*, 66 Md. 236, 7 Atl. 257); but the question whether a change increases the risk is for the jury (*Manheim Mut. Fire Ins. Co. v. Thompson* [Pa.] 1 Atl. 370). Where the change increases the value, and thus furnishes an additional incentive to the insured to preserve the property, there is no increase of risk (*Phoenix Ins. Co. v. Coomes*, 13 Ky. Law Rep. 238). On the other hand, a depreciation of the property insured after the issuance of the policy does not avoid the policy, under Rev. St. 1899, § 7979, providing that no company shall take a risk on any property at a greater ratio than three-fourths of the value of the property insured, and, when taken, its value shall not be questioned in any proceeding (*Siegle v. Phoenix Ins. Co.* [Mo. App.] 81 S. W. 637), as the statute merely operates to make the policy a valued one.

In this connection it may be noted that it was held in *Travis v. Peabody Ins. Co.*, 28 W. Va. 583, that a parol promise to keep the stock insured up to a certain value cannot be construed as a promissory representation or warranty, but only as an agreement that if the value was reduced below the amount specified the insurer's risk should be proportionately diminished.

The Delaware act of March 29, 1889, provides that, where a subsequent insurance policy on real property has a larger agreed valuation of the property insured than a prior one, all insurance shall be void. It was held that where the policy of insurance covers both real and personal property, and fixes the amount to be paid for each specifically in case of loss, the policy is valid as to the amount insured upon the personal property, inasmuch as the statute is a quasi penal one, and expressly confines the forfeiture to the realty (*Thurber v. Royal Ins. Co.*, 40 Atl. 1111, 1 Marv. 251).

(b) Repairs, alterations, and additions.

In the absence of a special stipulation to the contrary, the owner of an insured building has the right to make not only ordinary, but such general repairs as may be convenient or necessary to make the building better serve its purpose (*Phoenix Ins. Co. v. Coomes*, 13 Ky. Law Rep. 238). Thus, he may make such thorough repairs as may be necessary to render the building tenantable (*Jolly's Administrators v. Baltimore Equitable Society*, 1 Har. & G. [Md.] 295, 18 Am. Dec. 288), or to remedy defects endangering the safety of the insured property, so long as the risk is not increased (*James*

v. Lycoming Ins. Co., 13 Fed. Cas. 309). Even under a condition forbidding alterations affecting the risk, ordinary repairs made in the usual manner are permissible (*First Congregational Church v. Holyoke Mut. Fire Ins. Co.*, 158 Mass. 475, 33 N. E. 572, 19 L. R. A. 587, 35 Am. St. Rep. 508). In the absence of any contract determining what repairs or alterations the owner of an insured building is authorized to make without forfeiting his policy, the questions of what repairs or alterations he may make, and whether they were made in the usual way, are for the jury (*Jolly's Adm'r v. Baltimore Equitable Soc.*, 1 Har. & G. [Md.] 295, 18 Am. Dec. 288).

A condition prohibiting the use of the premises for carrying on or exercising any trade or business deemed extrahazardous means the actual use of the premises for the purpose of such business, and does not forbid the temporary employment of a carpenter in making repairs, though the trade of a carpenter and the business of "house building and repairing" are regarded as extrahazardous.

Grant v. Howard Ins. Co., 5 Hill (N. Y.) 10; *Merchants' Ins. Co. v. Frick*, 2 Am. Law Rec. 336, 5 Ohio Dec. 47; *Washington Fire Ins. Co. v. Davison*, 30 Md. 91; *Delonguemare v. Tradesmen's Ins. Co.*, 2 N. Y. Super. Ct. 629. See, also, *O'Neil v. Buffalo Fire Ins. Co.*, 3 N. Y. 122, where painters were employed in the building.

Though repairs were being made at the date of the policy, if they were completed before the policy was delivered and the premium paid, there was no forfeiture (*Massell v. Protective Mut. Fire Ins. Co.*, 19 R. I. 565, 35 Atl. 209). A condition in a policy prohibiting any alteration of the premises refers to the premises actually insured, and not to alterations on adjoining premises (*Schaeffer v. Farmers' Mut. Fire Ins. Co.*, 30 Md. 563, 31 Atl. 317, 45 Am. St. Rep. 361). Consequently, the operation of an engine 50 feet from the building is not within the prohibition. Conditions requiring notice of proposed alterations to be given and permission obtained must in general be strictly complied with (*Diehl v. Adams Co. Mut. Ins. Co.*, 58 Pa. 443, 98 Am. Dec. 302). Thus, where the condition was that, if alterations were contemplated, written notice must be given to the directors, their written consent signed by the secretary obtained, and an additional premium or deposit paid, the insured, desiring to make some alterations and changes in the building insured, took the policy to the secretary for the desired permission, but no such permission was indorsed on the policy, nor was any additional premium paid prior to loss. The court therefore held

that the policy was forfeited by the making of the changes and alterations in the building. (*Evans v. Trimountain Mut. Fire Ins. Co.*, 9 Allen [Mass.] 329.) But if such condition appears merely by indorsement on the back of the policy, and is not referred to in the policy, and does not itself provide for forfeiture if not complied with, it can be regarded as only directory (*Planters' Mut. Ins. Co. v. Rowland*, 66 Md. 236, 7 Atl. 257).

As in the case of repairs, an alteration of the premises which is necessary to and consistent with their ordinary and natural use will not work a forfeiture (*Washington Fire Ins. Co. v. Davison*, 30 Md. 91). Thus, the action of insured in sawing off the end of a joist adjacent to the flue of the building, on discovering that the same was charred and was burning, a few days after the issuance of the policy, and in likewise removing other boards in a similar position, was not an alteration of which insured was required to give notice (*Malin v. Mercantile Town Mut. Ins. Co.*, 105 Mo. App. 625, 80 S. W. 56). But under a provision authorizing "necessary alterations and repairs," it cannot be shown that a material enlargement was contemplated by the parties when the insurance was made (*Fros's Detroit L., etc., Works v. Millers', etc., M. Ins. Co.*, 37 Minn. 300, 34 N. W. 35, 5 Am. St. Rep. 846), though it was held in *Phoenix Ins. Co. v. Coomes*, 13 Ky. Law Rep. 238, that if the insured, when he procured his insurance, made known his intention to remove two rooms and build two others in their place, and the agent consented to it, an indorsement upon the policy of "Permission to repair building without vacancy" must be regarded as meaning something more than ordinary repairs. So, the removal of an old bulkhead in a mill power, and the substitution of a stone structure in its place, is not an alteration, but a mere repair (*Townsend v. Northwestern Ins. Co.*, 18 N. Y. 168). But where the lower floors of the premises were changed from two tenements into flats, new floors laid, the doors changed, and the stairs removed to the outside of the building, this was not in the nature of ordinary repairs, but constituted material alterations which might be properly found to increase the risk (*Hill v. Middlesex Mut. Fire Ins. Co.*, 55 N. E. 319, 174 Mass. 542).

New machinery may be substituted for old, without invalidating the policy, where the risk is not thereby increased (*James v. Lycoming Ins. Co.*, 13 Fed. Cas. 309). So, where an insurance policy on a "mill building and additions, including flumes * * * and automatic sprinkler equipment complete," gives the insured per-

mission to make alterations, additions, and repairs to building and machinery, this includes permission to make alterations in the automatic sprinkler equipment also, as well as to the parts of the building and machinery (*Firemen's Ins. Co. v. Appleton Paper & Pulp Co.*, 161 Ill. 9, 43 N. E. 713, affirming 59 Ill. App. 511). But a change in the process of manufacture is an alteration within the prohibition (*Planters' Mut. Ins. Co. v. Rowland*, 66 Md. 236, 7 Atl. 257).

The alteration in some instances amounts to a substantial addition to the insured premises. In *Frost's Detroit Lumber & Wood-ware Works v. Millers' & Manufacturers' Mut. Ins. Co.*, 37 Minn. 300, 34 N. W. 35, 5 Am. St. Rep. 846, the policy provided that if the insured building should be "altered, added to, or enlarged," notice must be given and consent indorsed on the policy. A by-law provided that if a building should be "altered, enlarged, or appropriated to any other purposes than those mentioned, or the risk be otherwise increased," without the consent of the insurer, the policy should be void. It was held that these provisions required notice and consent with respect to a material enlargement of the building, though the risk was not thereby increased, and that an addition 12 feet in width, extending the entire length of the building, was a material enlargement. So, an alteration which is in effect a change in the character of the entire structure will terminate the policy (*Calvert v. Hamilton Mut. Ins. Co.*, 1 Allen [Mass.] 308, 79 Am. Dec. 744).

Under a policy giving permission to make additions, alterations, and repairs, and providing for forfeiture on increase of risk by the erection of surrounding buildings, a warehouse erected 41 feet from the building insured cannot properly be called an addition thereto, so as to prevent forfeiture, though connected with it by a bridge and an underground passage (*Peoria Sugar Refining Co. v. People's Fire Ins. Co.*, 52 Conn. 581).

Where a policy issued on a survey by the agent including a written description of a building to be erected, and the additional building does not conform to the intention of the insured, as communicated to the company's agent at the time of the survey, the variation does not, of itself, vitiate the policy, unless the risk is thereby increased (*Perry County Ins. Co. v. Stewart*, 19 Pa. 45). Where the policy contained a clause forbidding the use of the premises for extrahazardous purposes, and the trade of a carpenter was designated as hazardous, the erection of additional buildings in connec-

tion with the insured premises did not constitute a violation thereof, unless it appeared that the insured premises were used as a carpenter shop (*Washington Fire Ins. Co. v. Davison*, 30 Md. 91).

In the absence of a stipulation against alterations, a policy upon a stone building with a frame addition is not avoided as to the latter by cutting away part thereof next to the stone building, and adding it to the rear of the addition, thus separating the addition from the main building. Such a change is only an alteration, and does not constitute the separated part of the building a new and distinct risk. (*Dorn v. Germania Ins. Co.*, 7 Fed. Cas. 922.)

The rule in Massachusetts is that where a material alteration is made in the insured premises without the consent of the insurer, in violation of a condition therein, the policy is forfeited, even though the alteration did not contribute to the loss.

Merriam v. Middlesex Mut. Fire Ins. Co., 21 Pick. (Mass.) 162, 32 Am. Dec. 252; *Lyman v. State Mutual Fire Ins. Co.*, 14 Allen (Mass.) 829; *Hill v. Middlesex Mut. Fire Ins. Co.*, 55 N. E. 319, 174 Mass. 542.

But a different rule has been adopted in Maryland and Pennsylvania.

Washington Fire Ins. Co. v. Davison, 30 Md. 91; *Girard Fire & Marine Ins. Co. v. Stephenson*, 37 Pa. 293, 78 Am. Dec. 423.

Under a provision of the policy that if, during the insurance, the risk shall be increased, or if the company shall so elect, it shall be optional for the company to terminate the insurance at any time by giving notice to the insured or his representative, a forfeiture of the policy does not follow the erection of an addition to the building insured, though the risk is thereby increased, where the company does not elect to terminate the insurance (*Commercial Ins. Co. v. Mehlman*, 48 Ill. 313, 95 Am. Dec. 543).

(c) Same—"Builder's risk."

Policies sometimes contain a clause or condition technically known as "builder's risk," providing, in substance, that the working of carpenters or mechanics in building, altering, or repairing the premises shall vitiate the policy unless permission for such work be indorsed thereon. This condition was regarded as designed only to prohibit such hazardous use of the building as arises from placing it under the control of workmen for rebuilding, alteration,

or repairs (*Franklin Fire Ins. Co. v. Chicago Ice Co.*, 36 Md. 102, 11 Am. Rep. 469). Such a condition does not refer to the casual patching up of the building, or such repairs as are indispensable to the proper conduct of the business carried on therein.

James v. Lycoming Ins. Co., 13 Fed. Cas. 309; *Summerfield v. Phoenix Assur. Co.* (C. C.) 65 Fed. 292; *Westchester Fire Ins. Co. v. Foster*, 90 Ill. 121; *Franklin Fire Ins. Co. v. Chicago Ice Co.*, 36 Md. 102, 11 Am. Rep. 469; *Mack v. Rochester German Ins. Co.*, 106 N. Y. 560, 18 N. E. 848.

It has also been held that it makes no difference that carpenters and other workmen are constantly employed for that purpose as part of the regular force of the insured's employés (*Franklin Fire Ins. Co. v. Chicago Ice Co.*, 36 Md. 102, 11 Am. Rep. 469). The theory of the cases is that the condition must receive a reasonable construction, and it cannot be so construed as to be repugnant to the nature and purpose of the policy, or inconsistent with the due and customary use of the property.

James v. Lycoming Ins. Co., 13 Fed. Cas. 309; *Summerfield v. Phoenix Assur. Co.* (C. C.) 65 Fed. 292.

In *Rann v. Home Ins. Co.*, 59 N. Y. 387, the policy, in addition to the "builder's risk" clause, contained a further provision that five days would be allowed each year for "incidental repairs." Plaintiffs procured a carpenter's and mechanic's risk for two months, and during that time made extensive repairs. Work had ceased for about two weeks, and the two months had expired, when plaintiffs commenced the further repair of putting on new sidings, the old having become decayed. This work had been in progress three days, when the building was destroyed by fire, the work of an incendiary. It was held that the work being done was embraced in the term "incidental repairs," and did not forfeit the policy. On the other hand, it has been held that the condition is broken and the policy annulled, by the making of extensive alterations without such notice or permission, irrespective of whether the risk was in fact increased during the time of the alterations, or whether, if increased, the increase continued at the time of the loss (*Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231). So, where the alteration involved the removal of large portions of two floors and the roof, and the introduction therein of two flues constructed of inflammable materials, and extending through the entire height of the structure, there was a

clear violation of the conditions of the contract (*Mack v. Rochester German Ins. Co.*, 106 N. Y. 560, 13 N. E. 343, reversing 35 Hun, 75).

Though forfeiture cannot be claimed under this condition, if mechanics were at work on the building, within the knowledge of the insurer's agent, when the policy was issued (*Hackett v. Philadelphia Underwriters*, 79 Mo. App. 16), a permit for such work will be strictly construed as to the time limit fixed therein. In *Smith v. German-American Ins. Co.*, 54 Hun, 638, 7 N. Y. Supp. 846, the policy, which was on an unfinished house, and recited that the building was to be occupied as a residence when completed, gave permission to mechanics to work in and about the house for 90 days. It was held that, while insured was to have the right to complete the building, this was to be done within 90 days, and work done in the construction of the house after the expiration of that time was a violation of a clause in the policy prohibiting carpenters or other mechanics from working on the house without written permission, even though the work was done by the insured himself.

As a result of the somewhat loose construction of the "builder's risk" clause in its early form, it was subsequently modified so as to provide for forfeiture if mechanics were employed in altering or repairing the premises for more than 15 days at any one time. This clause has been held to be reasonable and valid, and to have the effect of limiting by agreement the alterations or repairs which may be made without special agreement with the insurer, and without avoiding the policy, to such as can be completed within 15 days, even though the work done is reasonably necessary for the ordinary repair and preservation of the property (*German Ins. Co. v. Hearne*, 117 Fed. 289, 54 C. C. A. 527, 59 L. R. A. 492).¹ And in case of a violation of the condition it is immaterial whether the alteration did or did not contribute to the loss (*Newport Imp. Co. v. House Ins. Co.*, 163 N. Y. 237, 57 N. E. 475). According to *Smith v. German Ins. Co.*, 107 Mich. 270, 65 N. W. 236, 30 L. R. A. 368, common painters are not "mechanics," within the meaning of such word as used in the "builder's risk" clause. On the other hand, it was held in *German Ins. Co. v. Hearne*, 117 Fed. 289, 54 C. C. A. 527, 59 L. R. A. 492, that work done on an insured dwelling house, in polishing the woodwork, regilding light fixtures, reburnishing plumbing, and repairing defects in the plastering and spouting for a period

¹ Certiorari denied 188 U. S. 742, 23 Sup. Ct. 849, 47 L. Ed. 678.

of more than 15 days will cause a forfeiture of the policy, as it is "repairing," within the meaning of the clause.

(d) Same—Increase of risk.

Though it seems to be manifest from the foregoing discussion that the violation of a special provision against repairs and alterations, as, for instance, the "builder's risk" clause (*Newport Imp. Co. v. Home Ins. Co.*, 163 N. Y. 237, 57 N. E. 475), will forfeit the policy irrespective of whether the risk is increased, it may as easily be deduced that in the absence of a special stipulation the general rule is that alterations and repairs do not vitiate the policy unless the risk is increased.

The rule is asserted in *Dorn v. Germania Ins. Co.*, 7 Fed. Cas. 922; *James v. Lycoming Ins. Co.*, 13 Fed. Cas. 309; *Crane v. City Ins. Co.* (C. C.) 3 Fed. 558; *Firemen's Ins. Co. v. Appleton Paper & Pulp Co.*, 161 Ill. 9, 43 N. E. 713, affirming 59 Ill. App. 511; *Meyer v. Queen Ins. Co.*, 41 La. Ann. 1000, 6 South. 899; *Jolly's Adm'r v. Baltimore Equitable Soc.*, 1 Har. & G. (Md.) 295, 18 Am. Dec. 288; *Washington Fire Ins. Co. v. Davison*, 30 Md. 91; *Townsend v. N. W. Ins. Co.*, 18 N. Y. 168; *Girard Fire & Marine Ins. Co. v. Stephenson*, 37 Pa. 293, 78 Am. Dec. 423.

It becomes, therefore, necessary to ascertain the general rules by which increase of risk is determined, especially in view of the principle that alterations and repairs are not *per se* a change of risk.

Jolly's Adm'r v. Baltimore Equitable Soc., 1 Har. & G. (Md.) 295, 18 Am. Dec. 288; *Meyer v. Queen Ins. Co.*, 41 La. Ann. 1000, 6 South. 899.

So, too, if an addition to an insured building increases its value, and so furnishes an additional motive to the insured to preserve his property, it cannot be regarded as increasing the risk (*Phoenix Ins. Co. v. Coomes*, 13 Ky. Law Rep. 238).

It is, of course, elementary that any alterations or repairs which would cause the insurer to demand a higher rate of premium must be regarded as increasing the risk.

Planters' Mut. Ins. Co. v. Rowland, 66 Md. 236, 7 Atl. 257; *Kern v. South St. Louis Mut. Ins. Co.*, 40 Mo. 19; *Schenck v. Mercer County Mut. Fire Ins. Co.*, 24 N. J. Law, 447.

But to be distinguished from the *Rowland Case* is *Willow Grove Creamery Co. v. Planters' Mut. Ins. Co.*, 77 Md. 532, 26 Atl. 1024, where it was held that the question of increase of risk could not be

determined by evidence that the insurer had issued policies at the same rate on buildings in the vicinity similar to plaintiff's after the alterations were made.

The fact that the addition brought the house a few feet nearer another house does not show an increase of risk, in the absence of evidence of the distance between the two buildings (*Mitchell v. Mississippi Home Ins. Co.*, 72 Miss. 53, 18 South. 86, 48 Am. St. Rep. 535). The erection of a small addition intended for a use which requires the keeping of hazardous articles therein must be regarded as increasing the risk (*Francis v. Somerville Mut. Ins. Co.*, 25 N. J. Law, 78). So, an addition which contains a chimney and fireplace, with a stove in the basement a drum in the room above, and pipes running into the chimney, increases the risk (*Roberts v. Chenango County Mut. Ins. Co.*, 3 Hill [N. Y.] 501).

Though it has been held that one who has for 10 years been a member of a fire company and an assistant foreman therein, who was in the constant habit of attending fires and engaged in putting them out, is competent to testify as an expert as to whether certain alterations increased the risk (*Schenck v. Mercer County Mut. Fire Ins. Co.*, 24 N. J. Law, 447), the better rule seems to be that a witness will not be permitted to testify to his opinion as to whether the risk was increased by alterations of the premises, as that depends on facts which involve no peculiar science or information, but are within the common knowledge of men.

Lyman v. State Mutual Fire Ins. Co., 14 Allen (Mass.) 329; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567.

Generally speaking, whether the risk is increased by the alteration or repair of the building insured is a question for the jury.

Firemen's Ins. Co. v. Appleton Paper & Pulp Co., 161 Ill. 9, 43 N. E. 713; *Curry v. Commonwealth Ins. Co.*, 10 Pick. (Mass.) 535, 20 Am. Dec. 547; *Jones Mfg. Co. v. Manufacturers' Mut. Fire Ins. Co.*, 8 Cush. (Mass.) 82, 54 Am. Dec. 742; *Lyman v. State Mutual Fire Ins. Co.*, 14 Allen (Mass.) 329; *Schenck v. Mercer Ins. Co.*, 24 N. J. Law, 447; *Roby v. American Cent. Ins. Co.*, 120 N. Y. 510, 24 N. E. 808; *Perry County Ins. Co. v. Stewart*, 19 Pa. 45.

But where it appears that the loss was directly due to the alteration, no question arises for submission to the jury.

Northwestern National Ins. Co. v. Davis, 9 Ky. Law Rep. 933; *First Congregational Church v. Holyoke Mut. Fire Ins. Co.*, 158 Mass. 475, 38 N. E. 572, 19 L. R. A. 587, 35 Am. St. Rep. 508.

(c) Same—Person making alterations.

The question has been raised in a few cases whether the effect of alterations to forfeit the policy is in any degree dependent on the fact that such alterations were made by a third person, usually the tenant of the insured. That the policy will be forfeited if the alteration is made by a tenant with the knowledge of the insured may be conceded (*Lyman v. State Mut. Fire Ins. Co.*, 14 Allen [Mass.] 329). But where the by-laws prohibited the insured from altering the building, and declared the policy void if the risk was increased by any act of the insured, alterations made by a tenant contrary to the terms of his lease did not affect the rights of the insured (*Sanford v. Mech. Mut. Fire Ins. Co.*, 12 Cush. [Mass.] 541). So, under a provision that the insurance was to be void if alteration was made "by the act of the proprietors," occasioning greater risk than at the time of effecting insurance, without an additional premium, "the act" must be done, authorized, or adopted by the insured owner himself before the loss, to avoid the insurance (*Padelford v. Providence Mut. Fire Ins. Co.*, 3 R. I. 102, 67 Am. Dec. 496). But knowledge may be inferred from the fact that the insured and his tenant live near each other, or the fact that the alterations are of such character as to impress the jury with the belief that no tenant would make them without the knowledge and assent of his landlord.

Where the policy provides that it shall be void if the risk is increased by any means within the control of or known to the insured, alterations by a tenant without the knowledge or consent of the insured will not forfeit the policy.

Merrill v. Insurance Co. of North America (C. C.) 23 Fed. 245; *Nebraska & I. Ins. Co. v. Christensen*, 29 Neb. 572, 45 N. W. 924, 26 Am. St. Rep. 407.

As was said in the *Merrill Case*, authority to make alterations which would increase the risk cannot be implied from a general consent to make improvements. On the other hand, in *Diehl v. Adams Co. Mut. Ins. Co.*, 58 Pa. 443, 98 Am. Dec. 302, it was held that it is no excuse for a violation of a covenant against alteration that the alteration was made by a tenant of the insured without his knowledge or authority.

The principle governing the cases where the alteration is the act of a tenant has also been applied where the grantor of the insured, after the conveyance, and without the knowledge or consent of the

insured, made repairs on the premises in violation of the conditions in the policy (*Breckinridge v. American Cent. Ins. Co.*, 87 Mo. 62). So, where a policy insuring chattels belonging to a tenant of part of a building contained a provision that "mechanics will be allowed to make ordinary alterations and repairs to buildings, not exceeding fifteen days, during the term of this insurance," repairs made by the owner of the building did not forfeit the insurance, as the clause could only be construed as applying in case repairs were made under the direction of the insured (*Mechanics' Ins. Co. v. Hodge*, 149 Ill. 298, 37 N. E. 51, affirming 46 Ill. App. 479).

(2) Falling of building.

Policies insuring against loss or damage by fire usually contain a condition that if the "building, or any part thereof, fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease." This condition, under some circumstances, has been given the effect of an exception of risk, but generally it is to be regarded and given effect as a condition subsequent.

Western Assur. Co. v. J. H. Mohlman Co., 83 Fed. 811, 28 C. C. A. 157, 40 L. R. A. 561; *Phenix Ins. Co. v. Luce*, 123 Fed. 257, 60 C. C. A. 655; *N. & M. Friedman Co. v. Atlas Assur. Co.*, 133 Mich. 212, 94 N. W. 757.

In an early case (*Nave v. Home Mutual Ins. Co.*, 37 Mo. 430, 90 Am. Dec. 394), though there is nothing in the report to show whether the policy contained a condition as to falling of building, the court held that as insurance on a building is on the structure as a building, and not on the materials of which it is made, if, from defects in construction or overloading, the building falls, the policy terminates, and no recovery can be had for the subsequent destruction of the debris by fire.

Though undoubtedly the condition would apply only when the subject of the insurance was itself a building or contained in a building, yet where the structure insured fell, and there was no evidence that after the fall any injury was caused to it by fire or explosion, instructions based on various hypotheses supposing a destruction by fire or explosion, declaring that the structure was not a building within the meaning of the policy, and yet leaving it to the jury to determine whether it was or was not such a building, were properly refused as calculated to mislead the jury (*St. Louis Gaslight Co. v. American Fire Ins. Co.*, 33 Mo. App. 348).

So, too, there must be an actual falling of the building insured in order to bring the condition into operation. The fact that the building has been moved from its foundation is not sufficient if it remains intact.

Fireman's Fund Ins. Co. v. Congregation Rodelph Sholom, 80 Ill. 558; *Farrell v. Farmers' Mut. Fire Ins. Co.*, 66 Mo. App. 153.

And this is true though the building has been blown from its foundation and turned over on its side, if it retains its identity as a building (*Teutonia Ins. Co. v. Bonner*, 81 Ill. App. 231).

The earlier form of the condition did not contain the words "or any part thereof." Under such a condition it has been held that there must be a falling of a substantial part of the building. Thus, where the building consisted of five compartments, each under a separate roof, the fact that two of the compartments fell, leaving the other three uninjured, did not forfeit the policy (*Security Ins. Co. v. Mette*, 27 Ill. App. 324). So, where more than three-fourths of the building was left standing, there was no forfeiture under the condition (*Breuner v. Liverpool & London & Globe Ins. Co.*, 51 Cal. 101, 21 Am. Rep. 703). But in *Huck v. Globe Ins. Co.*, 127 Mass. 306, 34 Am. Rep. 373, where the building insured was substantially two distinct buildings, the fall of one terminated the policy, at least as to that portion of the building and the contents thereof.

Even under the later form of the condition, providing that if the building, "or any part thereof," shall fall, the insurance shall cease, there must be a falling of a substantial or functional part of the building (*London & L. Fire Ins. Co. v. Crunk*, 91 Tenn. 376, 23 S. W. 140). And if a material and substantial part of the building falls, the policy would be avoided, though the distinctive character of the building is not destroyed (*Home Mut. Ins. Co. v. Tomkies*, 30 Tex. Civ. App. 404, 71 S. W. 812). So, where the building insured was 50 feet long by 50 feet wide, the falling of a cupola 16 feet long, 12 feet wide, and 10 feet high, constituting a sort of third story, forfeited the policy (*Home Mut. Ins. Co. v. Tomkies*, 71 S. W. 814, 96 Tex. 187, affirming 71 S. W. 812, 30 Tex. Civ. App. 404). Where goods insured were in one half of a brick block, the fall of the other half terminated the insurance on the goods (*Nelson v. Traders' Ins. Co.*, 86 App. Div. 66, 83 N. Y. Supp. 220).

The policy in *Illinois Mutual Ins. Co. v. Mette*, 27 Ill. App. 330, covered the same property as in *Security Ins. Co. v. Mette*, 27 Ill.

App. 324, cited above, but the condition contained the clause "or any part thereof." It was held, therefore, that the fall of the two compartments terminated the policy.

Under the terms of the condition, it is, of course, elementary that, if the building falls before the fire breaks out, the policy is terminated, and there can be no recovery.

Western Assurance Co. v. J. H. Mohlman Co., 83 Fed. 811, 28 C. C. A. 157, 40 L. R. A. 561; *Nichols v. Sun Mut. Ins. Co.*, 71 Miss. 326, 14 South. 263, 42 Am. St. Rep. 465; *Liverpool & London & Globe Ins. Co. v. Ende*, 65 Tex. 118; *Pelican Ins. Co. v. Troy Co-op. Ass'n*, 77 Tex. 225, 13 S. W. 980.

On the other hand, it is equally clear that, under the terms of the condition, if the fall is the result of fire there can be no forfeiture. Thus, in *Ermentrout v. Girard Fire & Marine Ins. Co.*, 63 Minn. 305, 65 N. W. 635, 30 L. R. A. 346, 56 Am. St. Rep. 481, where a building adjacent to the one insured fell as the result of fire, and carried with it a portion of the insured building, this was held to come within the exception. The difficulty arises where the fire which is the cause of loss and the falling of the building are so closely connected in time that the relation between them cannot easily be traced. It has, indeed, been held that if the fire commenced before the fall of the building, and the building was subsequently blown down, the company would nevertheless be liable (*London & L. Fire Ins. Co. v. Crunk*, 91 Tenn. 376, 23 S. W. 140). But where the policy was on merchandise, and there was some evidence to show that the building was on fire before it fell, the court held that, if the building was blown down before the fire attacked the goods, there could be no recovery (*Fred J. Kiesel & Co. v. Sun Insurance Office*, 88 Fed. 243, 31 C. C. A. 515).²

An interesting phase of the question has been presented where the fall of the building was caused by explosion, and fire ensued, the policy containing the provision that the insurer should not be liable for loss or damage caused by explosion unless fire ensued, and, in that event, for the damage by fire only. In such case the liability of the company is governed by the clause relating to explosion, and the condition as to the fall of the building is inoperative.

Leonard v. Orient Ins. Co., 109 Fed. 286, 48 C. C. A. 369, 54 L. R. A. 706; *Dows v. Merchants' Ins. Co.*, 127 Mass. 346, 34 Am. Rep. 384; *John Davis & Co. v. Insurance Co. of North America*, 115 Mich. 382, 73 N. W. 398.

² *Certiorari* denied 171 U. S. 688, 19 Sup. Ct. 885, 43 L. Ed. 1179.

Where, in an action on such a policy, defendant claimed that the falling of the wall of the building was due to defects or overloading, while plaintiff claimed that it was the result of an explosion in a neighboring building, and was immediately followed by fire, and the evidence on such theories was sharply conflicting, an instruction that if the building, or some part thereof, fell by reason of some concussion occurring from without, or from fire outside or inside the building, and plaintiff had proved his contention that, through such explosion or fire, fire was communicated to plaintiff's building, and his stock was destroyed, plaintiff was entitled to recover, but that, if the building fell by reason of its own defects or by overloading, or both, plaintiff could not recover for the fire loss, sufficiently presented the issues of both parties to the jury (*Orient Ins. Co. v. Leonard*, 120 Fed. 808, 57 C. C. A. 176).

In view of the principle that this provision is a condition subsequent, it follows that, if the loss is otherwise within the terms of the policy, the burden is on the insurer to show that the building fell before the fire, so as to terminate the insurance.

Western Assurance Co. v. J. H. Mohlman Co., 88 Fed. 811, 28 C. C. A. 157, 40 L. R. A. 531; *Phoenix Ins. Co. v. Luce*, 123 Fed. 257, 60 C. C. A. 655; *N. & M. Friedman Co. v. Atlas Assur. Co.*, 133 Mich. 212, 94 N. W. 757.

But it was said in *Pelican Fire Ins. Co. v. Troy Co-op. Ass'n*, 77 Tex. 225, 13 S. W. 980, that, where there was an allegation in the answer that the building was blown down before the loss, the burden was on the insured to show that the loss was within the policy. Where the issue was whether the building was on fire before it fell, witnesses who had seen the roof of a building on fire need not necessarily be permitted to testify whether or not, in their opinion, the roof was standing when they saw it burning, the matter of giving opinion evidence being largely within the discretion of the trial court (*Fred J. Kiesel & Co. v. Sun Insurance Office*, 88 Fed. 243, 31 C. C. A. 515).

The sufficiency of the evidence as to whether the building fell as the result of fire, or the fall preceded the fire, was considered in *Phoenix Ins. Co. v. Luce*, 123 Fed. 257, 60 C. C. A. 655; *N. & M. Friedman Co. v. Atlas Assur. Co.*, 133 Mich. 212, 94 N. W. 757.

(g) Erection of buildings on adjacent premises.

The courts do not agree whether statements made to the insurer relative to the distance of other exposures from the property

insured and the condition of adjacent premises are to be regarded as continuing warranties. In an early case (*Stebbins v. The Globe Ins. Co.*, 2 N. Y. Super. Ct. 675), it was said that representations of the position of a building with respect to others is not a warranty that the buildings will retain that position during the life of the policy, and the assured is not thereby prevented from erecting other buildings in the vicinity. On the other hand, in *Straker v. Phenix Ins. Co.*, 101 Wis. 418, 77 N. W. 752, a statement as to exposures within 100 feet was regarded as a continuing warranty.

Where the policy provides that it shall be void if the risk be increased by the erection of buildings on the adjacent premises, the occurrence of the event forfeits the policy.

Northwestern National Ins. Co. v. Davis, 10 Ky. Law Rep. 818; *Yentzer v. Farmers' Mut. Ins. Co.*, 200 Pa. 325, 49 Atl. 767.

But the burden is on the insurer to show a violation of the condition (*Ritter v. Sun Mut. Ins. Co.*, 40 Mo. 40). Where the goods insured were removed to new premises, and the policy duly transferred, the addition of new exposures to the new premises after the transfer of the policy forfeited it, though with such new exposures added the new premises were in substantially the same condition as the original risk (*McCoy v. Iowa State Ins. Co.*, 107 Iowa, 80, 77 N. W. 529).

It is obvious that the effect of the violation of the condition depends on the definition of terms. Thus where the policy contained a condition that, "if the risk shall be increased by the erection or use of any building contiguous thereto, without the consent of the company indorsed thereon, this policy shall be null and void," it was held that a building erected at a distance of 25 feet was not contiguous, within the meaning of the condition (*Olson v. St. Paul F. & M. Ins. Co.*, 35 Minn. 432, 29 N. W. 125, 59 Am. Rep. 333). The theory of the court seems to be that since the insurer saw fit to use the word "contiguous" instead of "adjacent" or "neighboring" it must be given its strict and primary meaning, which is "touching."

On the other hand, it has been held that, in the absence of any express or implied condition relative to the erection of buildings on neighboring premises, the erection of such buildings will not forfeit the policy, unless actual injury results.

Grant v. Howard Ins. Co., 5 Hill (N. Y.) 10; *Gates v. Madison County Mut. Ins. Co.*, 5 N. Y. 469, 55 Am. Dec. 360; *Stebbins v. The Globe Ins. Co.*, 2 N. Y. Super. Ct. 675; *Howard v. Kentucky & L. Mut. Ins. Co.*, 13 B. Mon. (Ky.) 282.

This has been held even where the policy contained a clause declaring that it should be void if the risk should be increased by any means within the control of the insured (*Grant v. Howard Ins. Co.*, 5 Hill [N. Y.] 10). Such a provision has also been construed as referring only to such regulations as may be made to prevent fires (*Commercial Ins. Co. v. Mehlman*, 48 Ill. 313, 95 Am. Dec. 543). But the rule is otherwise, and the weight of authority undoubtedly is that **the erection of buildings on adjacent premises comes within the condition that the policy shall be void if the risk be increased by any means within the control of the insured.**

Franklin Brass Co. v. Phoenix Assur. Co., 65 Fed. 773, 13 C. C. A. 124, 25 U. S. App. 119; *Gardiner v. Piscataquis Mut. Fire Ins. Co.*, 38 Me. 439; *Allen v. Massasolt Ins. Co.*, 99 Mass. 160; *Murdock v. Chenango County Mut. Ins. Co.*, 2 N. Y. 210; *Pottsville Mut. Fire Ins. Co. v. Horan*, 89 Pa. 438.

The condition as to change of risk usually calls for notice thereof to be given to the insurer. When such is the case, notice of the erection of neighboring buildings must be given.

Peoria Sugar Refining Co. v. People's Fire Ins. Co. (C. C.) 24 Fed. 773; *Gardiner v. Piscataquis Mut. Fire Ins. Co.*, 38 Me. 439; *Pottsville Mut. Fire Ins. Co. v. Horan*, 89 Pa. 438.

But the requirement is satisfied by the giving of oral notice (*Liddle v. Market Fire Ins. Co.*, 29 N. Y. 184). If the policy does not contain a provision calling for notice, a general custom requiring such notice is not operative (*Stebbins v. The Globe Ins. Co.*, 2 N. Y. Super. Ct. 675).

There is a conflict of opinion as to the effect of the condition when the new buildings are erected on premises over which the insured has no control. It has been held in some cases that the condition as to increase of risk applies only to the acts of the insured himself, and not to the erection of buildings on adjacent premises not under his control (*German Ins. Co. v. Wright*, 6 Kan. App. 611, 49 Pac. 704). So it has been held that where the premises were under the control of a tenant of the insured the erection of buildings by the tenant does not forfeit the policy (*Franklin Fire Ins. Co. v. Gruver*, 100 Pa. 266). In such case it has been said that to forfeit the policy it must appear that the insured knew the erection of the building would increase the risk and the rate of premium (*Lebanon Mut. Ins. Co. v. Losch*, 109 Pa. 100). On the other hand, it has been held in New Hampshire (*Janvrin v. Rockingham Farmers' Mut. Fire*

Ins. Co., 70 N. H. 35, 46 Atl. 686) and in Wisconsin (Straker v. Phenix Ins. Co., 101 Wis. 413, 77 N. W. 752) that the erection of neighboring buildings forfeits the policy, though the insured did not own and had no control over the adjoining property.

(h) Same—Increase of risk.

The general rule undoubtedly is that, in the absence of an express stipulation, the erection of neighboring buildings must increase the risk in order that the policy shall be forfeited.

Stetson v. Massachusetts Mut. Fire Ins. Co., 4 Mass. 330, 3 Am. Dec. 217; *Franklin Fire Ins. Co. v. Gruver*, 100 Pa. 286.

But in accordance with the general rule as to warranties, where the nonexistence of an exposure is regarded as a continuing warranty it is ipso facto material to the risk (*Straker v. Phenix Ins. Co.*, 101 Wis. 413, 77 N. W. 752). The erection within 10 or 12 feet of the building insured of a building to be used as a blacksmith shop is a manifest and material increase of risk (*Gardiner v. Piscataquis Mut. Fire Ins. Co.*, 38 Me. 439). So the erection of another building, contiguous to the insured buildings, devoted to the purpose of an incubator, in which stoves fed by gasoline or kerosene were kept burning day and night without any watchman, was an increase of risk (*Yentzer v. Farmers' Mut. Ins. Co.*, 200 Pa. 325, 49 Atl. 767). The moving of a small frame building up to the warehouse containing the property, and connecting it thereto, so as to constitute one building, has been regarded as an increase of risk, probably on the ground that the fire which destroyed the property originated in such new building (*Northwestern National Ins. Co. v. Davis*, 10 Ky. Law Rep. 818). But it has also been held in Kentucky that where the cause of loss originates in the building so erected on adjacent premises the insurer is relieved, not on the ground of an increase of risk, but on the ground that the new risk so created is one which the company did not insure (*Howard v. Ky. & L. Mut. Ins. Co.*, 13 B. Mon. [Ky.] 282).

An interesting case is *Pottsville Mut. Fire Ins. Co. v. Horan*, 89 Pa. 438. At the time of the issuance of the policy an undisclosed carpenter shop stood on the adjoining lot. This in and of itself constituted a breach of warranty, but it was understood between the agent and the insured that the building should be soon removed, and this was done by the insured, and a dwelling erected in its place. The insured contended that there was rather a lessening of

the risk than an increase by the change, and that, therefore, he was not bound to give notice. But the court points out that the insurance was based upon the idea that the lot was vacant, and that it was not for the insured to change the contract and set off a decrease of risk by the removal of a building from the rear of a lot as against the building thereon of a dwelling on the front of the lot.

The rule in Pennsylvania is that mere increase of risk is not sufficient. There must also be knowledge on the part of the insured of the increase, and that it would increase the rate of premium.

Franklin Fire Ins. Co. v. Gruver, 100 Pa. 266; *Lebanon Mut. Ins. Co. v. Losch*, 109 Pa. 100.

In this connection attention may be called to *Chambers v. Cramer*, 49 W. Va. 395, 38 S. E. 691, 54 L. R. A. 545, where it was held that the fact that the erection of a building will increase the rate of insurance on neighboring property is not ground for an injunction to restrain the erection of such building.

While the burden of proof is on the insurer to show an increase of risk by the erection of neighboring buildings (*Ritter v. Sun Mut. Ins. Co.*, 40 Mo. 40), expert testimony to show an increase of actual danger of fire from the erection of buildings near the insured premises is not admissible. The witness can know no more about the subject-matter than the jury, since he must draw his deductions from facts already in the possession of the jury (*Franklin Fire Ins. Co. v. Gruver*, 100 Pa. 266). The question whether the erection of the building creates an increase of risk is strictly for the jury.

Lattomus v. Farmers' Mut. Fire Ins. Co., 3 Houst. (Del.) 404; *Ritter v. Sun Mut. Ins. Co.*, 40 Mo. 40; *Janvrin v. Rockingham Farmers' Mut. Fire Ins. Co.*, 70 N. H. 85, 46 Atl. 686.

(1) Change in condition or use of adjacent premises.

A condition in a policy requiring the assured to give the insurer notice of any increased risk "by the use or occupation of neighboring premises, or otherwise," does not amount to a warranty, and is fulfilled by a mere exercise of reasonable diligence to ascertain the existence of such increase of risk, and notify the insurer thereof (*Eclipse Ins. Co. v. Schoemer*, 2 Cin. R. 474, 13 Ohio Dec. 1018). So it has been held that a statement that an adjacent building is vacant cannot be regarded as a warranty that it will remain so (*State Ins. Co. v. Taylor*, 14 Colo. 499, 24 Pac. 333, 20 Am. St. Rep. 281). Where there is no condition, express or implied, in a policy, regarding adjoining premises, and no representation or suppression of any

fact relating to the subject insured, the insured has the same right to use his adjoining property as any other owner (*Miller v. Western Farmers' Mut. Ins. Co.*, 1 Handy, 208, 12 Ohio Dec. 105). So, too, where property in the city in which an insurance company is located is insured without any representations, but on a survey by the insurer's agent the insured is not bound to give notice of an increase of the risk by a change in the use of the neighboring premises, a verbal communication at the time of the renewal of the policy is sufficient (*Liddle v. Market Fire Ins. Co.*, 29 N. Y. 184).

A stipulation as to increased risk cannot be extended to cover risks created on the adjacent property of independent proprietors who use their own premises in a legitimate manner (*Sun Ins. Co. v. Texarkana Foundry & Machine Works Co.*, 3 Willson, Civ. Cas. Ct. App. § 320). Nor is the policy forfeited by an increase in the risk caused by explosives kept in an adjoining house, not under the control of the insured, which in no way contributed to the loss (*State Ins. Co. of Des Moines v. Taylor*, 14 Colo. 499, 24 Pac. 333, 20 Am. St. Rep. 281). Where the goods insured were stored in warehouses, the rear of which, at the time the insurance was taken out, was connected by an iron door with two buildings occupied by a candy manufacturer, and appliances were afterwards put into these two buildings for a steam bakery, and communications made with adjoining premises, the change was material to the risk, so as to forfeit the policy (*Leibrandt & McDowell Stove Co. v. Firemen's Ins. Co.* [C. C.] 35 Fed. 30).

As in the case of erection of neighboring buildings, knowledge by the insured that the risk is increased by a change in the condition of the adjacent premises is regarded as an important factor in Pennsylvania (*Lebanon Mut. Fire Ins. Co. v. Hankinson*, 3 Atl. 672), and also in Ohio (*Eclipse Ins. Co. v. Schoemer*, 2 Cin. R. 474, 13 Ohio Dec. 1018). And whether there is an increase of risk from such a cause is a question for the jury (*Girard Fire & Marine Ins. Co. v. Stephenson*, 37 Pa. 293, 78 Am. Dec. 423).

(j) Violation of "clear-space clause."

The policy may contain a provision "warranted by the insured that a continuous clear space of 100 feet shall hereafter be maintained between the property insured" and certain other exposures. Such a provision is an express continuing warranty.

Pettit v. German Ins. Co. (O. C.) 98 Fed. 800; *Michigan Shingle Co. v. London & L. Fire Ins. Co.*, 91 Mich. 441, 51 N. W. 1111.

Such a stipulation is a reasonable and valid provision of the policy (*Liverpool & L. & G. Ins. Co. v. T. M. Richardson Lumber Co.*, 69 Pac. 938, 11 Okl. 585); but to show a breach thereof the burden is on the insurer (*Liverpool & L. & G. Ins. Co. v. Farnsworth Lumber Co.*, 72 Miss. 555, 17 South. 445). Insured's ignorance of the fact that the policy contained the "clear-space clause" will not excuse his violation of it, but he will be conclusively presumed to have had knowledge (*Hartford Fire Ins. Co. v. Post*, 25 Tex. Civ. App. 428, 62 S. W. 140).

In determining whether there had been a violation of a warranty in the nature of a "clear-space clause" requiring the maintenance of a clear space of 100 feet between the property insured and a mill, the distance should be estimated from a shed attached to the mill, and not from a prominent corner of the mill (*Merchants' Ins. Co. v. New Mexico Lumber Co.*, 10 Colo. App. 223, 51 Pac. 174). Where the property insured was lumber piled on five docks, it is not material that at the time the policy was issued the insurer knew that the lumber on two of the docks was within the distance prescribed by the "clear-space clause," nor can the insured recover for the lumber on the other three docks, which was beyond the distance prescribed (*Michigan Shingle Co. v. London & Lancashire Fire Ins. Co.*, 91 Mich. 441, 51 N. W. 1111). Where the condition was that "a continuous clear space of 100 feet shall be maintained between the property insured and any woodworking establishment, tramways, upon which lumber is not piled, alone being excepted," and the property was piled in close proximity to long wooden platforms extending back to plaintiff's sawmill, in the absence of a showing that the platforms were understood to be tramways, at the time the contract was entered into, by both parties, there could be no recovery (*Gough v. Jewett*, 32 App. Div. 79, 52 N. Y. Supp. 707, rehearing denied 34 App. Div. 624, 54 N. Y. Supp. 1102).

(k) Change in location of personal property insured.

On the question whether a statement in the policy that the personal property insured is situated in a certain place or contained in a certain building is a warranty that it shall remain in such location, the courts are in direct conflict. The weight of authority, however, is that statements as to location are matters of description only, and not continuing warranties.

This is the doctrine asserted in *London & L. Fire Ins. Co. v. Graves*, 4 Ky. Law Rep. 706; *United States Fire & Marine Ins. Co. v.*

Kimberly, 34 Md. 224, 6 Am. Rep. 325; *Everett v. Continental Ins. Co.*, 21 Minn. 76; *Holbrook v. St. Paul Fire & Marine Ins. Co.*, 25 Minn. 229; *Haws v. Fire Ass'n of Philadelphia*, 114 Pa. 481, 7 Atl. 159; *Western & A. Pipe Lines v. Home Ins. Co.*, 145 Pa. 346, 22 Atl. 665, 27 Am. St. Rep. 703.

At best, such statement is only a warranty in præsenti (*United States Fire & Marine Ins. Co. v. Kimberly*, 34 Md. 224, 6 Am. Rep. 325). Or, giving it the very broadest possible construction, it could be regarded as no more than an implied warranty that the insured would not voluntarily move the property (*Western & Atlantic Pipe Lines v. Home Ins. Co.*, 145 Pa. 346, 22 Atl. 665, 27 Am. St. Rep. 703).

On the other hand, in Iowa (*Harris v. Royal Canadian Ins. Co.*, 53 Iowa, 236, 5 N. W. 124) and in Ohio (*Phoenix Fire Ins. Co. v. Vorhis*, 1 O. C. D. 180) such statements have been regarded as warranties. In other jurisdictions, statements as to location have been regarded as warranties, but with the qualification that such a warranty does not forbid temporary removal in pursuance of the customary use of the property.

Lyons v. Providence Washington Ins. Co., 14 R. I. 109, 51 Am. Rep. 364, reversing 13 R. I. 347, 48 Am. Dec. 32; *Noyes v. Northwestern Nat. Ins. Co.*, 64 Wis. 415, 25 N. W. 419, 54 Am. Rep. 631.

So, where the policy insured "personal property while located as described herein and not elsewhere," the statement as to location was held to be a warranty (*Bahr v. National Fire Ins. Co.*, 80 Hun, 309, 29 N. Y. Supp. 1031). The statement in the Bahr Case would seem rather to be in the nature of a limitation as to the place of risk. Statements as to location have been so construed in other cases.

Phoenix Ins. Co. v. Stewart, 53 Ill. App. 273; *Village of L'Anse v. Fire Association*, 119 Mich. 427, 78 N. W. 465, 43 L. R. A. 838, 75 Am. St. Rep. 410; *Montgomery v. Delaware Ins. Co.*, 55 S. C. 1, 32 S. E. 723; *British America Assur. Co. v. Miller*, 91 Tex. 414, 44 S. W. 60, 39 L. R. A. 545, 66 Am. St. Rep. 901.

In still other cases the policy contains a provision in the nature of a condition subsequent prohibiting the removal of the property from the location stated in the policy; or removal has been regarded as prohibited under the clause forbidding any change which will increase the risk. In whatever light the statement is viewed, it is, of course, necessary to define what is a removal or change of loca-

tion that will constitute a breach of the warranty or condition. Removal from one part of the building to another part of the same building is not a breach, though the risk be increased (*Plinsky v. Germania Fire & Marine Ins. Co.* [C. C.] 32 Fed. 47). So, where the policy described the property as contained in the third story of a certain building, the removal of the property into another room in such third story was not a breach of the condition against removal (*West v. Old Colony Ins. Co.*, 9 Allen [Mass.] 316). And if, at the date of the policy, the goods are not in the location described, but before delivery and payment of premium they are placed therein, there is no such removal as is contemplated by the condition (*Mas-sell v. Protective Mut. Fire Ins. Co.*, 19 R. I. 565, 35 Atl. 209).

It is, of course, elementary that where statements as to location are not regarded as warranties, but as matter of description only, any removal necessary by reason of the customary use of the property is permissible.

London & L. Fire Ins. Co. v. Graves, 4 Ky. Law Rep. 706; *McKeesport Mach. Co. v. Franklin Ins. Co.*, 173 Pa. 53, 34 Atl. 16.

The same rule has been applied in some cases where such statements are regarded as continuing warranties, the warranty being qualified to that extent.

Noyes v. Northwestern Nat. Ins. Co., 64 Wis. 415, 25 N. W. 419, 54 Am. Rep. 681; *Lyons v. Providence Washington Ins. Co.*, 14 R. I. 109, 51 Am. Rep. 364, reversing 13 R. I. 347, 43 Am. Rep. 32.

If the statement as to location is regarded as limitation as to place of risk, the removal of the property necessitated by the customary use thereof would nevertheless suspend the risk.

Village of L'Anse v. Fire Association, 119 Mich. 427, 78 N. W. 465, 43 L. R. A. 838, 75 Am. St. Rep. 410; *British America Assur. Co. v. Miller*, 91 Tex. 414, 44 S. W. 60, 39 L. R. A. 545, 66 Am. St. Rep. 901.

(1) Same—Consent to removal of property.

Where insured notified the company that she would change the location of property insured, and was informed that the assent of the company to such change, when made, must be entered on the policy of insurance, and nothing further is done by insured, such notice is not sufficient to bind the company (*Phoenix Fire Ins. Co. v. Vorhis*, 1 Ohio Cir. Ct. R. 326, 1 O. C. D. 180). So, a mere agreement by the agent to give consent to removal if the policy is brought to him does not evade a forfeiture (*Connecticut Fire Ins. Co. v.*

Smith, 10 Colo. App. 121, 51 Pac. 170). A subsequent ratification of the removal may, however, be equivalent to a precedent consent (Williamsburgh City Fire Ins. Co. v. Cary, 83 Ill. 453). But where consent for the removal and for the continuance of the policy in force after removal is given, there is, in effect, a new contract, and a new risk taken by the company, and though there are some elements of the new risk which were forbidden by the original policy, if they are known to the company when the new risk is taken, their existence does not affect the validity of the new insurance (Rathbone v. City Fire Ins. Co., 31 Conn. 193).

To be effective the consent must, of course, be given by one authorized so to do. Where agents had no authority to insure property located in the country (Miller v. Insurance Co. of North America, 106 Mo. App. 205, 80 S. W. 330), they had no power to consent to the removal of property to the country. Consent given by a clerk of the agent may be ratified by the agent (Thuringia Ins. Co. v. Goldsmith [C. C. A.] 132 Fed. 456).

Consent of an insurance company to removal of goods insured to another building does not make removal obligatory on the insured, and the fact that indorsement of consent was made in July, and that the removal of the goods was not completed in November, when the part remaining in the old building was destroyed by fire, does not show that the insured was guilty of unreasonable delay in the removal, since the question of reasonable time must be determined with reference to the date when the removal actually began (Sharpless v. Hartford Fire Ins. Co., 140 Pa. 437, 21 Atl. 451, reversing 8 Pa. Co. Ct. R. 387).

So, where an applicant for insurance stated that one of the buildings described in the application was to be moved 15 feet, and a loss occurred before the building had been moved, it was a question for the jury whether the insured had a reasonable time after the application to remove such building (Lindsey v. Union Mut. Fire Ins. Co., 8 R. I. 157).

Where consent to a removal was given with an agreement that the policy would be continued in force, and that the property would be covered by the policy in its new location, the fact that, in the progress of removing the property to the new location, it was for a day or more kept at some other location, would not have the effect to prevent a recovery; the loss having occurred at the location to which the agent assented to the removal of the property (Ohio Farmers' Ins. Co. v. Burget, 61 N. E. 712, 65 Ohio St. 119, 55 L. R.

A. 828, 87 Am. St. Rep. 596, affirming 17 Ohio Cir. Ct. R. 619, 9 O. C. D. 369).

(m) Same—Effect of removal.

Where there is an absolute condition against removal, or statements as to location are construed as continuing warranties, a breach of the warranty or condition is generally held to forfeit the policy.

Harris v. Royal Canadian Ins. Co., 58 Iowa, 236, 5 N. W. 124; *Miller v. Insurance Co. of North America*, 106 Mo. App. 205, 80 S. W. 330; *Spitzer v. St. Mark's Ins. Co.*, 13 N. Y. Super. Ct. 6; *Bahr v. National Fire Ins. Co.*, 80 Hun, 309, 29 N. Y. Supp. 1031; *Phoenix Fire Ins. Co. v. Vorhies*, 1 Ohio Cir. Ct. R. 328, 1 O. C. D. 180.

The defense of removal must be pleaded to be available (*Montgomery v. Delaware Ins. Co.*, 67 S. C. 399, 45 S. E. 934), but a return of the premium is not a condition precedent thereto.

Harris v. Royal Canadian Ins. Co., 58 Iowa, 236, 5 N. W. 124; *Miller v. Insurance Co. of North America*, 106 Mo. App. 205, 80 S. W. 330.

In Illinois it has been held that a removal of goods insured to another location does not render the policy absolutely void, but merely voidable (*Williamsburg City Fire Ins. Co. v. Cary*, 83 Ill. 453). In other cases it is said that on removal the risk is only suspended, and there is no forfeiture unless loss occurs during the removal.

Ohio Farmers' Ins. Co. v. Burget, 61 N. E. 712, 65 Ohio St. 119, 55 L. R. A. 828, 87 Am. St. Rep. 596; *Bready v. Farmers' Mutual Fire Ins. Soc.*, 15 Montg. Co. Law Rep'r (Pa.) 43.

This is, of course, the rule where the provision as to location is regarded as a limitation of the place of risk.

Village of L'Anse v. Fire Ass'n of Philadelphia, 119 Mich. 427, 78 N. W. 465, 43 L. R. A. 838, 75 Am. St. Rep. 410; *Montgomery v. Delaware Ins. Co.*, 55 S. C. 1, 32 S. E. 723; *British America Assur. Co. v. Miller*, 91 Tex. 414, 39 L. R. A. 545, 44 S. W. 60, 66 Am. St. Rep. 901.

But it has been held that, under a by-law of a mutual live-stock insurance company providing that the insurance shall be confined within 12 miles of H., removal of property insured beyond such limit will not forfeit the insurance (*Reck v. Hatboro Mut. Live-Stock & Protective Ins. Co. of Montgomery County*, 163 Pa. 443, 30 Atl. 205, reversing 12 Pa. Co. Ct. R. 320, 2 Pa. Dist. R. 502).

If the statement as to location is regarded as matter of description only, a change of location does not, of course, affect the insurance.

Everett v. Continental Ins. Co., 21 Minn. 76; Holbrook v. St. Paul Fire & Marine Ins. Co., 25 Minn. 229; Haws v. Fire Ass'n, 114 Pa. 431, 7 Atl. 159.

(n) Same—Increase of risk.

A change in the location of insured chattels may increase the hazard or it may diminish it, but the insurer is not required to leave the question of increased hazard to be tried as a matter of defense after a loss. It may, by the stipulations of its contract, reserve the right to decide that question for itself, and to decide it conclusively. That right may be exercised by the insurer by a stipulation that the policy should become void if, without its consent, there should be a change in the location of the property. (Ohio Farmers' Ins. Co. v. Burget, 61 N. E. 712, 65 Ohio St. 119, 55 L. R. A. 825, 87 Am. St. Rep. 596.) The increase of risk may be caused by the different and more hazardous use of the new location.

Robinson v. Mercer County Mut. Fire Ins. Co., 27 N. J. Law, 134; Dougherty v. Greenwich Ins. Co. of New York, 42 Atl. 485, 64 N. J. Law, 716.

It has, indeed, been said that as the rate of premium depends on the location of the property, a change of location may in itself be regarded as an increase of risk (Lyons v. Providence Washington Ins. Co., 14 R. I. 109, 51 Am. Rep. 364, reversing 13 R. I. 347, 43 Am. Rep. 32). But in Runkle v. Hartford Ins. Co., 99 Iowa, 414, 68 N. W. 712, it was held that a change in location could not be said, as a matter of law, to increase the risk. In determining whether there has been an increase of risk, regard must be had to the ordinary risks incident to the customary use of the property (Holbrook v. St. Paul Fire & Marine Ins. Co., 25 Minn. 229). Mere increase of moral hazard is not sufficient, but there must be an increase of physical hazard (Plinsky v. Germania Fire & Marine Ins. Co. [C. C.] 32 Fed. 47).

The removal of a house from its original site does not avoid a fire policy, unless changing the risk; and this is a question of fact for the jury (Griswold v. American Cent. Ins. Co., 70 Mo. 654, affirming 1 Mo. App. 97). The removal of an addition to the insured property does not increase the risk, so as to invalidate the policy, where the addition continued to be on plaintiff's land, and within the terms of the location described in the policy (Hannon v. Hartford Fire Ins. Co., 58 N. Y. Supp. 549, 41 App. Div. 226).

10. CHANGE IN USE OR OCCUPANCY OF INSURED PREMISES OR PREMISES CONTAINING PERSONAL PROPERTY INSURED.

- (a) Scope of discussion.
- (b) Nature of statements or conditions as to occupancy or use of building.
- (c) What constitutes a change of occupants.
- (d) What constitutes a change in use.
- (e) Same—Usual and customary use.
- (f) Same—Actual and permanent change.
- (g) Effect of change of occupants.
- (h) Effect of change in use.
- (i) Same—As dependent on increase of risk.
- (j) Same—What constitutes increase of risk.
- (k) Same—Acts of third persons and changes not under control of insured.
- (l) Same—Temporary change in use and relation to cause of loss.
- (m) Illegal use of property insured.
- (n) Operation of mill or factory at night.
- (o) Suspension of business carried on within the building.
- (p) Same—Extent and cause of suspension of business.
- (q) Questions of practice.

(a) Scope of discussion.

Policies of insurance usually contain statements descriptive of the use and occupancy of the buildings insured or containing the insured property, or conditions prohibiting any change in the use and occupancy of such buildings. Forfeiture has been claimed on the ground of noncompliance with the continuing warranty predicated on such statements, or of a breach of the condition. In some instances the claim of forfeiture is based on a change of occupancy, using the words in their narrow sense of a change of occupants. Generally, however, the word "occupancy" is used as synonymous with use, and the claim of forfeiture is based really on a change in use. In the following discussion, where mere change in occupants, without an accompanying change in the use to which the building is put, is the issue, that phrase will be used rather than change in occupancy.

(b) Nature of statements or conditions as to occupancy or use of building.

In an early case (*Catlin v. Springfield Fire Ins. Co.*, 5 Fed. Cas. 310) where the policy described the house as "at present occupied as a dwelling house, but to be occupied hereafter as a tavern," and privi-

leged as such," it was held that this was not a warranty that the house should, during the continuance of the risk, be constantly occupied as a tavern, but that it was, at best, a mere representation of the intention to occupy it as such, and a license or privilege by the underwriters that it might be so occupied. In accordance with the doctrine of this case, it has been laid down as a rule that a clause in the application or the policy, stating the purpose for which the building insured or containing the insured property is used, is not a continuing warranty, but matter of description only, or at best a warranty in præsenti.

This principle is asserted in *Hartford Fire Ins. Co. v. Smith*, 8 Colo. 422; *Billings v. Tolland County Mut. Fire Ins. Co.*, 20 Conn. 189, 50 Am. Dec. 277; *New England Fire & Marine Ins. Co. v. Wetmore*, 32 Ill. 221; *Burlington Ins. Co. v. Brockway*, 138 Ill. 644, 28 N. E. 799, affirming 39 Ill. App. 43; *Baker v. German Fire Ins. Co.*, 124 Ind. 490, 24 N. E. 1041; *German Insurance Co. v. Hart*, 16 Ky. Law Rep. 344; *Meyer v. Queen Ins. Co.*, 41 La. Ann. 1000, 6 South. 899; *United States Fire & Marine Ins. Co. v. Kimberly*, 34 Md. 224, 6 Am. Rep. 325; *Blood v. Howard Fire Ins. Co.*, 12 Cush. (Mass.) 472; *Gates v. Madison County Mut. Ins. Co.*, 5 N. Y. 469, 55 Am. Dec. 360; *Smith v. Mechanics' & Traders' Fire Ins. Co.*, 32 N. Y. 399; *Whitney v. Black River Ins. Co.*, 9 Hun (N. Y.) 37; *Driscoll v. German-American Ins. Co.*, 74 Hun, 153, 26 N. Y. Supp. 646; *Merchants' Ins. Co. v. Frick*, 2 Am. Law Rec. 336, 5 Ohio Dec. 47; *Cumberland Valley Mut. Protection Co. v. Schell*, 29 Pa. 31; *East Texas Fire Ins. Co. v. Kempner*, 37 Tex. 236, 27 S. W. 122, 47 Am. St. Rep. 99, affirming on this point (Tex. Civ. App.) 25 S. W. 999; *Id.*, 12 Tex. Civ. App. 533, 34 S. W. 393; *Bryan v. Peabody Ins. Co.*, 8 W. Va. 605.

In the *Blood Case* the court said that a decisive and satisfactory indication of the intent of the parties to limit the statement to description of the property as it was at the inception of the contract, and not to extend it to the mode of its future use and occupation, was found in the fact that there was an express agreement by which the insurers protected themselves against any increase of risk in consequence of a change in the situation or circumstances of the property. In other cases the intent not to make the statement a continuing warranty was based on the fact that the insurer retained in the policy a clause relating to using the property in any manner regarded as hazardous (*Smith v. Mechanics' & Traders' Fire Ins. Co.*, 32 N. Y. 399). Where the building is described as a dwelling, and the agent had notice, at the time of the issuance of the policy, that the building was then used for school purposes, and that it was

the understanding that as soon as such use ceased it should be occupied as a dwelling house, such understanding does not constitute a warranty that it will be so used. The contract as entered into between the parties was reduced to writing and was evidenced by the policy itself. (*Niagara Fire Ins. Co. v. Johnson*, 4 Kan. App. 16, 45 Pac. 789.) In *Pabst Brewing Co. v. Union Ins. Co.*, 63 Mo. App. 663, the court held that a statement as to the use of the premises is not in fact a warranty; but that, if such words could be construed as a continuing warranty, the warranty was only that the building would not be devoted to more hazardous uses.

It is true that the rule in Delaware is that there is in every policy of insurance against fire an implied promise or undertaking on the part of the insured that he will not, after the making of the policy, alter or change the kind or character of business carried on or to be carried on, so as to increase the risk of loss by fire; and this is the rule of law, though there be no by-law of the company on the subject (*Hoffecker v. New Castle County Mutual Ins. Co.*, 5 Houst. 101). A similar rule has been asserted in the lower courts of Ohio (*Elstner v. Cincinnati Equitable Ins. Co.*, 12 Ohio Dec. 703), but with the qualification that the change, to invalidate the policy, must be voluntarily made or permitted. So, too, it has been intimated in other cases that statements as to the use of the building might be regarded as continuing warranties, if the issue was squarely presented.

Deweese v. Manhattan Ins. Co., 35 N. J. Law, 366; *Wall v. East River Mut. Ins. Co.*, 7 N. Y. 370; *Hoxsie v. Providence Mut. Fire Ins. Co.*, 6 R. I. 517.

But in the other cases in which such statements have been held to be continuing warranties the policy contained some special stipulation, or the statement was so peculiarly worded as to take the cases out of the general rule.

The following statements as to use and occupancy have been held to be continuing warranties: Where property insured was described as a paper mill, and paper mills were enumerated among risks insured at special rates (*Wood v. Hartford Fire Ins. Co.*, 13 Conn. 533, 35 Am. Dec. 92); where the policy contained a provision that, if the premises are used for any other purpose than is mentioned in said application without the consent in writing of the company, then the policy shall be void (*Cedar Rapids Ins. Co. v. Shimp*, 16 Ill. App. 248); where the policy provided that it should be void if there should be any increase of hazard by change of use or occupancy, vacancy, or nonoccupancy (*Ger-*

mania Fire Ins. Co. v. Deckard, 8 Ind. App. 861, 23 N. E. 868); a stipulation, in a policy describing the building as a dwelling, that no business should be carried on in the building designated in the policy as specially hazardous, without notifying the company (Gasner v. Metropolitan Ins. Co., 13 Minn. 483 [Gil. 447]); a provision that, if the premises shall be appropriated or used for carrying on any business denominated hazardous or extra-hazardous, etc., the policy shall cease (Mead v. Northwestern Ins. Co., 7 N. Y. 530); a provision that the premises shall not be used for carrying on certain enumerated employments (Westfall v. Hudson River Fire Ins. Co., 12 N. Y. 289), or hazardous business (Sarsfield v. Metropolitan Ins. Co., 42 How. Prac. [N. Y.] 97); where the property was described as a building "to be used as foundries and machine shops" (Sun Ins. Co. v. Texarkana Foundry & Machine Works, 8 Willson, Civ. Cas. Ct. App. [Tex.] § 820; Sun Mut. Ins. Co. v. Texarkana Foundry & Machine Co., 15 S. W. 34, 4 Willson, Civ. Cas. Ct. App. [Tex.] § 81); where the building was described as "a dwelling house to be occupied by tenants for three years," and the policy prohibited the use of the building "for any purpose * * * different from that set forth" (Kircher v. Milwaukee Mechanics' Mut. Ins. Co., 74 Wis. 470, 43 N. W. 487, 5 L. R. A. 779).

Generally speaking, if there is any warranty as to the future use or occupation of the property, it must be contained in the policy, or be reduced to writing in proper form, before it can be admitted to affect its construction or obligation (City of New York v. Brooklyn Fire Ins. Co., 41 Barb. [N. Y.] 231, affirmed 3 Abb. Dec. [N. Y.] 251; *Id.*, *43 N. Y. 465).

Where the statement is merely as to the person who is the occupant, the rule laid down in the Catlin Case is followed. Thus a statement that the building is occupied by the insured is not a warranty that he will continue to occupy it.

Joyce v. Maine Ins. Co., 45 Me. 168, 71 Am. Dec. 536; German Ins. Co. v. Russell, 65 Kan. 373, 69 Pac. 345, 58 L. R. A. 234.

Nor is it a warranty that it shall not become unoccupied.

Royal Ins. Co. v. Lubelsky, 86 Ala. 530, 5 South. 768; Imperial Fire Ins. Co. v. Kiernan, 83 Ky. 468; Cumberland Valley Mut. Protection Co. v. Douglas, 58 Pa. 419, 98 Am. Dec. 298.

But a stipulation that a certain portion of the building shall remain unoccupied during the continuance of the policy is a promissory warranty (Stout v. City Fire Ins. Co., 12 Iowa, 371, 79 Am. Dec. 539).

A statement that the premises are occupied by a tenant is not a warranty that they shall continue to be so occupied.

Evans v. Queens Ins. Co., 5 Ind. App. 193, 81 N. E. 843; *Herrick v. Union Mut. Fire Ins. Co.*, 48 Me. 558, 77 Am. Dec. 244; *Boardman v. New Hampshire Mutual Fire Ins. Co.*, 20 N. H. 551.

Nor can a continuing warranty be predicated on a statement that the premises are occupied by a certain person named.

O'Neil v. Buffalo Fire Ins. Co., 3 N. Y. 122; *Gates v. Madison County Mut. Ins. Co.*, 5 N. Y. 469, 55 Am. Dec. 360.

A statement that the building is unoccupied, but "to be occupied by a tenant," is merely a reservation of the right to put in a tenant (*Hough v. City Fire Ins. Co.*, 29 Conn. 10, 76 Am. Dec. 581). So a statement that the building is occupied by "assured or tenant" does not prevent an occupancy by both assured and a tenant (*Harris v. Phoenix Ins. Co.*, 85 Iowa, 238, 52 N. W. 128). On the other hand, where the policy provided that unoccupied premises must be insured as such or the policy is void, the insurance of the premises as occupied amounts to a continuing warranty that they shall remain occupied (*Wustum v. City Fire Ins. Co.*, 15 Wis. 138).

(c) What constitutes a change of occupants.

What will constitute a change of occupants, within the condition prohibiting such change? It would seem to be elementary that there must be a material change. Thus, where the premises were occupied as both a grocery store and the office of a factory, the fact that the grocery moved out of the building was not such a change as was contemplated by the condition (*Western Home Ins. Co. v. Thorpe*, 40 Kan. 255, 19 Pac. 631).

A change from occupation by the owner or insured to occupation by a tenant may be regarded as a material change, and consequently within the meaning of a condition providing that a change of occupants will forfeit the insurance.

Planters' Mut. Ins. Ass'n v. Dewberry, 69 Ark. 295, 62 S. W. 1047, 86 Am. St. Rep. 195; *Hunt v. State Ins. Co.*, 66 Neb. 121, 92 N. W. 921.

But a mere change in the occupant, as from owner to tenant, will not forfeit the policy, under the clause providing for forfeiture if the premises be used for any trade or business which will increase the risk (*Hawkes v. Dodge County Mut. Ins. Co.*, 11 Wis. 118).

Since a family is a number of persons living together in one house, under one management or head, and no specific number of persons is requisite to constitute it, where a building is insured as occupied by a family, there is not necessarily a change of occupants by a change in the personnel of the family; but this is a question for the jury (*Poor v. Hudson Ins. Co.* [C. C.] 2 Fed. 432). The term "occupancy" may be used in relation to personal property, referring in such case to the possession thereof (*Walradt v. Phoenix Ins. Co.*, 136 N. Y. 375, 32 N. E. 1063, 32 Am. St. Rep. 752). And where store fixtures in the possession of a tenant are insured, the fact that the insured gave one who had become owner of the building an order on the tenant for rent of the fixtures does not show that the insured had ceased to be the lessor of such fixtures, so that a change of occupants could be predicated thereon (*Erb v. German Ins. Co.*, 99 Iowa, 398, 68 N. W. 701).

The question whether the subsequent vacancy of the premises will forfeit the insurance under the clause as to change of occupants has arisen in some cases. A mere temporary vacancy is not a change of occupancy within the condition.

Western Assur. Co. v. Mason, 5 Ill. App. 141; *Georgia Home Ins. Co. v. Brady* (Tex. Civ. App.) 41 S. W. 518.

It has also been asserted in some cases that a condition prohibiting a change of occupants has no application where the premises become vacant and there is no clause in the policy providing for forfeiture in the case of vacancy.

Merchants' Ins. Co. v. Frick, 2 Am. Law Rec. 886, 5 Ohio Dec. 47; *McAnnally v. Somerset Co. Mut. Ins. Co.*, 2 Pittsb. R. (Pa.) 189; *Somerset Co. Mut. Fire Ins. Co. v. Usaw*, 112 Pa. 80, 4 Atl. 355, 56 Am. Rep. 307; *Gilliat v. Pawtucket Mut. Fire Ins. Co.*, 8 R. I. 282, 91 Am. Dec. 229.

The general question of the effect of vacancy on the insurance is, however, discussed in a subsequent brief.¹

(d) What constitutes a change in use.

Where the statement as to use is mere description, it cannot limit the right of the insured to use his property in the same manner that buildings of that description are generally used.

Billings v. Tolland Co. Mut. Fire Ins. Co., 20 Conn. 189, 50 Am. Dec. 277; *Farmers' Mutual Fire Ins. Ass'n v. Kryder*, 5 Ind. App. 430, 81 N. E. 851, 51 Am. St. Rep. 284.

¹ See post, p. 1652.

And, in determining whether there has been a change in the use of the premises, reference must be had to the original use and that contemplated by both parties when the policy was issued. Thus ordinary mercantile purposes cannot be construed to include use of the premises for manufacturing (*Eager v. Fireman's Fund Ins. Co.*, 71 Hun, 352, 25 N. Y. Supp. 35, affirmed in 148 N. Y. 726, 42 N. E. 722), or for a restaurant (*Garretson v. Merchants' & Bankers' Ins. Co.*, 81 Iowa, 727, 45 N. W. 1047; *Id.*, 92 Iowa, 293, 60 N. W. 540).

In accordance with the foregoing principle, it has been asserted in some cases that, where the use of the building is classified as of a certain degree of hazard, a change in use within the same degree of hazard is not a change prohibited by the policy.

Virginia Fire & Marine Ins. Co. v. Feagin, 62 Ga. 515; *Brink v. Merchants' & Mechanics' Ins. Co.*, 49 Vt. 442.

So, too, where by a written clause privilege was granted to use the premises for certain specified purposes, "and other extrahazardous purposes," and in the policy the occupations permitted were not classed as "extrahazardous," but as "specially hazardous," the court held that the written permission to use premises for other extrahazardous purposes must be construed to mean for the purposes included in the specially hazardous class (*Reynolds v. Com. Fire Ins. Co.*, 47 N. Y. 597).

But, where the use mentioned or permitted in the policy is classified as a special hazard or special risk, the use of the premises or a part thereof for another trade or business, also classified as a special hazard or special risk, will forfeit the policy, as such hazards must be specially provided for in the policy.

Wood v. Hartford Fire Ins. Co., 18 Conn. 533, 35 Am. Dec. 92; *Lee v. Howard Fire Ins. Co.*, 3 Gray (Mass.) 533; *Matthews v. Queen City Ins. Co.*, 2 Cin. R. 109, 13 Ohio Dec. 798.

(c) Same—Usual and customary use.

As a necessary corollary of the principles discussed in the preceding subdivision, it follows that a condition relating to change in use refers only to a new and different use, and does not prohibit uses which are usual, necessary, or customary accompaniments of the described or permitted use.

Benshaw v. Missouri State Mut. Fire & Marine Ins. Co., 108 Mo. 595, 15 S. W. 945, 23 Am. St. Rep. 904; *City of New York v. Exchange Fire Ins. Co.*, 22 N. Y. Super. Ct. 424; *City of New*

York v. Hamilton Fire Ins. Co., 23 N. Y. Super. Ct. 537; New York v. Brooklyn Fire Ins. Co., 41 Barb. (N. Y.) 231, 3 Abb. Dec. (N. Y.) 251, affirming 41 Barb. (N. Y.) 231; City of New York v. Exchange Fire Ins. Co., 3 Abb. Dec. (N. Y.) 261; Whitney v. Black River Ins. Co., 72 N. Y. 117, 28 Am. Rep. 116; Washington Mut. Ins. Co. v. Merchants' & Mfra.' Mut. Ins. Co., 5 Ohio St. 450; Virginia Fire & Marine Ins. Co. v. Thomas, 90 Va. 658, 19 S. E. 454; Georgia Home Ins. Co. v. Thomas, 90 Va. 658, 19 S. E. 457.

So, where the building was occupied for certain manufacturing purposes, the use of a room for repairing the machinery used in such manufacturing was not a change in use within a prohibition in the policy (*Lounsbury v. Protection Ins. Co.*, 8 Conn. 459, 21 Am. Dec. 686). Nor does it fall within the prohibition where, in a building used for the manufacture of lead pipe, the reels on which the pipe is wound are manufactured (*Collins v. Charlestown Mut. Fire Ins. Co.*, 10 Gray [Mass.] 155); or hogsheads for containing the product are manufactured in a building devoted to "tobacco pressing" (*Sims v. State Ins. Co.*, 47 Mo. 54, 4 Am. Rep. 311). But where the insurance was on merchandise only, including "cabinet ware," the use of the premises for manufacturing such articles was within a prohibition against carrying on any trade or business, or use of the premises for more hazardous purposes (*Appleby v. Astor Fire Ins. Co.*, 54 N. Y. 253).

(2) Same—Actual and permanent change.

There must be an actual change in use, and unless such is shown the condition is not operative (*Miller v. Oswego & Onondaga Ins. Co.*, 18 Hun [N. Y.] 525). So, under a condition prohibiting the use of the premises for carrying on any hazardous, etc., business or trade, a violation is shown only when there is an actual trade or business of the nature prohibited carried on in the building (*Fire Association v. Gilmer*, 3 Walk. [Pa.] 234). Thus making repairs on the building does not come within the prohibition, though the business of "house building and repairing," and the trade of a carpenter, are classified as extrahazardous.

Lounsbury v. Protection Ins. Co., 8 Conn. 459, 21 Am. Dec. 686; *Grant v. Howard Ins. Co.*, 5 Hill (N. Y.) 10; *Merchants' Ins. Co. v. Frick*, 5 Ohio Dec. 47, 2 Am. Law Rec. 336; *Delonguemare v. Tradesmen's Ins. Co.*, 2 N. Y. Super. Ct. 629; *O'Neil v. Buffalo Fire Ins. Co.*, 3 N. Y. 122.

The use of a single room in the building for weaving a few pieces of stuff from woolen and linen thread and cotton, spun elsewhere and kept in the room, does not show that the premises were used as a "cotton mill," "woolen mill," or a manufactory requiring the use of heat, nor for "storing cotton in bales, or wool," within a clause prohibiting such use (*Vogel v. People's Mut. Fire Ins. Co.*, 9 Gray [Mass.] 23). Nor is lighting a building with gasoline devoting it to a "more hazardous use," within the condition (*Mutual Fire Ins. Co. v. Coatesville Shoe Factory*, 80 Pa. 407).

The change must be on the premises insured, and the condition is not violated by a change on the adjoining premises.

Southern Ins. & Trust Co. v. Lewis, 42 Ga. 587; *Martin v. Mutual Fire Ins. Co.*, 45 Md. 51.

Thus, where a description of the insured premises as used for the manufacture of bath tubs was construed as a warranty against any change in use, there was no violation of the warranty by the fact that the business of sawing and planing lumber was carried on in an adjoining building, and the shavings carried therefrom by a tube to the boiler room of the building insured, to be there used for fuel (*Keeney v. Home Ins. Co.*, 71 N. Y. 396, 27 Am. Rep. 60). But it was held, in *Appleby v. Firemen's Fund Ins. Co.*, 45 Barb. (N. Y.) 454, where the policy was on goods in a certain part of the building, that a provision in such policy against the premises being used for purposes denominated hazardous or extrahazardous will be violated if a part of the premises are used by others for such prohibited purposes, though insured never kept any part of his goods in such part of the building. The court seems to lay stress on the fact that insured had control of the whole building. A different rule might have applied, had insured only had control of that part wherein his goods were located.

Though, where there is a special provision prohibiting a specified use of the premises, even a temporary and incidental use for such purpose will be fatal (*People's Ins. Co. v. Kuhn*, 12 Heisk. [Tenn.] 515), a change in use, to fall within the general condition, must be permanent in its nature, and not merely temporary or incidental.

Adair v. Southern Mut. Ins. Co., 107 Ga. 297, 33 S. E. 78, 45 L. R. A. 204, 73 Am. St. Rep. 122; *Gates v. Madison County Mut. Ins. Co.*, 5 N. Y. 469, 55 Am. Dec. 360; *Hynds v. Schenectady County Mut. Ins. Co.*, 16 Barb. (N. Y.) 119, affirmed in 11 N. Y. 554; *Merchants' & Manufacturers' Mut. Ins. Co. v. Washington Mut.*

Ins. Co., 1 Handy (Ohio) 408, affirming Id. 181; Krug v. German Fire Ins. Co., 147 Pa. 272, 28 Atl. 572, 30 Am. St. Rep. 729; Kircher v. Milwaukee Mechanics' Mut. Ins. Co., 74 Wis. 470, 48 N. W. 487, 5 L. R. A. 779.

The same rule governs where there is an implied warranty against change in use (*Elstner v. Insurance Company*, 1 Disn. 412, 12 Ohio Dec. 703). Where there is no condition or warranty, a mere temporary or incidental use of the premises will not affect the insurance, unless such use is fraudulent or grossly careless, and also the cause of loss (*Billings v. Tolland County Mut. Fire Ins. Co.*, 20 Conn. 139, 50 Am. Dec. 277). If the use is not of that character, it will not affect the policy, though it is the cause of loss (*Loud v. Citizens' Mut. Ins. Co.*, 2 Gray [Mass.] 221). Where, however, an unused mill was occupied for some months as a cooper shop by the owner for profit, there was an "appropriation to other purposes" within a prohibition in the policy (*Harris v. Columbiana Ins. Co.*, 4 Ohio St. 285).

Civ. Code Ga. § 2100, which provides that any change in the property or the use to which it is applied, without the consent of the insurer, whereby the risk is increased, voids the policy, does not apply to a mere temporary change in the use or occupation of the premises, but to one of a permanent nature. *Adair v. Southern Mut. Ins. Co.*, 107 Ga. 297, 33 S. E. 78, 45 L. R. A. 204, 73 Am. St. Rep. 122.

Within the condition as to change of use is the change from a tavern barn to a livery barn (*Hobby v. Dana*, 17 Barb. [N. Y.] 111); use of dwelling as a saloon (*Sarsfield v. Metropolitan Ins. Co.*, 42 How. Prac. [N. Y.] 97), or even as a place where liquors are occasionally sold (*People's Ins. Co. v. Kuhn*, 12 Helsk. [Tenn.] 515); use of dwelling house as a house of prostitution (*Cedar Rapids Ins. Co. v. Shimp*, 16 Ill. App. 248; *Indiana Insurance Company v. Brehm*, 88 Ind. 578; *Allen v. Home Ins. Co.*, 133 Cal. 29, 65 Pac. 188).

It is not a change within the condition when a building described as a dwelling house and store ceases to be used as a dwelling (*Burlington Ins. Co. v. Brockway*, 138 Ill. 644, 28 N. E. 799, affirming 39 Ill. App. 43); nor that a house was leased and became unoccupied (*Hawkes v. Dodge County Mut. Ins. Co.*, 11 Wis. 118); nor is the use of a planer in a sawmill (*Whitney v. Black River Ins. Co.*, 72 N. Y. 117, 28 Am. Rep. 116); nor a change in the method of lighting (*Mutual Fire Ins. Co. v. Coatesville Shoe Factory*, 80 Pa. 407).

The use of a dwelling for a boarding house is not a change in use (*Rafferty v. New Brunswick Fire Ins. Co.*, 18 N. J. Law, 480, 38

Am. Dec. 525) ; nor does the fact that liquor is sold to the boarders make the house a tavern.

(g) Effect of change of occupants.

In view of the general principle that the owner of the building insured may have it occupied by any one he pleases, provided the pursuits or property therein do not vitiate the policy, under the conditions relative to the risks (*Lyon v. Commercial Ins. Co.*, 2 Rob. [La.] 266), it is evident that, in the absence of any stipulation to the contrary, a mere change in tenants will not forfeit the policy.

Harris v. Phoenix Ins. Co., 85 Iowa, 238, 52 N. W. 128; *Gates v. Madison County Mut. Ins. Co.*, 5 N. Y. 469, 55 Am. Dec. 360; *Cumberland Valley Mut. Protection Co. v. Douglas*, 58 Pa. 419, 98 Am. Dec. 298.

But, if the policy provides that it shall become void if the premises be occupied by "tenants" (*Elliott v. Farmers' Ins. Co.*, 114 Iowa, 153, 86 N. W. 224), occupation by one tenant will forfeit the policy; and this, though the tenant used the premises for the same purpose as did the owner. Nor is the forfeiture saved by the subsequent enactment of Code, § 1743, providing that a condition in a policy making it void before the loss occurs shall not prevent a recovery thereon, if it be shown that the failure to observe the condition did not contribute to the loss. So, too, noncompliance with a provision in a policy to the effect that the upper portion of the building shall remain unoccupied during the continuance of the policy will avoid the policy, whether the change in the use of the premises is material to the risk or not (*Stout v. City Fire Ins. Co. of New Haven*, 12 Iowa, 371, 79 Am. Dec. 539).

(h) Effect of change in use.

If the policy contains an absolute condition prohibiting the use of the premises for certain purposes, or any change in use, or if the recital as to use is construed as a continuing warranty, a change in use or use for the prohibited purpose will forfeit the policy.

Adair v. Southern Mut. Ins. Co., 107 Ga. 297, 33 S. E. 78, 25 L. R. A. 204, 78 Am. St. Rep. 122; *Cedar Rapids Ins. Co. v. Shimp*, 16 Ill. App. 248; *Indiana Ins. Co. v. Brehm*, 88 Ind. 578; *Stout v. City Fire Ins. Co.*, 12 Iowa, 371, 79 Am. Dec. 539; *Lee v. Howard Fire Ins. Co.*, 3 Gray (Mass.) 583; *Wetherell v. City Fire Ins. Co.*, 16 Gray (Mass.) 276; *Gasner v. Metropolitan Ins. Co.*, 13 Minn. 483 (Gil. 447); *Merwin v. Star Fire Ins. Co.*, 7 Hun (N. Y.) 659, affirmed without opinion 72 N. Y. 603; *Matthews v. Queen*

City Ins. Co., 2 Cin. R. 109, 18 Ohio Dec. 798; Sum Mut. Ins. Co. v. Texarkana Foundry & Machine Co., 15 S. W. 84, 4 Willson, Civ. Cas. Ct. App. (Tex.) § 31; Kircher v. Milwaukee Mechanics' Mut. Ins. Co., 74 Wis. 470, 43 N. W. 487, 5 L. R. A. 779.

In such cases the good faith of the insured does not affect the question (*Kyte v. Commercial Assur. Co.*, 134 Mass. 43, 10 N. E. 518); nor is it necessary that the insured should have been grossly negligent in making or allowing the change (*Southern Mut. Ins. Co. v. Hudson*, 38 S. E. 964, 113 Ga. 434).

▲ a policy containing a condition in the body that the exercise of any of the vocations denominated hazardous in a memorandum of hazards annexed to the policy would invalidate it does not violate St. 1861, c. 152, which provides that in fire policies the conditions of the insurance shall be stated in the body of the policy. *Campbell v. Charter Oak Fire & Marine Ins. Co.*, 7 Allen (Mass.) 45, note.

Under Laws 1872, c. 103, § 10 (Rev. St. § 1931), prohibiting mutual companies from insuring schoolhouses, a policy issued by such a company on a dwelling becomes void if the dwelling is afterwards converted into a schoolhouse. *Luthe v. Farmers' Mut. Fire Ins. Co.*, 55 Wis. 543, 13 N. W. 490.

The condition sometimes contains the provision that the policy will become void by a change in use, unless notice is given to the insurer and consent thereto indorsed on the policy. Under such a clause notice to a mere soliciting agent is not sufficient (*Cedar Rapids Ins. Co. v. Shimp*, 16 Ill. App. 248); nor is it sufficient that the insurers had notice at the time of the insurance of an intention on the part of insured to make the change (*Elstner v. Cincinnati Equitable Ins. Co.*, 1 Disn. 412, 12 Ohio Dec. 703). Verbal notice to the proper officer will, however, satisfy the requirement (*Planters' Mut. Ins. Co. v. Rowland*, 66 Md. 236, 7 Atl. 257).

Where privilege to use the building for a purpose increasing the risk has been given, it is not necessary, in the absence of agreement to the contrary, that the company should give notice to the insured that the privilege for which the insured had paid an additional premium had expired. *Fire Ass'n v. Gilmer*, 3 Walk. (Pa.) 234.

If there is no express provision or warranty against change of use, or if the use is not prohibited, there will be no forfeiture.

Hartford Fire Ins. Co. v. Smith, 3 Colo. 422; *Martin v. Capital Ins. Co.*, 85 Iowa, 643, 52 N. W. 534; *Rafferty v. New Brunswick Fire Ins. Co.*, 18 N. J. Law, 480, 38 Am. Dec. 525.

(1) Same—As dependent on increase of risk.

In the cases cited in the preceding subdivision to the effect that a breach of a special condition or warranty as to change of use forfeited the policy, the question whether the risk was increased by the change is, apparently in some and expressly in others, regarded as immaterial. It is, indeed, said in *Wood v. Hartford Fire Ins. Co.*, 13 Conn. 533, 35 Am. Dec. 92, that the change may have even diminished the hazard, and yet forfeiture would follow. We may, therefore, assume the rule to be that when there is a special condition providing for forfeiture by a change in use, to produce that result, it is not necessary that the risk should be increased by the change. If, however, there is but a general statement as to the use of the building, not amounting to an express warranty or condition, the rule is that a change in use will not forfeit the policy unless such change increases the risk.

The rule is asserted in *Hoffecker v. New Castle County Mutual Ins. Co.*, 4 Houst. (Del.) 806; *Baker v. German Fire Ins. Co.*, 124 Ind. 490, 24 N. E. 1041; *Russell v. Cedar Rapids Ins. Co.*, 78 Iowa, 216, 42 N. W. 654, 4 L. R. A. 538; *German Ins. Co. v. Hart*, 16 Ky. Law Rep. 344; *Blood v. Howard Fire Ins. Co.*, 12 Oush. (Mass.) 472; *Smith v. Mechanics' & Traders' Fire Ins. Co.*, 82 N. Y. 399; *Miller v. Oswego & Onondago Ins. Co.*, 18 Hun (N. Y.) 526; *Driscoll v. German Amer. Ins. Co.*, 74 Hun, 153, 26 N. Y. Supp. 646; *East Texas Fire Ins. Co. v. Kempner*, 12 Tex. Civ. App. 533, 34 S. W. 393, affirming (Tex. Civ. App.) 25 S. W. 999.

Even where there is an express provision forbidding a change in use, if it is qualified by the words "so as to increase the risk," the rule would be the same.

Adair v. Southern Mut. Ins. Co., 107 Ga. 297, 33 S. E. 78, 45 L. R. A. 204, 73 Am. St. Rep. 122; *Niagara Fire Ins. Co. v. Johnson*, 4 Kan. App. 16, 45 Pac. 789.

In *Cumberland Valley Mutual Protection Company v. Schell*, 29 Pa. 31, where the policy in this case stipulated that it should be suspended in case the property should be used in any way so as to increase the hazard, the court held that the effect would be the same without this stipulation as with it.

A policy may be forfeited by a change in use, under the general clause providing that the policy shall become void if the risk be increased by any means (*School District No. 116 v. German Ins. Co.*, 7 S. D. 458, 64 N. W. 527). So, too, where the policy contains a special provision against change in use, if the new use is not within

the terms of the condition, the policy may be forfeited, under the general condition as to increase of risk (*Phoenix Assur. Co. v. Franklin Brass Co.*, 58 Fed. 166, 7 C. C. A. 144, 8 U. S. App. 451).

The general rule that the policy will be forfeited by a change in use increasing the risk is asserted in *Franklin Brass Co. v. Phoenix Assur. Co.*, 65 Fed. 773, 13 C. C. A. 124, 25 U. S. App. 119; *Hoffecker v. New Castle County Mut. Ins. Co.*, 5 *Houst. (Del.)* 101; *Robinson v. Mercer County Mut. Fire Ins. Co.*, 27 *N. J. Law*, 134; *Planters' Mut. Ins. Co. v. Rowland*, 66 *Md.* 236, 7 *Atl.* 257; *Hobby v. Dana*, 17 *Barb. (N. Y.)* 111; *City of New York v. Exchange Fire Ins. Co.*, 22 *N. Y. Super. Ct.* 424; *Sun Mut. Ins. Co. v. Texarkana Foundry & Machine Co.*, 15 *S. W.* 34, 4 *Willson, Civ. Cas. Ct. App. (Tex.)* § 31.

It has, however, been held in Illinois (*North British & Mercantile Ins. Co. v. Steiger*, 13 *Ill. App.* 482) that the increase of risk must exist at the time of loss. And in *Adair v. Southern Mut. Ins. Co.*, 107 *Ga.* 297, 33 *S. E.* 78, 45 *L. R. A.* 204, 73 *Am. St. Rep.* 122, the court laid stress on the fact that the loss resulted directly from the increase of risk. It has also been said that a mere increase of risk does not avoid the policy, unless it arises from something else than the appropriation of the premises to the uses which are contemplated and covered by the policy (*City of New York v. Hamilton Fire Ins. Co.*, 23 *N. Y. Super. Ct.* 537). The Pennsylvania rule is that, in addition to an increase of risk, it must appear that the insured knew the change would increase the risk.

Rife v. Lebanon Mut. Ins. Co., 115 *Pa.* 530, 6 *Atl.* 65, 2 *Am. St. Rep.* 580; *McGonigle v. Susquehanna Mut. Fire Ins. Co.*, 168 *Pa.* 1, 31 *Atl.* 868.

(j) Same—What constitutes increase of risk.

Whether the clause under which forfeiture is claimed because of a change in use increasing the risk is a special clause relating to change in use or the general clause relating to increase of risk, the change must be substantial and essentially an increase (*Crane v. City Ins. Co.* [C. C.] 3 *Fed.* 558). But, in determining whether a certain change has increased the risk, the fact that some other change may have diminished the risk cannot be taken into consideration (*Albion Lead Works v. Williamsburg City Fire Ins. Co.* [C. C.] 2 *Fed.* 479). However, the comparison must be made with the risk existing at the inception of the policy (*Hoffecker v. New Castle County Mutual Ins. Co.*, 5 *Houst. [Del.]* 101), or, as it has been

stated in other cases, with the conditions known to exist at the inception of the policy.

Whitney v. Black River Ins. Co., 72 N. Y. 117, 28 Am. Rep. 116;
Heffron v. Kittanning Ins. Co., 132 Pa. 580, 20 Atl. 698.

In accord with these last-cited cases is the principle that the use represented to exist at the inception of the policy, and not the actual use, is the basis on which the comparison must be made (*State Mutual Fire Ins. Co. v. Arthur*, 30 Pa. 315).

It is, of course, elementary that any change in occupancy and use which lessens the vigilance and care exercised to prevent fires is an increase in risk (*Western Assur. Co. v. McPike*, 62 Miss. 740). So, too, it is a general rule that, if the use to which change is made is one which would have called for a greater premium in the first instance, it will be regarded as an increase of risk (*Southern Mutual Ins. Co. v. Hudson*, 113 Ga. 434, 38 S. E. 964). But an increase of risk cannot be based merely on the fact that an increased premium was demandable by reason of the nature of the subsequent occupancy (*Monteleone v. Royal Ins. Co.*, 47 La. Ann. 1563, 18 South. 472, 56 L. R. A. 784); and, though the test is actual increase of risk of damage from fire, not the rating established by insurance companies (*Carroll v. Home Ins. Co.*, 51 App. Div. 149, 64 N. Y. Supp. 522), yet the classification of risks adopted by the company is to be taken into consideration in determining whether a change in use is an increase of risk.

Harris v. Protection Ins. Co., *Wright* (Ohio) 548; *Russell v. Cedar Rapids Ins. Co.*, 78 Iowa, 216, 42 N. W. 654, 4 L. R. A. 538.

A provision that any use of the premises which would increase the hazard, according to the by-laws and conditions, or the class of hazards and rates annexed to the policy, is not violated by a certain use, where there is in fact, no class of hazards or rates annexed and the by-laws and conditions do not declare that such use shall constitute a use which would increase the hazard (*Schaeffer v. Farmers' Mutual Fire Ins. Co.*, 80 Md. 563, 31 Atl. 317, 45 Am. St. Rep. 361).

There is an increase of risk by a change in use where a tavern barn is used as a livery stable (*Hobby v. Dana*, 17 Barb. [N. Y.] 111); where a building represented to be used for school and church purposes is used for the storage of unslaked lime (*School Dist. No. 116 v. German Ins. Co. of Freeport*, 7 S. D. 458, 64 N. W. 527); where a house is abandoned by the owner or tenant and

is occupied by an unauthorized person, paying no rent, as a retail liquor store (*Western Assur. Co. v. McPike*, 62 Miss. 740); by the addition of a foundry and blacksmith shop to a building containing a printing office (*Robinson v. Mercer County Mut. Fire Ins. Co.*, 27 N. J. Law, 134); but not by the use of a planer in a sawmill (*Whitney v. Black River Ins. Co.*, 72 N. Y. 117, 28 Am. Rep. 116); nor by the use of a dwelling as a boarding house (*Planters' Insurance Co. v. Sorrels*, 1 Baxt. [Tenn.] 352, 25 Am. Rep. 780).

There is not necessarily an increase of risk by a change in the process of manufacture used in a flouring mill (*Planters' Mut. Ins. Co. v. Rowland*, 66 Md. 236, 7 Atl. 257); or by the use of a store for an auction sale (*Rice v. Tower*, 1 Gray [Mass.] 426). Assured's leaving the premises closed during ordinary business hours, and being absent during 26 days prior to the fire, does not, as a matter of law, avoid a policy conditioned to be void if the premises shall be used so as to increase the risk (*O'Brien v. Commercial Fire Ins. Co.*, 38 N. Y. Super. Ct. 517).

(k) Same—Acts of third persons and changes not under control of insured.

The condition, whether specific or general, sometimes provides that the change must be one within the control or knowledge of the insured in order to forfeit the policy. Where this is the condition, the policy will not, of course, be forfeited, unless the change in use is within the knowledge or control of the insured.

Waggonick v. Westchester Fire Ins. Co., 34 Ill. App. 629; *Northern Assur. Co. of London, England, v. Crawford*, 59 S. W. 916, 24 Tex. Civ. App. 574.

Where the policy was on the goods of a tenant, who rented only part of the building, a change in the use of the part not rented by him would not forfeit the policy, as such a change was not within his control, and especially as there was nothing to show knowledge of the increased risk (*McKee v. Susquehanna Mut. Fire Ins. Co.*, 135 Pa. 544, 19 Atl. 1067). It does not appear whether the condition was qualified or not.

Where a policy contained a clause authorizing the company, in case the premises should be occupied or used so as to increase the risk, to terminate the insurance upon notice and return of the unearned premium, it was held that this condition was intended to provide for increase of risk by the acts of third persons, over whom the insured had no control, and did not affect another clause providing against increase of risk by act of the insured. *Williams v. People's Fire Ins. Co.*, 57 N. Y. 274.

Where goods insured were seized on execution and a part of them sold at public auction within the store building, it was held that the use of the building for the auction was a change in use within the control of the insured; but, in the absence of proof of an increase of risk, the policy was not forfeited (*Rice v. Tower*, 1 Gray [Mass.] 426).

Where the condition is specific, and is not qualified as to the control of the insured, the fact that the change is made by a tenant of the insured will not relieve him from the forfeiture.

Howell v. Baltimore Equitable Soc., 16 Md. 377; *Hobby v. Dana*, 17 Barb. (N. Y.) 111; *Steinmetz v. Franklin Ins. Co.*, 6 Phila. (Pa.) 21.

The theory of these cases is probably that governing *Allen v. Home Ins. Co.*, 133 Cal. 29, 65 Pac. 138, where it was said that the insured cannot commit his property to the care of another, and thus avoid responsibility. So a policy taken out by a mortgagor may be forfeited by a change in use by the lessee of the mortgagee in possession (*Wetherell v. City Fire Ins. Co.*, 16 Gray [Mass.] 276). But where a policy on mortgaged premises provides that it shall not become void through the act or neglect of the mortgagor, and that the insurer shall be notified of any increase of hazard known to the mortgagee, the stipulation must be construed as providing that the building shall not be used for hazardous purposes with the knowledge of the mortgagee (*Gasner v. Metropolitan Ins. Co.*, 13 Minn. 483 [Gil. 447]).

(1) Same—Temporary change in use and relation to cause of loss.

The principle that a breach of condition does not ipso facto forfeit the policy, but merely affords ground of forfeiture at the option of the insurer, has been applied to a change of use or occupancy (*Hunt v. State Ins. Co.*, 66 Neb. 121, 92 N. W. 921). So, too, it may be regarded as the rule that a mere temporary change in use or occupancy operates to suspend the risk only, and not to forfeit the policy absolutely.

Lounsbury v. Protection Ins. Co., 8 Conn. 459, 21 Am. Dec. 686; *Adair v. Southern Mut. Ins. Co.*, 107 Ga. 297, 33 S. E. 78, 45 L. R. A. 204, 78 Am. St. Rep. 122; *Crete Farmers' Mut. Township Ins. Co. v. Miller*, 70 Ill. App. 590; *United States Fire & Marine Ins. Co. v. Kimberly*, 84 Md. 224, 6 Am. Rep. 325; *Kircher v. Milwaukee Mechanics' Mut. Ins. Co.*, 74 Wis. 470, 43 N. W. 487, 5 L. R. A. 779.

But it is evident that the application of this rule must, in general, depend on the conditions of the policy. Thus, where the policy provides that, if the premises be occupied for certain prohibited uses, the policy shall be void "so long as the same shall be so appropriated, applied, or used," there is merely a suspension of the risk, and, unless the property is improperly used at the time of loss, the right of recovery is not affected.

Such was the condition in *New England Fire & Marine Ins. Co. v. Wetmore*, 32 Ill. 221. Similar conditions were construed in *Lounsbury v. Protection Ins. Co.*, 8 Conn. 459, 21 Am. Dec. 686; *Phoenix Ins. Co. v. Lawrence*, 4 Metc. (Ky.) 9, 81 Am. Dec. 521; *Moore v. Protection Ins. Co.*, 29 Me. 97, 48 Am. Dec. 514.

The contrary view was taken in *Mead v. Northwestern Ins. Co.*, 7 N. Y. 530, where the condition was like that in the *Wetmore* Case; the court holding that the condition against change in use was an absolute promissory warranty. So it has been held, where there was an absolute condition against increase of risk, that a change in use increasing the risk would absolutely avoid, and not merely suspend, the policy, though such use ceased before loss (*Kyte v. Commercial Union Assur. Co.*, 149 Mass. 116, 21 N. E. 361, 3 L. R. A. 508).

It has been held in Pennsylvania that a breach of the condition against change in use operates as an absolute forfeiture, though the use ceased before the fire, only where there is a provision to that effect.

Mutual Fire Ins. Co. v. Coatesville Shoe Factory, 80 Pa. 407; *Manufacturers' & Merchants' Ins. Co. v. Kunkle*, 6 Wkly. Notes Cas. (Pa.) 234.

Where the change in use is directly related to the cause of loss, the policy is forfeited.

Appleby v. Astor Fire Ins. Co., 54 N. Y. 253; *Boatwright v. Aetna Ins. Co.*, 1 Strob. (S. C.) 281.

So it has been held that where the provision against change in use is a promissory warranty, or there is an absolute condition against increase of risk, a breach of such warranty or condition forfeits the policy, whether the cause of loss is related to such change in use or not.

Martin v. Capital Ins. Co., 85 Iowa, 643, 52 N. W. 534; *Howell v. Baltimore Equitable Soc.*, 16 Md. 377; *Mead v. Northwestern Ins.*

Co., 7 N. Y. 530; *Manufacturers' & Merchants' Ins. Co. v. Kunkle*, 6 Wkly. Notes Cas. (Pa.) 234; *Kircher v. Milwaukee Mechanics' Mut. Ins. Co.*, 74 Wis. 470, 43 N. W. 487, 5 L. R. A. 779.

Indeed, it has been held, in *Hoffecker v. New Castle County Mutual Ins. Co.*, 4 Houst. (Del.) 306, that where a policy contains no special condition against change in use or occupancy, but only the stipulation implied by law, it is immaterial whether or not the loss was caused by the change; the question being whether the change caused any increase of risk or not. On the other hand, in the absence of stipulations calling for absolute forfeiture, the better rule seems to be that the change in use must have contributed to the loss, or must, at least, be an existing use at the time of loss.

New England Fire & Marine Ins. Co. v. Wetmore, 32 Ill. 221; *United States Fire & Marine Ins. Co. v. Kimberly*, 34 Md. 224, 6 Am. Rep. 325; *Boardman v. Merrimack Mut. Fire Ins. Co.*, 8 Cush. (Mass.) 583.

(m) Illegal use of property insured.

The general rule that the use of the premises or property insured, after the issuance of the policy, for an illegal purpose, will forfeit the insurance, has been asserted in some cases.

Indiana Ins. Co. v. Brehm, 88 Ind. 578; *Campbell v. Charter Oak Fire & Marine Ins. Co.*, 10 Allen (Mass.) 213; *People's Ins. Co. v. Spencer*, 53 Pa. 353, 91 Am. Dec. 217.²

The rule has, however, been modified in numerous cases by the particular facts or conditions; and while the general truth of the principle may be admitted, in its practical application it must be qualified. Thus it has been held that a mere illegal use will not forfeit the policy, unless accompanied by an increase of risk.

Such is the doctrine of *Ætna Ins. Co. v. Norman*, 12 Ind. App. 652, 40 N. E. 1116; *Martin v. Capital Ins. Co.*, 85 Iowa, 643, 52 N. W. 534; *Erb v. German-American Ins. Co.*, 98 Iowa, 606, 67 N. W. 583, 40 L. R. A. 845; *Petty v. Mutual Fire Ins. Co.*, 82 N. W. 767, 111 Iowa, 358; *Hinckley v. Germania Ins. Co.*, 140 Mass. 38, 1 N. E. 737, 54 Am. Rep. 445; *Kyte v. Commercial Union Assur. Co.*, 149 Mass. 116, 21 N. E. 361, 3 L. R. A. 508; *Moriarty v. United States Fire Ins. Co.*, 19 Tex. Civ. App. 669, 49 S. W. 132.

² Validity of policy on property intended for use for illegal purpose, see ante, vol. 1, p. 546.

The theory of the cases is that mere illegal use cannot as a matter of law be said to increase the risk. That will depend on the nature of the use.

Martin v. Capital Ins. Co., 85 Iowa, 648, 52 N. W. 534; *Erb v. German-American Ins. Co.*, 98 Iowa, 806, 67 N. W. 583, 40 L. R. A. 845.

It has been held, in Massachusetts (*Kelly v. Worcester Mut. Fire Ins. Co.*, 97 Mass. 284) and in Kansas (*Concordia Fire Ins. Co. v. Johnson*, 4 Kan. App. 7, 45 Pac. 722), that an illegal use forfeits the policy, though by a tenant and without the knowledge or consent of the insured; but it is to be remarked that the policies in these cases contained an absolute condition against the use of the premises for an unlawful purpose. So it was held, in *Nebraska & I. Ins. Co. v. Christensen*, 29 Neb. 572, 45 N. W. 924, 26 Am. St. Rep. 407, where there was no special clause prohibiting illegal use, such use by a tenant would not affect the insurance.

It has also been held in Massachusetts that the temporary illegal use of property insured, if un contemplated at the time of taking out the policy, would not of itself, and as a matter of law, render the policy void during the whole of the rest of the time which it was to run. It would simply vitiate the policy during the time of the illegal use, and when such illegal use stopped, the policy would revive (*Hinckley v. Germania Fire Ins. Co.*, 140 Mass. 38, 1 N. E. 737, 54 Am. Rep. 445). This is in accord with the earlier case (*Boardman v. Merrimack Mut. Fire Ins. Co.*, 8 Cush. 583), where it was held that the mere drawing of a lottery in the building on one occasion would not forfeit the policy, when the loss was in no way connected therewith. Nor is the rule of the *Hinckley Case* changed in *Kyte v. Commercial Union Assur. Co.*, 149 Mass. 116, 21 N. E. 361, 3 L. R. A. 508, as in that case there was a special provision against increase of risk, and it was therefore held that an illegal use increasing the risk forfeited the policy, though such use ceased before the loss. So it was held, in *Concordia Fire Ins. Co. v. Johnson*, 4 Kan. App. 7, 45 Pac. 722, that, where there is an express provision against unlawful use, a temporary use of the premises for the unlawful purpose operates as an absolute forfeiture. But in *Nebraska & I. Ins. Co. v. Christensen*, 29 Neb. 572, 45 N. W. 924, 26 Am. St. Rep. 407, where there was no special provision, it was held that the unlawful use must have contributed to the loss. Where the policy provides for some other remedy than forfeiture,

as, for instance, gives the insurer the option of cancellation, absolute forfeiture will not follow unlawful use.

Behler v. German Mut. Fire Ins. Co., 68 Ind. 347; *Hinckley v. Germania Ins. Co.*, 140 Mass. 38, 1 N. E. 737, 54 Am. Rep. 445.

To constitute an illegal use of the premises such a use as will forfeit the policy, it must be something more than a mere incidental use. Such was the doctrine announced in *Boardman v. Merimack Mut. Fire Ins. Co.*, 8 Cush. (Mass.) 583, where the building was on one occasion used for the drawing of a lottery. So it was held, in *Insurance Co. of North America v. Evans*, 64 Kan. 770, 68 Pac. 623, that a merely incidental sale of liquor by a druggist, though unlawful, was not such an illegal use as would forfeit the policy. And even in cases where the policy contained special provisions against unlawful use it has been held that the illegal use must be something permanent or habitual.

Concordia Fire Ins. Co. v. Johnson, 4 Kan. App. 7, 45 Pac. 722; *Kelly v. Worcester Fire Ins. Co.*, 97 Mass. 284.

Where the policy is on whisky stored in what is described as a bonded warehouse, under the exclusive control of a government storekeeper, the fact that such warehouse is part of a building in which illicit distilling is carried on does not afford a ground of forfeiture (*Cochran v. Amazon Ins. Co.*, 7 Ohio Dec. 276, 2 Wkly. Law Bul. 54). The premises are not used for an unlawful purpose, within a condition prohibiting such use, merely because they are occupied as a drug store by one who is not a registered pharmacist (*Erb v. German Ins. Co.*, 68 N. W. 701, 99 Iowa, 398); nor because insured had not paid a sufficient privilege tax (*Sneed v. British America Assur. Co.*, 72 Miss. 51, 17 South. 281).

The ground on which forfeiture was claimed was the illegal sale of liquor in *Ætna Ins. Co. v. Norman*, 12 Ind. App. 652, 40 N. E. 1116, *Martin v. Capital Ins. Co.*, 85 Iowa, 643, 52 N. W. 534, *Erb v. German-American Ins. Co.*, 98 Iowa, 606, 67 N. W. 583, 40 L. R. A. 845, *Kelly v. Worcester Mut. Fire Ins. Co.*, 97 Mass. 284, and *Kyte v. Commercial Union Assur. Co.*, 149 Mass. 116, 21 N. E. 361, 8 L. R. A. 508; use of premises as house of prostitution in *Cedar Rapids Ins. Co. v. Shimp*, 16 Ill. App. 248, *Behler v. German Mut. Fire Ins. Co.*, 68 Ind. 347, *Indiana Ins. Co. v. Brehm*, 88 Ind. 578, and *Nebraska & I. Ins. Co. v. Christensen*, 29 Neb. 572, 45 N. W. 924, 28 Am. St. Rep. 407; use of premises for gambling in *Moriarty v. United States Fire Ins. Co.*, 19 Tex.

Civ. App. 669, 49 S. W. 182; as an unlicensed pool room in *Hinckley v. Germania Ins. Co.*, 140 Mass. 38, 1 N. E. 737, 54 Am. Rep. 445; for illicit distilling in *People's Ins. Co. v. Spencer*, 53 Pa. 353, 91 Am. Dec. 217; and for the keeping of fireworks contrary to the city ordinance in *Jones v. Firemen's Fund Ins. Co.*, 2 Daly (N. Y.) 307.

(a) Operation of mill or factory at night.

In *Bilbrough v. Metropolis Ins. Co.*, 12 N. Y. Super. Ct. 587, a statement by the insured that he would not run his factory nights for more than four months was regarded as an absolute agreement to that effect, so that a resumption of night work after the expiration of that period would forfeit the policy. But, where the insured stated that his factory was "usually" operated certain hours (*North Berwick Co. v. New England Fire & Marine Ins. Co.*, 52 Me. 336), such a statement was regarded as authorizing an inference that at some times the factory would be operated at night; and it was therefore held that the operation of the factory at night from August 1 to October 19 without a permit did not forfeit the policy, so as to prevent a recovery for a loss occurring after a permit had been obtained and paid for.

In the same case it appeared that there was another policy covering merchandise in a storehouse; the policy containing the usual condition against increase of risk. It was held that the removal of the limitation as to night work in the policy on the factory was not such an increase of risk, within the provisions of the first policy, as would cause a forfeiture of such policy.

Where the insured warranted that he would not permit the factory to be worked at night, but his statements were afterwards qualified by a clause as to materiality, the statement as to night work cannot be regarded as a continuing warranty (*Phoenix Assur. Co. v. Munger Improved Cotton Mach. Mfg. Co.*, 92 Tex. 297, 49 S. W. 222).

The present form of policy usually contains a condition declaring the policy, if on a mill or factory, void if the establishment is operated extra time or at night without special permission. A breach of such condition will, of course, forfeit the policy.

Van Tuyl v. Westchester Fire Ins. Co., 55 N. Y. 657; *Alsbaugh v. British American Ins. Co.*, 121 N. C. 290, 28 S. E. 415. A flour mill is a "manufacturing establishment," within the clause. *Carlin v. Western Assur. Co.*, 57 Md. 515, 40 Am. Rep. 440.

But such will not be the result where the mill was operated under a permit from the agent, and the loss did not occur until several months after the night work had ceased (*Strause v. Palatine Ins. Co.*, 128 N. C. 64, 38 S. E. 256). If, however, the mill is operated during the prohibited hours after the permit has expired, it is as much a violation of the condition as if no permit had ever been obtained (*Reardon v. Faneuil Hall Ins. Co.*, 135 Mass. 121). Under a provision that the policy shall be void if the mill is run extra hours, but fixing no hours within which the mill may run, it cannot be declared void merely because it appears that sometimes the mill was run nights (*German-American Ins. Co. v. Steiger*, 109 Ill. 254).

(c) Suspension of business carried on within the building.

The policy usually provides that it shall be void if, the subject of the insurance being a manufactory, the factory shall cease to be operated without the consent of the insurer. In some policies the clause is qualified by a provision fixing a certain number of days during which the operations of the factory may be suspended without consent. Such conditions are valid (*Dover Glass Works Co. v. American Fire Ins. Co.*, 1 Marv. [Del.] 32, 29 Atl. 1039, 65 Am. St. Rep. 264), and a breach thereof will, in general, forfeit the policy.

Stone v. Howard Ins. Co., 153 Mass. 475, 27 N. E. 6, 11 L. R. A. 771;
Cronin v. Fire Ass'n of Philadelphia, 123 Mich. 277, 82 N. W. 45;
Id., 127 Mich. 812, 86 N. W. 1028; *Sechrist v. Codorus & Manheim Mut. Protection Co.*, 7 Pa. Super. Ct. 246.

Where the insurer attaches a rider to a policy, permitting the sawmill insured thereby to remain idle during the winter season, it will be presumed, in the absence of evidence to the contrary, that the local meaning of the term "winter season" was contemplated (*Barker v. Citizens' Mut. Fire Ins. Co.* [Mich.] 99 N. W. 866); that is to say, the period between the closing down of the mill in the fall and the arrival of logs in the spring.

Where the policy declared that, unless otherwise provided by agreement indorsed thereon, it would be void if the factory ceased to be operated for more than 10 consecutive days, and operation ceased April 20, but permit was granted allowing suspension of work until July 20 (*El Paso Reduction Co. v. Hartford Ins. Co.* [C. C.] 121 Fed. 937), the effect was not to give permission for a

further period of ten days after the expiration of the period specified in the indorsement, but simply to extend the time of permitted idleness from ten days to the expiration of the designated period.

While suspension of operation will not forfeit the policy under the general condition as to increase of risk, unless there is an actual increase (*Allemania Ins. Co. v. White* [Pa.] 11 Atl. 96), under the special clause, it is immaterial whether there is an increase of risk (*Dover Glass Works Co. v. American Fire Ins. Co.*, 1 Marv. [Del.] 32, 29 Atl. 1039, 65 Am. St. Rep. 264). Neither does it affect the result that the factory was in operation at the time of loss, if forfeiture had already occurred (*Cronin v. Fire Ass'n of Philadelphia*, 82 N. W. 45, 123 Mich. 277). But if the factory is operated only in a partial way at the time the policy is issued (*Lebanon Mut. Ins. Co. v. Erb*, 112 Pa. 149, 4 Atl. 8), or if the company or its authorized agent has at the time of the execution of the policy notice of the fact that the factory is not in operation, and will in all probability not be operated for some time to come, but with such notice issues the policy and collects the premium (*Thackery Mining & Smelting Co. v. American Fire Ins. Co.*, 62 Mo. App. 293), the insurer will not be allowed to defeat the policy on account of the violation of such provision. So, where continuous operation is neither customary nor practicable, forfeiture will not necessarily follow a suspension of operation (*Morotock Ins. Co. v. Pankey*, 91 Va. 259, 21 S. E. 487), though the contrary doctrine was adopted in Massachusetts (*Stone v. Howard Ins. Co.*, 153 Mass. 475, 27 N. E. 6, 11 L. R. A. 771). A description of the factory as "occupied" does not imply that it is in operation, contrary to the known fact, so as to bring the condition into effect (*Louck v. Orient Ins. Co.*, 176 Pa. 638, 35 Atl. 247, 33 L. R. A. 712).

It has been held in New York (*Halpin v. Insurance Co. of North America*, 120 N. Y. 73, 23 N. E. 989, 8 L. R. A. 79) that, where the policy covered mill machinery apart from the building, the property insured was not a mill or factory as those words are commonly understood, and consequently that the condition did not apply. Similarly in Nebraska (*Phenix Ins. Co. of Brooklyn v. Holcombe*, 57 Neb. 622, 78 N. W. 300, 73 Am. St. Rep. 532) it was held that an insurance of personal property consisting of merchandise and machinery used in manufacture is not an insurance of a manufacturing establishment, within a clause in the policy providing that,

if the insured property be a manufacturing establishment, its non-operation would avoid the policy. A different view was taken in Massachusetts (*Stone v. Howard Ins. Co.*, 153 Mass. 475, 27 N. E. 6, 11 L. R. A. 771), where separate policies were written covering the building, the machinery, and the stock of manufactured goods. It was held that, though the clause as to nonoperation would not affect the policy on stock, it would be effective in the policy on machinery.

(p) Same—Extent and cause of suspension of business.

Where a policy on a manufacturing establishment is renewed at the request of the assignee for benefit of the assured's creditors, many days after the operation of the machinery ceased, but while the premises are occupied by the foreman, who is engaged in putting together and selling engines and other articles belonging to the assigned estate, and a loss occurs during such condition of affairs, the establishment has not ceased to be operated within the meaning of the policy (*Bole v. New Hampshire Fire Ins. Co.*, 159 Pa. 53, 28 Atl. 205).

There is no substantial error in a statement that the premises, elsewhere described as a building used for making and drying paper, were constantly worked, though the process of drying, which required attendance, was the only work carried on at night, and no work was done on Sunday (*Prieger v. Exchange Mut. Ins. Co.*, 6 Wis. 89).

But the mere presence of a watchman on the premises will not save the forfeiture (*Dover Glass Works Co. v. American Fire Ins. Co.*, 1 Marv. [Del.] 32, 29 Atl. 1039, 65 Am. St. Rep. 264). And where the provision is that, if the mill is shut down, notice must be given and consent obtained (*McKenzie v. Scottish Union & National Ins. Co.*, 112 Cal. 548, 44 Pac. 922), a sawmill which has stopped running for the winter is "shut down," though men are employed about the premises shipping lumber therefrom, and the machinery has not been dismantled and put in shape for the winter. The mere fact that some work is being done on the premises will not save the forfeiture (*Brehm Lumber Co. v. Svea Ins. Co.* [Wash.] 79 Pac. 34).

It is a well-settled rule that where the suspension is merely temporary, and is caused by the actual necessities and exigencies of the business, such as necessity of making repairs, want of mate-

rial, or failure of motive power, it is not to be regarded as a cessation of operation within the meaning of the policy.

The rule has been asserted in the following cases, the cause of suspension being stated: *Ehlers v. Aurora Fire Ins. Co.*, 19 Pa. Ct. R. 165, 6 Pa. Dist. R. 441, severity of climate and breaking of machinery; *City Planing & Shingle Mill Co. v. Merchants', Manufacturers' & Citizens' Mut. Fire Ins. Co.*, 72 Mich. 654, 40 N. W. 777, 18 Am. St. Rep. 552, and *Lebanon Mut. Ins. Co. v. Leathers (Pa.)* 8 Atl. 424, lack of raw material; *Rosencrans v. North American Ins. Co.*, 68 Mo. App. 352, high water; *Poss v. Western Assur. Co.*, 7 Lea (Tenn.) 704, 40 Am. Rep. 68, prevalence of yellow fever; *Ladd v. Aetna Ins. Co.*, 147 N. Y. 478, 42 N. E. 197, affirming 70 Hun, 490, 24 N. Y. Supp. 384, illness of head sawyer; *American Fire Ins. Co. v. Brighton Cotton Mfg. Co.*, 125 Ill. 131, 17 N. E. 771, affirming 24 Ill. App. 149, and *Whitney v. Black River Ins. Co.*, 72 N. Y. 117, 28 Am. Rep. 116, affirming 9 Hun, 37, necessity for repairs; *Brighton Mfg. Co. v. Reading Fire Ins. Co. (C. C.)* 33 Fed. 232, *Same v. Fire Ass'n of Philadelphia*, Id. 234, *Same v. Reliance Ins. Co.*, Id. 235, and *Same v. Fire Ins. Co. of Pennsylvania*, Id. 236, necessity for repairs and high price of raw material.

When, however, the condition is that the policy shall be void if the factory ceases to be operated from any cause whatever (*Day v. Mill Owners' Mut. Fire Ins. Co.*, 70 Iowa, 710, 29 N. W. 443), the fact that the stoppage was to make needed repairs will not excuse a forfeiture.

(g) Questions of practice.

The defense of change in condition or use is an affirmative one, and must be pleaded to be available (*City of New York v. Brooklyn Fire Ins. Co.*, 3 Abb. Dec. [N. Y.] 251, *43 N. Y. 465). It must appear, too, that the change was after the issuance of the policy.

Kentucky & Louisville Mut. Ins. Co. v. Southard, 8 B. Mon. (Ky.) 634; *Oriental Ins. Co. v. Drake*, 10 Ky. Law Rep. 445.

Where the policy provided for forfeiture if the property, which was a manufacturing establishment, ceased to be operated for more than ten days, an answer which did not allege that the insured property was a manufacturing establishment failed to plead a forfeiture because of its idleness (*Queen Ins. Co. v. Excelsior Milling Co.* [Kan. Sup.] 76 Pac. 423). A plea that the building insured was used for other purposes, which increased the risk, without specifying the purposes, is demurrable (*Hoffecker v. New Castle County Mut. Ins.*

Co., 5 Houst. [Del.] 101). And that there was an increase of risk must also be alleged (*Ætna Ins. Co. v. Norman*, 12 Ind. App. 652, 40 N. E. 1116). But it is not sufficient to state merely that the risk was increased, without stating the means by which it was done.

Behler v. German Mut. Fire Ins. Co., 68 Ind. 347; *Germania Ins. Co. v. Stewart*, 18 Ind. App. 627, 42 N. E. 236.

Where, in an action on a fire policy on a building "while occupied as a dwelling house," the complaint fails to allege that the building was so occupied at the time the fire occurred, the complaint does not state a cause of action, since there could be no recovery unless such fact was proved, and the facts necessary to be proved must be alleged (*Allen v. Home Ins. Co.*, 65 Pac. 138, 133 Cal. 29). In *Peirce v. Cohasset Ins. Co.*, 123 Mass. 572, where the answer alleged that plaintiff had warranted that the building was and should be occupied as a dwelling house, and that, disregarding this, he used and occupied the building, at the time he procured the policy and afterwards, as a boarding house and hotel, but did not allege change in the occupation, the court deemed evidence of a change in occupation subsequent to the policy a different defense from that set up in the answer, and one which, if relied on, should have been pleaded.

The burden is, of course, on the insurer to show a breach of a warranty or condition as to the use of the building.

Catlin v. Springfield Fire Ins. Co., 5 Fed. Cas. 310; *Catlin v. Traders' Ins. Co.*, 83 Ill. App. 40.

Where the defense is an increase of risk by change in use, the books of the insurer are not admissible to show that insured had, at various times, paid an additional premium for permission to so use the building (*Fire Association v. Gilmer*, 3 Walk. [Pa.] 234). And where a book was produced and identified by witness as the rules of the "Iowa Board of Underwriters," showing rates of premiums for Iowa, and he testified that the "Board of Underwriters" was an organization of insurance men, representing the various companies authorized to do business in Iowa, it was held that the preliminary proofs were not sufficient to entitle the defendant to introduce the parts of the book showing the classification of risks similar to the one in controversy (*Russell v. Cedar Rapids Ins. Co.*, 78 Iowa, 216, 42 N. W. 654, 4 L. R. A. 538). In *Martin v. Capital Ins. Co.*, 85 Iowa, 643, 52 N. W. 534, a witness was allowed to tes-

tify as to the classification of risks contained in such a book. All facts, and even opinions, bearing on the question, are competent (*German-American Ins. Co. v. Steiger*, 109 Ill. 254); but, where the question involves only common knowledge, expert testimony is not admissible (*Hahn v. Guardian Assurance Co.*, 23 Or. 576, 32 Pac. 683, 37 Am. St. Rep. 709). Evidence on this point should be in response to hypothetical questions.

Southern Mutual Ins. Co. v. Hudson, 113 Ga. 484, 88 S. E. 964; *Carroll v. Home Ins. Co.*, 64 N. Y. Supp. 522, 51 App. Div. 149.

While it would be competent, to show an increase of risk by changed use, to prove a general custom to refuse to insure such a risk, the practice of a single company cannot be shown (*Catlin v. Traders' Ins. Co.*, 83 Ill. App. 40).

Evidence as to the character of persons frequenting the house is not admissible. *Russell v. St. Nicholas Fire Ins. Co.*, 51 N. Y. 643; *Russell v. Metropolitan Ins. Co.*, 51 N. Y. 650. An answer filed in another action by one not a party to the action on trial, and not verified by such a party, or one shown to be acting in the matter as the agent of, or answering on information furnished by, such party, is not admissible to prove a change in use. *London & L. Fire Ins. Co. v. Schwulst* (Tex. Civ. App.) 48 S. W. 89. Where the issue is as to suspension of a factory, it is proper to prove the fact of the temporary suspension of other mills for the same reason, as showing that such stoppages were incident to that locality. *City Planing & Shingle Mill Co. v. Merchants', Manufacturers' & Citizens' Mut. Fire Ins. Co.*, 72 Mich. 654, 40 N. W. 777, 16 Am. St. Rep. 552.

The sufficiency of the evidence was considered in *Niagara Fire Ins. Co. v. Johnson*, 4 Kan. App. 16, 45 Pac. 789; *Cronin v. Fire Ass'n of Philadelphia*, 127 Mich. 612, 86 N. W. 1028; *Nichols v. Iowa Merchants' Mut. Ins. Co.* (Iowa) 101 N. W. 115.

Whether there has been an increase of risk by a change in use of the insured premises is a question for the jury.

Phoenix Assur. Co. v. Franklin Brass Co., 58 Fed. 166, 7 C. C. A. 144, 8 U. S. App. 451; *Adair v. Southern Mutual Ins. Co.*, 107 Ga. 297, 33 S. E. 78, 45 L. R. A. 204, 73 Am. St. Rep. 122; *Hartford Fire Insurance Co. v. Walsh*, 54 Ill. 164, 5 Am. Rep. 115; *German Ins. Co. v. Steiger*, 109 Ill. 254; *North British & Mercantile Ins. Co. v. Steiger*, 124 Ill. 81, 16 N. E. 95, affirming 26 Ill. App. 228; *Germania Fire Ins. Co. v. Deckard*, 3 Ind. App. 861, 23 N. E. 868; *Anthony v. German-American Ins. Co. of New York*, 48 Mo. App. 65; *Schenck v. Mercer County Mut. Fire Ins. Co.*, 24 N. J. Law, 447; *Smith v. Mechanics' & Traders' Fire Ins.*

Co., 32 N. Y. 899; *Eager v. Fireman's Fund Ins. Co.*, 71 Hun, 352, 25 N. Y. Supp. 85, affirmed in 148 N. Y. 728, 42 N. E. 722; *Driscoll v. German Amer. Ins. Co.*, 74 Hun, 153, 28 N. Y. Supp. 646; *Kircher v. Milwaukee Mechanics' Mut. Ins. Co.*, 74 Wis. 470, 43 N. W. 487, 5 L. R. A. 779; *Western Assur. Co. v. Ray*, 105 Ky. 523, 49 S. W. 323.

11. VACANCY OF PREMISES AS GROUND OF FORFEITURE.

- (a) In general.
- (b) Construction of condition.
- (c) Notice of vacancy and consent thereto in general.
- (d) What constitutes breach of condition in general.
- (e) What constitutes vacancy or nonoccupancy—General principles.
- (f) Same—Dwellings.
- (g) Same—Buildings other than dwellings.
- (h) Temporary absence of occupant.
- (i) Temporary vacancy incident to change of tenants.
- (j) Vacancy pending preparation for occupancy or repair of the building.
- (k) Effect of breach of condition.
- (l) Same—As dependent on increase of risk.
- (m) Same—As dependent on knowledge and good faith of insured.
- (n) Questions of practice.
- (o) Same—Evidence.
- (p) Same—Questions for jury.

(a) In general.

The experience of insurers is that vacant buildings, being deprived of the care usually bestowed by the occupant, are in greater danger of fire, other things being equal, than occupied buildings. For this reason they usually charge additional premiums for the insurance of vacant buildings, and attempt to provide in the policy on an occupied building for the termination of the insurance if the building becomes vacant. In some instances they have attempted to secure this result, by the contention that the description of the building as occupied in a certain way is a continuing warranty that it shall remain occupied. Though it was held, in *Poor v. Humboldt Ins. Co.*, 125 Mass. 274, 28 Am. Rep. 228, that a stipulation that a family should live in the house insured throughout the year was an express warranty, and without its literal and exact fulfillment the policy would cease to be binding on the company, the general rule is that a mere description of the property as occupied

in a certain manner is not a warranty that it shall continue to be so occupied.

Liverpool, London & Globe Ins. Co. v. McGuire, 52 Miss. 227; Schultz v. Merchants' Ins. Co., 37 Mo. 331; O'Niel v. Buffalo Fire Ins. Co., 8 N. Y. 122; Merchants' Ins. Co. v. Frick, 2 Am. Law Rec. 336, 5 Ohio Dec. 47.

This contention has been made, even where the policy contained a special clause against vacancy; but the rule has been applied to such cases on the theory that, if the description was a warranty, the vacancy clause would have been unnecessary.

Burlington Ins. Co. v. Brockway, 138 Ill. 644, 28 N. E. 799, affirming 89 Ill. App. 43; Imperial Fire Ins. Co. v. Kiernan, 88 Ky. 468, affirming 7 Ky. Law Rep. 542.

So, where the policy was indorsed with a permit for vacancy for 30 days (Pabst Brewing Company v. Union Insurance Company, 63 Mo. App. 663), a mere description cannot be regarded as a continuing warranty. And where the statement is that the building is "to be occupied" in a certain way this can be regarded only as a statement of expectation or intention, and not as an absolute promissory warranty.

Royal Ins. Co. v. Lubelsky, 86 Ala. 530, 5 South. 768; Kimball v. Aetna Ins. Co., 9 Allen (Mass.) 540, 85 Am. Dec. 786.

In German Ins. Co. v. Penrod, 35 Neb. 273, 53 N. W. 74, the application for insurance described the building as in process of erection and intended for the use of tenants. The policy, however, stated that it was so occupied. The building was burned before it was completed. It was held that there was not, in view of the statement in the application, a warranty that the building was occupied; consequently, vacancy was not a defense.

On the other hand, it has been held (Aiple v. Boston Ins. Co. [Minn.] 100 N. W. 8), that the term "occupied as a dwelling" will be construed to be one of warranty, in the absence of knowledge by the insurer that the building was vacant.

Generally the policy contains a condition that it shall be void if the premises insured become vacant and so remain for more than a specified number of days. There are many forms of the condition, but the result intended to be secured is the same in all of them. Such conditions are conditions subsequent (Home Insurance Com-

pany v. Boyd, 19 Ind. App. 173, 49 N. E. 285), though in some cases they have been regarded as stipulations in the nature of express promissory warranties.

North American Fire Ins. Co. v. Zaenger, 63 Ill. 464; Evans v. Queen Ins. Co., 5 Ind. App. 198, 31 N. E. 843; Couch v. Farmers' Fire Ins. Co., 72 N. Y. Supp. 95, 64 App. Div. 367.

The condition may take the form of an exception of risk, as in Snyder v. Fireman's Fund Ins. Co., 78 Iowa, 146, 42 N. W. 630, where the provision was that "no liability shall exist under this policy for loss on any vacant or unoccupied building, unless consent for such vacancy" is indorsed thereon.

A clause requiring notice of "change as to tenants or occupancy" cannot be construed as a condition against vacancy. Somerset County Mut. Fire Ins. Co. v. Usaw, 112 Pa. 80, 4 Atl. 355, 56 Am. Rep. 307; McAnnally v. Somerset Co. Mut. Ins. Co., 2 Pittsb. R. (Pa.) 189.

The validity of the condition against vacancy has been upheld in several cases where the question has been raised.

Baldwin v. German Ins. Co., 105 Iowa, 379, 75 N. W. 326; Piscataqua Savings Bank v. Traders' Ins. Co., 8 Kan. App. 241, 55 Pac. 496; Halpin v. Aetna Fire Ins. Co., 10 N. Y. St. Rep. 344.

But the insurer cannot rely upon a vacancy clause, printed in type smaller than long primer, and not written with pen and ink, in view of the provisions of Code Va. § 3252 [Va. Code 1904, p. 1712], declaring that a failure to perform any condition of a policy issued after the statute takes effect shall not be a valid defense, unless such condition is printed in type as large or larger than long primer, or written with pen and ink (Dupuy v. Delaware Ins. Co. [C. C.] 63 Fed. 680).

Reference to the size of the type in which the condition is printed is also made in Meyer v. Queen Ins. Co., 41 La. Ann. 1000, 6 South. 899.¹

A provision that the policy should be void if at the time of the fire the premises should be occupied, in whole or in part, for any purposes classified as more hazardous, in the annexed printed conditions, than that described in the application, unless permission be

¹ See, also, ante, vol. 1, p. 531.

given, did not have the force to incorporate within the policy a provision on the back thereof requiring notice if the building became vacant or tenantless for 30 days, in view of the provisions of St. 1864, c. 196, requiring that the conditions of the insurance shall be stated in the body of the policy (*Mullaney v. National Fire & Marine Ins. Co.*, 118 Mass. 393).

In *Miller v. Hillsboro Mut. Fire Ass'n*, 44 N. J. Eq. 224, 14 Atl. 278,² the policy recited that the insurer should be liable in accordance with the terms of the by-laws and conditions of the policy. Several by-laws were annexed to the policy as conditions of the insurance, but one—a by-law declaring that a vacancy of more than 30 days would render void a policy on a dwelling—was not annexed to the policy. It was held that such by-law could not affect the insured's rights under the policy.

A mutual company cannot by a subsequent by-law incorporate a condition against vacancy into the policy (*Becker v. Farmers' Mut. Ins. Co.*, 48 Mich. 610, 12 N. W. 874).

(b) Construction of condition.

In the construction of the condition, especially when the meaning of the words "vacant" and "unoccupied" is involved, the nature of the premises insured must, of course, be taken into consideration (*Fritz v. Home Ins. Co.*, 78 Mich. 565, 44 N. W. 139). Where a policy insuring a building "occupied as a dwelling house" provided that it should be void "if the premises described" should be unoccupied for more than 10 days, the "premises" referred to were not the various buildings on the tract of land on which the insured dwelling house was located, but the dwelling house itself (*Thomas v. Hartford Fire Ins. Co.*, 53 S. W. 297, 21 Ky. Law Rep. 914; *Id.*, 56 S. W. 264, 21 Ky. Law Rep. 1139). So, where the dwelling on a farm was unoccupied, the insured cannot excuse a forfeiture by showing that the land, which was particularly described in the policy, was occupied (*Sexton v. Hawkeye Ins. Co.*, 69 Iowa, 99, 28 N. W. 462). A scow, if so used, may be regarded as a "building," within a condition against vacancy of the building insured (*Enos v. Sun Insurance Company*, 67 Cal. 621, 8 Pac. 379). The condition may be applied in an insurance against fire on a vessel (*Reid v. Lancaster Fire Ins. Co.*, 90 N. Y. 382).

² Reversing 42 N. J. Eq. 459, 7 Atl. 895, and (N. J. Ch.) 10 Atl. 106.

When the insurance is on personalty in a certain building, the mention of the building being merely descriptive, the vacancy clause does not apply, so as to forfeit the policy because the building is vacant (*Carr v. Roger Williams Ins. Co.*, 60 N. H. 513). Especially will this rule prevail where the condition is that if the premises insured become vacant the policy shall be void (*Halpin v. Insurance Co. of North America*, 120 N. Y. 73, 23 N. E. 989, 8 L. R. A. 79). But if the personalty is described as contained in a certain building, and the policy provides that it shall be void if "the above-mentioned premises become vacant," the condition is operative (*Halpin v. Ætna Fire Ins. Co.*, 120 N. Y. 70, 23 N. E. 988). The same result will follow when the personalty is insured while contained in a building "occupied and to be occupied as a dwelling house" (*Huber v. Manchester Fire Asur. Co.*, 92 Hun, 223, 36 N. Y. Supp. 873).

The condition may be applicable where the policy insures against loss or damage by windstorm (*Sexton v. Hawkeye Ins. Co.*, 69 Iowa, 99, 28 N. W. 462), as an occupant may, by the exercise of proper precautions, secure to the building increased stability and capacity to resist the effects of the wind.

The question has sometimes been raised whether there can be a breach of the condition where the building was vacant at the inception of the risk. Though it has been held (*Keith v. Quincy, Mut. Fire Ins. Co.*, 10 Allen [Mass.] 228) that the condition refers only to the future, in both Kentucky and Wisconsin it has been said that a condition that the policy shall be void if the premises become vacant and so remain will be operative, though the vacancy exists at the time the policy is issued.

Thomas v. Hartford Fire Ins. Co., 21 Ky. Law Rep. 914, 53 S. W. 297; *Id.*, 56 S. W. 264, 21 Ky. Law Rep. 1139; *England v. Westchester Fire Ins. Co.*, 81 Wis. 583, 51 N. W. 954, 29 Am. St. Rep. 917.

Apparently the determining factor in these cases is the phrase "and so remain." So a similar condition has been held to apply, where the vacancy exists at the time of renewal (*Hotchkiss v. Home Ins. Co.*, 58 Wis. 297, 17 N. W. 138). On the other hand, the contrary view has been taken in Illinois, Michigan, and Missouri.

Germania Fire Ins. Co. v. Klewer, 129 Ill. 599, 22 N. E. 489, affirming 27 Ill. App. 590; *Aurora Fire & Marine Ins. Co. v. Kranich*, 36 Mich. 294; *Hackett v. Philadelphia Underwriters*, 79 Mo. App. 16.

It was also said in the *Kranich* Case that the fact that, intermediate between the date of the policy and the date of the loss, the vacant premises became occupied and subsequently vacant again, would not cause the condition to attach and become operative. The same rule was asserted in *Bennett v. Agricultural Ins. Co.*, 106 N. Y. 243, 12 N. E. 609; but the contrary rule was announced in *Indiana* (*Evans v. Queen Ins. Co.*, 5 Ind. App. 198, 31 N. E. 843) and *Alabama* (*Royal Ins. Co. v. Lubelsky*, 86 Ala. 530, 5 South. 768).

It was held in *Snyder v. Fireman's Fund Ins. Co.*, 78 Iowa, 146, 42 N. W. 630, that a clause, in the nature of an exception of risk, declaring that "no liability shall exist under this policy for loss on any vacant and unoccupied building, unless consent for such vacancy or unoccupancy be thereon indorsed," is not limited to vacancy at the date of the policy, but refers to buildings becoming vacant or unoccupied after the policy is issued.

Where the policy provides that "if the premises hereby insured shall become vacant or unoccupied, or, if the property insured be a mill or manufactory, shall cease to be operated, and so remain for a period of more than fifteen days," the limitation as to time refers to the vacancy clause, as well as the cessation of operation (*Miaghan v. Hartford Fire Ins. Co.*, 24 Hun [N. Y.] 58).

(c) Notice of vacancy and consent thereto in general.

Where a policy declares that it shall be void if the buildings become vacant without notice to and consent by the insurer, the fact that a rule of the company permits vacancy for a period not to exceed 30 days at one time does not render it the less necessary to give notice and obtain consent for a vacancy for such a period.

Rogers v. Phenix Ins. Co., 121 Ind. 570, 23 N. E. 498; *Phenix Ins. Co. v. Rogers*, 11 Ind. App. 72, 38 N. E. 865.

Where a policy requires notice to be given if the insured premises become vacant, such notice must be given within a reasonable time.

Moriarty v. Home Ins. Co., 53 Minn. 549, 55 N. W. 740; *Alston v. Old North State Ins. Co.*, 80 N. O. 326; *State v. Tuttgerding*, 8 Ohio Dec. 74; *Strunk v. Firemen's Ins. Co.*, 160 Pa. 345, 28 Atl. 779, 40 Am. St. Rep. 721.

And, as said in the *Alston* Case, a delay of six weeks in giving such notice is inexcusable. If proper notice is given, the policy

will remain in force until the insurer takes action thereon to terminate the insurance.

Wakefield v. Orient Ins. Co., 50 Wis. 532, 7 N. W. 647; Strunk v. Firemen's Ins. Co., 160 Pa. 345, 28 Atl. 779, 40 Am. St. Rep. 721.

Therefore, as said in the Wakefield Case, it is not necessary that there should be indorsed on the policy a specific consent to the vacancy.

The condition calling for notice in case of vacancy does not require such notice to be given where there is a vacancy of only a portion of the premises, unless so stipulated (Bryan v. Peabody Ins. Co., 8 W. Va. 605). Verbal notice will fulfill the requirement (McAnnally v. Somerset County Mut. Ins. Co., 2 Pittsb. R. [Pa.] 189); but notice to one who has been the agent of the company, but is not such at the time of the vacancy, is not sufficient (Strunk v. Firemen's Ins. Co., 160 Pa. 345, 28 Atl. 779, 40 Am. St. Rep. 721).

Where an insured makes application to the insurer for a consent that the premises, a dwelling house, may be unoccupied during the "farming season," and the insurer in response thereto gave consent to nonoccupancy during the summer, such consent is to be deemed to apply to each succeeding summer during the life of the policy (Vanderhoef v. Agricultural Ins. Co., 46 Hun [N. Y.] 328). And if the insured delivers the policy to the agent for the purpose of having a vacancy permit attached, as agreed, the permit becomes operative from the time of such delivery, irrespective of the time when it was in fact attached (Sullivan v. Germania Fire Ins. Co., 89 Mo. App. 106). A permit may, indeed, be retroactive in its effect (Wheeler v. Watertown Fire Ins. Co., 131 Mass. 1); and it was held, in Steen v. Niagara Fire Ins. Co., 89 N. Y. 315, 42 Am. Rep. 297, where the property became vacant after the issuance of the policy, that an indorsement to the effect that "the dwelling house being unoccupied for a short time, but being in charge of a trusted person living near by, shall be no prejudice to this policy," operated not only to excuse the vacancy that had occurred, but any that might occur in the future.

The permit, whether express or implied from the notice, must be strictly complied with. Thus, where the notice was that insured was going away, but would not take his household goods, the policy was forfeited if he did in fact take substantially all of them (Hill v. Equitable Mutual Fire Ins. Co., 58 N. H. 82). And where the permit is conditioned, "All openings to be kept securely closed,"

the condition must be complied with to render the permit operative (*Eakin v. Home Ins. Co.*, 1 White & W. Civ. Cas. Ct. App. [Tex.] § 370). So a permit for vacancy for a certain number of days will be limited in its operation to the number of days specified.

Ranspach v. Teutonia Fire Ins. Co., 109 Mich. 699, 87 N. W. 967;
Maness v. Sun Ins. Co. (Tex. Civ. App.) 32 S. W. 328.

Nor will the permit be extended by a mere oral agreement to extend, if desired, where no request for an extension was ever made (*Burner's Adm'r v. German-American Ins. Co.*, 103 Ky. 370, 45 S. W. 109). But where the building, when insured, was not complete or fit for occupancy, and the agent agreed to extend the vacancy permit every 30 days until the work on the building was complete or he was notified otherwise, his neglect to indorse the extension would not, under the policy, be forfeitable (*Dupuy v. Delaware Ins. Co.* [C. C.] 63 Fed. 680).

A mere indorsement that "It is understood that the buildings are now occupied for dwelling and farm purposes" is not a permit that the dwelling may be occupied only at intervals as the work on the farm demanded (*Fitzgerald v. Connecticut Fire Ins. Co.*, 64 Wis. 463, 25 N. W. 785).

(d) What constitutes breach of condition in general.

When the condition is a general one, declaring the policy void if the property becomes vacant, vacancy of the premises is, of course, a breach; but this result will be qualified to just the extent to which the condition is qualified. So a failure to comply with the terms of a permit or with the terms of the notice (*Hill v. Equitable Fire Ins. Co.*, 58 N. H. 82) is a breach. But, if a building is described as occupied as a store and dwelling, ceasing to occupy it as a dwelling is not a breach of the vacancy clause, if the building is still occupied as a store (*Burlington Ins. Co. v. Brockway*, 138 Ill. 644, 28 N. E. 799, affirming 39 Ill. App. 43).

Where the premises were vacant at the date of issuance of the policy, and the issue was whether the vacancy continued more than 30 days, so as to come within the prohibition in the policy, it appeared that the application was filed, and some days thereafter, on receiving notice that the policy was ready, insured called for it and paid the premium. It was held that, as the policy took effect on payment of the premium, in the absence of agreement otherwise, the time between the application and payment of the premium cannot be considered in determining whether the premises were vacant

for 30 days (*Wainer v. Milford Mut. Fire Ins. Co.*, 153 Mass. 335, 26 N. E. 877, 11 L. R. A. 598). Where the insured property was vacated on the evening of January 1st, and was burned on the evening of January 10th, it was not vacant for "more than ten days," under a policy providing that such vacancy should void it (*Phoenix Ins. Co. v. Burton* [Tex. Civ. App.] 39 S. W. 319).³

Some interesting questions have arisen as to what will constitute a breach, where the condition declares the policy shall be void if the premises become "vacant and unoccupied." It has been held that, as the copulative conjunction was used, in order to constitute a breach it must appear that the house was not only unoccupied, but vacant (*Herrman v. Merchants' Ins. Co.*, 81 N. Y. 184, 37 Am. Rep. 488, affirming 44 N. Y. Super. Ct. 444). The theory of this case was that, as the house was furnished and in charge of a neighbor, it could not be said to be vacant, though it was unoccupied. On the other hand, another policy on the same property provided that it should be void if the building became "vacant or unoccupied." As the alternative conjunction was used, the court held (*Herrman v. Adriatic Fire Ins. Co.*, 85 N. Y. 162, 39 Am. Rep. 644) that it was not necessary that the building should be both vacant and unoccupied, but it was sufficient to constitute a breach that it was not occupied as a dwelling, though it was not vacant. So, in *Barry v. Prescott Ins. Co.*, 35 Hun (N. Y.) 601, where the condition was "vacant or unoccupied," it was held that there was a breach if the house was not occupied as a dwelling, though it was not actually vacant.

Aside from the question of the entirety or divisibility of the contract of insurance, where the policy covers two or more buildings, or a building and personal property,⁴ the question has been raised in some cases whether, if the "premises" include two or more buildings, there can be a breach of the condition against vacancy unless the whole of the premises is vacant. In *Bryan v. Peabody Ins. Co.*, 8 W. Va. 605, the general principle was asserted that there is no violation of the condition requiring notice by a failure to give notice of the vacancy of a portion of the premises. Similarly, in *Worley v. State Ins. Co.*, 91 Iowa, 150, 59 N. W. 16, 51 Am. St. Rep. 334, where the policy covered a house and barn, it was said that a

³ Computation of time in general, see Cent. Dig. vol. 45, cols. 2989-3070, "Time."

⁴ See post, p. 1894.

vacancy of "the premises" occurred only when both buildings were vacant. And a building containing several tenements is not unoccupied as long as some of the tenements are in actual use and occupation as places of habitation (*Harrington v. Fitchburg Mut. Fire Ins. Co.*, 124 Mass. 126). In a recent case (*Central Montana Mines Co. v. Fireman's Fund Ins. Co.* [Minn.] 99 N. W. 1120, rehearing denied 100 N. W. 3), the policy was on mining property, consisting of a quartz mill, bunk house, assay house, and other offices necessary and constituting a part of the entire system, and contained a clause that the policy should be void if "the building herein described, whether intended for occupancy by the owner or tenant, be or become vacant or unoccupied, and so remain for ten days." It was held that, as the policy described the property as part of an entire system, a vacancy of one of the buildings was not such a vacancy of the property as would avoid the policy.

On the other hand, where the policy covered a farmhouse and adjoining buildings (*Hartshorne v. Agricultural Ins. Co.*, 50 N. J. Law, 427, 14 Atl. 615), it was said that there was a compliance with the condition only if each of the buildings was occupied. Bearing in mind the general rule that, in determining whether a building is vacant, regard must be had to the use for which the building is intended, it may be said that **the question whether the premises are vacant depends on whether the more important portion thereof is vacant.** Thus, if a dwelling and outbuildings are insured, non-occupancy of the dwelling is sufficient to constitute a vacancy of the premises.

Republic County Mut. Fire Ins. Co. v. Johnson (Kan. Sup.) 76 Pac. 419;
Herrman v. Adriatic Ins. Co., 85 N. Y. 162, 39 Am. Rep. 644, reversing 45 N. Y. Super. Ct. 894.

But the nonoccupancy of an outbuilding is not a breach of the vacancy clause, where the policy also covers the dwelling and that is occupied (*Kimball v. Monarch Ins. Co.*, 70 Iowa, 513, 30 N. W. 862).

Though the premises were vacant at the time the policy issued, if they remain vacant until the time of the fire, the policy will be forfeited, under a condition providing for forfeiture if the premises become vacant "and so remain."

Thomas v. Hartford Fire Ins. Co., 21 Ky. Law Rep. 914, 53 S. W. 297, rehearing denied 56 S. W. 264, 21 Ky. Law Rep. 1139; *Short*

v. Home Ins. Co., 20 Alb. Law J. (N. Y.) 54; England v. Westchester Fire Ins. Co., 81 Wis. 583, 51 N. W. 954, 29 Am. St. Rep. 917.

The contrary rule has been asserted in *Germania Ins. Co. v. Klewer*, 129 Ill. 599, 22 N. E. 489; *Aurora Fire & Marine Ins. Co. v. Kranich*, 36 Mich. 294; *Hackett v. Philadelphia Underwriters*, 79 Mo. App. 16.

But a reasonable time will be allowed the insured to secure a tenant (*Hough v. City Fire Ins. Co.*, 29 Conn. 10, 76 Am. Dec. 581).

The condition in a policy of insurance that if the house insured shall cease to be occupied, or shall be unoccupied at the time of effecting insurance, and not so stated in the application, the policy shall be void, is intended to protect the company against an increase of risk by reason of the house being vacant. Hence it is not broken when a house which is insured as "unoccupied" is temporarily occupied, and then vacated by a tenant, before it is burned. (*Bennett v. Agricultural Ins. Co.*, 106 N. Y. 243, 12 N. E. 609.)

The opposite rule was asserted in *Royal Ins. Co. v. Lubelsky*, 86 Ala. 530, 5 South. 768, and *Evans v. Queens Ins. Co.*, 5 Ind. App. 198, 31 N. E. 843.

Where the condition is that "unoccupied premises must be insured as such, or the policy is void," and that, if the premises are insured as occupied, "the policy becomes void when the occupant personally vacates the premises," unless immediate notice be given, it will be assumed, if the premises were not insured as unoccupied, that they were occupied, so that a subsequent vacancy will amount to a breach of the clause against vacancy (*Wustum v. City Fire Ins. Co.*, 15 Wis. 138).

(e) What constitutes vacancy or nonoccupancy—General principles.

When a building can be regarded as vacant or unoccupied, within the meaning of what is usually termed "the vacancy clause," has not been definitely determined. The decisions are far from uniform, and in some instances irreconcilable. It is likely that in most of these instances the difficulty is that the courts have not properly discriminated between the terms "vacant" and "unoccupied," but have regarded them as to all intents and purposes synonymous. It may be that such was the theory of the insurer; but, as said in *Stone v. Granite State Fire Ins. Co.*, 69 N. H. 438, 45 Atl. 235, in determining what is meant by the use of such words, the test is not what the insurer meant, but the ordinary sense of the words.

Under the general rule that the construction of a contract is the province of the court, what is meant by the words "vacant" and "unoccupied," as used in the vacancy clause, is a question of law.

Phoenix Ins. Co. v. Tucker, 92 Ill. 64, 34 Am. Rep. 106; *Schuermann v. Dwelling House Ins. Co.*, 161 Ill. 437, 43 N. E. 1093, 52 Am. St. Rep. 377; *Dwelling House Ins. Co. v. Osborn*, 1 Kan. App. 197, 40 Pac. 1099; *Hartshorne v. Agricultural Ins. Co.*, 50 N. J. Law, 427, 14 Atl. 615.

Notwithstanding the lack of uniformity in the decisions of the courts, certain general principles have been fairly well settled. The weight of authority is that the term "vacant" is by no means synonymous with "unoccupied." "Vacant" implies entire abandonment (*Whitney v. Black River Ins. Co.*, 9 Hun [N. Y.] 37), and that the building is not occupied for any purpose (*Pabst Brewing Co. v. Union Ins. Co.*, 63 Mo. App. 663). It means deprived of contents; empty.

Limburg v. German Fire Ins. Co., 90 Iowa, 709, 57 N. W. 626, 23 L. R. A. 99, 48 Am. St. Rep. 468; *Thomas v. Hartford Fire Ins. Co.*, 21 Ky. Law Rep. 914, 53 S. W. 297; *Norman v. Missouri Town Mut. Fire L. T. C. & W. Ins. Co.*, 74 Mo. App. 456; *Barry v. Prescott Ins. Co.*, 35 Hun (N. Y.) 601; *Woodruff v. Imperial Fire Ins. Co.*, 83 N. Y. 133.

But in this definition "empty" has reference to the use of the building, and, though the building is not empty, if the articles stored there are of a character foreign to the use and purpose of the building, it will be regarded as vacant.

Sexton v. Hawkeye Ins. Co., 69 Iowa, 99, 28 N. W. 462; *Richards v. Continental Ins. Co.*, 83 Mich. 508, 47 N. W. 350, 21 Am. St. Rep. 611; *Martin v. Rochester German Ins. Co.*, 86 Hun, 33, 33 N. Y. Supp. 404.

In view of the foregoing definition, it follows that a building may be unoccupied by a human being, and yet not be vacant (*Norman v. Missouri Town Mut. Fire L. T. C. & W. Ins. Co.*, 74 Mo. App. 456). On the other hand, the words "occupied" and "unoccupied" refer to occupation by human beings. "Occupied" implies an actual use by some person or persons, according to the purpose for which the building is designed.

Limburg v. German Fire Ins. Co., 90 Iowa, 709, 57 N. W. 626, 48 Am. St. Rep. 468, 23 L. R. A. 99; *Stoltenberg v. Continental Ins. Co.*,

106 Iowa, 565, 76 N. W. 835, 68 Am. St. Rep. 323; Ashworth v. Builders' Mut. Fire Ins. Co., 112 Mass. 422, 17 Am. Rep. 117; Bonefant v. American Fire Ins. Co., 76 Mich. 653, 43 N. W. 682.

The word does not, however, imply that some person must be in the building all the time, without interruption, but merely that there must be no cessation of occupancy for any considerable length of time.

Insurance Co. of North America v. Coombs, 19 Ind. App. 331, 49 N. E. 471; Paine v. Agricultural Ins. Co., 5 Thomp. & C. (N. Y.) 619; Wait v. Agricultural Ins. Co., 13 Hun (N. Y.) 871; Vanderhoef v. Agricultural Ins. Co., 46 Hun (N. Y.) 328.

But the meaning of the two words will, to some extent at least, be governed by the context, and where the by-laws of a mutual company declared that it would not insure "unoccupied" houses, and would not be liable for loss on a house which had been vacant for 30 days prior to the loss (*Dohlantry v. Blue Mounds Fire & Lightning Ins. Co.*, 83 Wis. 181, 53 N. W. 448), the court regarded the word "vacant" as equivalent to "unoccupied," with the signification of "uninhabited," as it would be unreasonable to suppose that, though the company would not insure unoccupied property, it would be willing to carry the risk on such property if the unoccupied condition occurred after the policy took effect.

It has already been intimated that the purpose for which the building is intended is a factor in the definition of the words "vacant" and "unoccupied." We are therefore justified in assuming that the use and occupancy which will satisfy the condition must be of such a character as ordinarily pertains to the purpose to which the building is adapted or devoted. The rule is, indeed, asserted and applied in numerous cases.

Reference may be made to *American Ins. Co. v. Foster*, 92 Ill. 334, 34 Am. Rep. 134; *Burlington Ins. Co. v. Brockway*, 138 Ill. 644, 28 N. E. 799, affirming 39 Ill. App. 43; *Traders' Ins. Co. v. Race* (Ill.) 29 N. E. 846; *Kimball v. Monarch Ins. Co.*, 70 Iowa, 513, 30 N. W. 862; *Limburg v. German Fire Ins. Co.*, 90 Iowa, 709, 57 N. W. 626, 43 Am. St. Rep. 468, 23 L. R. A. 99; *Stoltenberg v. Continental Ins. Co.*, 106 Iowa, 565, 76 N. W. 835, 68 Am. St. Rep. 323; *Ashworth v. Builders' Mut. Fire Ins. Co.*, 112 Mass. 422, 17 Am. Rep. 117; *Fritz v. Home Ins. Co.*, 78 Mich. 565, 44 N. W. 139; *Pabst Brewing Co. v. Union Ins. Co.*, 63 Mo. App. 663; *Hampton v. Hartford Fire Ins. Co.*, 65 N. J. Law, 265, 47 Atl. 433, 52 L. R. A. 344; *Whitney v. Black River Ins. Co.*, 9 Hun (N. Y.) 37; *Caraher v. Royal Ins. Co.*, 63 Hun, 82, 17 N. Y. Supp.

858; *East Texas Fire Ins. Co. v. Dyches*, 56 Tex. 565; *Georgia Home Ins. Co. v. Brady* (Tex. Civ. App.) 41 S. W. 513; *Phoenix Ins. Co. v. Swann* (Tex. Civ. App.) 41 S. W. 519.

Especially would this rule apply where the insurer knows that a continuous occupancy is not contemplated, in view of the nature of the business carried on in the building or the use for which it is fit.

Des Moines Ice Co. v. Niagara Fire Ins. Co., 99 Iowa, 193, 68 N. W. 600; *Fritz v. Home Ins. Co.*, 78 Mich. 565, 44 N. W. 139; *Morotock Ins. Co. v. Pankey*, 91 Va. 259, 21 S. E. 487.

The purpose and intent of the clause forfeiting the policy if the premises become vacant or unoccupied is to secure, as a precaution against loss, that care and watchfulness which the owner or occupant of a building will naturally give it.

Sexton v. Hawkeye Ins. Co., 69 Iowa, 99, 28 N. W. 462; *Hanscom v. Home Ins. Co.*, 90 Me. 333, 38 Atl. 324; *Litch v. North British & Mercantile Ins. Co.*, 136 Mass. 491; *Bonefant v. American Fire Ins. Co.*, 76 Mich. 653, 43 N. W. 682; *Stensgaard v. National Fire Ins. Co.*, 36 Minn. 181, 30 N. W. 468; *Paine v. Agricultural Ins. Co.*, 5 Thomp. & C. (N. Y.) 619; *Martin v. Rochester German Ins. Co.*, 86 Hun, 35, 33 N. Y. Supp. 404.

Consequently occupancy by one who has conspired to burn the building is not sufficient (*Names v. Dwelling House Ins. Co.*, 95 Iowa, 642, 64 N. W. 628). But no particular degree of care or watchfulness is required (*Hartford Fire Ins. Co. v. Smith*, 3 Colo. 422). The rule is that the insurer has the right to the care and supervision involved in an occupancy in view of the use to which the building is devoted.

Bellevue Roller Mill Co. v. London & L. Fire Ins. Co., 4 Idaho, 307, 89 Pac. 196; *Kimball v. Monarch Ins. Co.*, 70 Iowa, 513, 30 N. W. 862; *Stoltenberg v. Continental Ins. Co.*, 106 Iowa, 565, 78 N. W. 835, 68 Am. St. Rep. 323; *Ashworth v. Builders' Mut. Fire Ins. Co.*, 112 Mass. 422, 17 Am. Rep. 117; *Fritz v. Home Ins. Co.*, 78 Mich. 565, 44 N. W. 139.

So, where a farm house and outbuildings are insured, it is the purpose of the insurer to secure for the outbuildings the care and watchfulness naturally resulting from the occupancy of the dwelling (*Hartshorne v. Agricultural Ins. Co.*, 50 N. J. Law, 427, 14 Atl. 615).

In determining whether the continuity of occupancy is completely broken, the intent of the occupant is an important factor.

American Ins. Co. v. Padfield, 78 Ill. 167; *Home Ins. Co. v. Boyd*, 19 Ind. App. 173, 49 N. E. 285; *Snyder v. Fireman's Fund Ins. Co.*, 78 Iowa, 146, 42 N. W. 630; *Thomas v. Hartford Fire Ins. Co.*, 21 Ky. Law Rep. 914, 53 S. W. 297; *Id.*, 56 S. W. 264, 21 Ky. Law Rep. 1139; *Hampton v. Hartford Fire Ins. Co.*, 65 N. J. Law, 265, 47 Atl. 433, 52 L. R. A. 344.

But even an intent to return will not suffice to save a forfeiture, if there is an absence for an unreasonable or a considerable length of time.

Phoenix Ins. Co. v. Tucker, 92 Ill. 64, 34 Am. Rep. 106; *McMurray v. Capital Ins. Co.*, 87 Iowa, 453, 54 N. W. 354; *Sleeper v. New Hampshire Fire Ins. Co.*, 56 N. H. 401.

In such case, or if there is no intent to return, vacating the premises will be regarded as an abandonment from the time of the act.

O'Brien v. Commercial Fire Ins. Co., 38 N. Y. Super. Ct. 517; *Mooney v. Glens Falls Ins. Co.*, 4 Pa. Dist. R. 639.

(f) Same—Dwellings.

A dwelling is occupied when it is in actual use by human beings who are living in it as a place of habitation. Bearing in mind the distinction between "vacant" and "unoccupied," and the qualification, already referred to in subdivision (b), that a house may be unoccupied, and yet not be vacant, it may be said that, in a general sense, a dwelling is "unoccupied" when it has ceased to be a customary place of habitation or abode.

Schuermann v. Dwelling House Ins. Co., 161 Ill. 437, 43 N. E. 1093, 52 Am. St. Rep. 377; *Home Ins. Co. v. Boyd*, 19 Ind. App. 173, 49 N. E. 285; *Agricultural Ins. Co. v. Hamilton*, 82 Md. 88, 33 Atl. 429, 30 L. R. A. 633, 51 Am. St. Rep. 457; *Bonefant v. American Fire Ins. Co.*, 76 Mich. 653, 43 N. W. 682; *Hoover v. Mercantile Town Mut. Ins. Co.*, 69 S. W. 42, 93 Mo. App. 111; *Johnson v. New York Bowery Fire Ins. Co.*, 39 Hun (N. Y.) 410; *Farmers' Ins. Co. v. Wells*, 42 Ohio St. 519; *Weldert v. State Ins. Co.*, 19 Or. 261, 24 Pac. 242, 20 Am. St. Rep. 809.

This principle does not imply that there must be some one in the house constantly, or that it must be occupied by a family, or that it must be put to all the uses to which a dwelling is usually put. The only essential is that it is the usual place of abode.

Hartford Fire Ins. Co. v. Smith, 3 Colo. 422; *Rockford Ins. Co. v. Storig*, 137 Ill. 646, 24 N. E. 674, affirming 31 Ill. App. 486; *Home*

Ins. Co. v. Wood, 47 Kan. 521, 28 Pac. 167; *Dwelling House Ins. Co. v. Osborn*, 1 Kan. App. 197, 40 Pac. 1099; *Imperial Fire Ins. Co. v. Kiernan*, 88 Ky. 468; *Home Ins. Co. v. Peyson*, 54 Neb. 495, 74 N. W. 960; *Moody v. Amazon Ins. Co.*, 52 Ohio St. 12, 38 N. E. 1011, 26 L. R. A. 313, 49 Am. St. Rep. 699; *Home Ins. Co. v. Hancock*, 106 Tenn. 513, 62 S. W. 145, 52 L. R. A. 665.

It was held to be a sufficient occupancy within the condition, though the insured, who took up his residence in the house just before the fire, intended to occupy it for only a few days, while his own home was being repaired (*Detroit Fire & Marine Ins. Co. v. Chetlain*, 61 Ill. App. 450). But where there was a warranty in a policy on a hotel, "a family live in the house throughout the year," the presence of workmen, who merely slept in the house, was not a compliance with the warranty (*Poor v. Humboldt Ins. Co.*, 125 Mass. 274, 28 Am. Rep. 228). And where occupancy as a compliance with the condition was defined as occupying the house with intent in good faith to maintain a home, as in *Names v. Dwelling House Ins. Co.*, 95 Iowa, 642, 64 N. W. 628, it was said that occupancy by one who had conspired to burn the house to procure the insurance on the personal property therein was not such an occupancy as was contemplated by the policy.

Nor does it affect the question that the family have left with the intention of not returning, if some member thereof remains in charge of the house pending the arrival of the new tenant (*Phoenix Ins. Co. v. Tucker*, 92 Ill. 64, 34 Am. Rep. 106).

Where the question is whether the house is "occupied," as distinguished from "vacant," the rule undoubtedly is that a merely constructive occupation is not sufficient (*Agricultural Ins. Co. v. Frith*, 21 Ill. App. 593). Consequently, if the house is not actually occupied, the requirement is not satisfied by the frequent visits of the owner or some other person whom he has employed for such purpose.

Stoltenberg v. Continental Ins. Co., 76 N. W. 835, 106 Iowa, 565, 68 Am. St. Rep. 323; *Burner's Adm'r v. German-American Ins. Co.*, 108 Ky. 370, 45 S. W. 109; *Hanscom v. Home Ins. Co.*, 90 Me. 333, 38 Atl. 324; *Bonefant v. American Fire Ins. Co.*, 76 Mich. 653, 43 N. W. 682; *Lester v. Mississippi Home Ins. Co. (Miss.)* 19 South. 99; *Craig v. Springfield Fire & Marine Ins. Co.*, 34 Mo. App. 481; *Sonneborn v. Manufacturers' Ins. Co.*, 44 N. J. Law, 220, 43 Am. Rep. 365; *Palne v. Agricultural Ins. Co.*, 5 Thomp. & C. (N. Y.) 619; *Stapleton v. Greenwich Ins. Co.*, 16 Misc. Rep. 483, 38 N. Y. Supp. 973; *Weidert v. State Ins. Co.*, 19 Or. 261, 24 Pac. 242, 20 Am. St. Rep. 809; *Watertown Fire Ins. Co. v. Cherry*, 84 Va. 72, 3 S. E. 876.

This rule has been applied even where the son of the owner slept in the house during the day, but was absent at night at his work (*Eureka Fire & Marine Ins. Co. v. Baldwin*, 57 N. E. 57, 62 Ohio St. 368, reversing 17 Ohio Cir. Ct. R. 143, 9 O. C. D. 118). So, too, where the house has in reality been abandoned by the tenant, the occupation by a person without authority, paying no rent and having no family, is not a compliance with the requirement (*Western Assur. Co. v. McPike*, 62 Miss. 740). But where there was no intent to abandon the premises, and the absence was merely temporary, such occasional visits and supervision will suffice.

Hill v. Ohio Ins. Co., 99 Mich. 466, 58 N. W. 359; *Johnson v. New York Bowery Fire Ins. Co.*, 39 Hun (N. Y.) 410.

Similarly, the occasional occupation of the house by the owner or his employés will not satisfy the requirement as to occupation.

Agricultural Ins. Co. v. Hamilton, 82 Md. 88, 33 Atl. 477, 30 L. R. A. 633, 51 Am. St. Rep. 457; *Ashworth v. Builders' Mut. Fire Ins. Co.*, 112 Mass. 422, 17 Am. Rep. 117; *Fitzgerald v. Connecticut Fire Ins. Co.*, 64 Wis. 463, 25 N. W. 785; *Dohlantry v. Blue Mounds Fire & Lightning Ins. Co.*, 83 Wis. 181, 53 N. W. 448.

But, where the house was described as a summer residence, the occasional occupation of the house by the owner during the winter was sufficient (*Western Assur. Co. v. Mason*, 5 Ill. App. 141).

Bearing in mind the definition of "vacant," that it means deprived of contents, empty, we can readily perceive the basis of the principle that, though the occupant has removed from the house, if he has left his furniture and household goods, or a substantial part therein, the house is not vacant within the meaning of the condition.

Shackelton v. Sun Fire Office Co., 55 Mich. 288, 21 N. W. 843, 54 Am. Rep. 379; *Norman v. Missouri Town Mut. Fire L. T. O. & W. Ins. Co.*, 74 Mo. App. 456; *Herrman v. Merchants' Ins. Co.*, 81 N. Y. 184, 37 Am. Rep. 488, affirming 44 N. Y. Super. Ct. 444; *Woodruff v. Imperial Fire Ins. Co.*, 83 N. Y. 183; *Phoenix Ins. Co. v. Burton* (Tex. Civ. App.) 39 S. W. 319; *German-American Ins. Co. v. Evants*, 94 Tex. 490, 62 S. W. 417, denying writ of error 61 S. W. 536, 25 Tex. Civ. App. 300.

It has even been said in some cases that the house under those circumstances is not unoccupied.

Home Ins. Co. v. Wood, 47 Kan. 521, 28 Pac. 167; *Omaha Fire Ins. Co. v. Sinnott*, 74 N. W. 955, 54 Neb. 522; *Gibbs v. Continental*

Ins. Co., 18 Hun (N. Y.) 611; *Moody v. Amazon Ins. Co.*, 52 Ohio St. 12, 88 N. E. 1011, 26 L. R. A. 813, 49 Am. St. Rep. 690; *Home Ins. Co. v. Hancock*, 106 Tenn. 513, 62 S. W. 145, 52 L. R. A. 665.

But it is to be observed that in some of these cases, some person either had supervision of or slept in the house. Moreover it is doubtful if attention was called to the distinction between "vacant" and "unoccupied." In any event, it is manifest that, in order that the principle shall apply, there must be a substantial quantity of furniture left, and not a few stray articles, some of which are possibly useless.

Robinson v. Aetna Ins. Co., 88 S. W. 693, 18 Ky. Law Rep. 865; *Hartshorne v. Agricultural Ins. Co.*, 50 N. J. Law, 427, 14 Atl. 615; *Stapleton v. Greenwich Ins. Co.*, 15 Misc. Rep. 642, 37 N. Y. Supp. 347; *Id.*, 16 Misc. Rep. 483, 38 N. Y. Supp. 973.

But, where it is shown that the insured had two houses, evidence that there was more furniture in one of them than in the other, as tending to show which one he occupied as a dwelling, is too remote to be admissible. *Weidert v. State Ins. Co.*, 19 Or. 261, 24 Pac. 242, 20 Am. St. Rep. 809.

Nor will the principle apply if the articles left or stored in the house are such as are not suitable for use in a dwelling, such as tools or machinery.

Sexton v. Hawkeye Ins. Co., 69 Iowa, 99, 28 N. W. 462; *Richards v. Continental Ins. Co.*, 88 Mich. 508, 47 N. W. 350, 21 Am. St. Rep. 611; *Martin v. Rochester German Ins. Co.*, 86 Hun, 35, 33 N. Y. Supp. 404.

The sufficiency of the occupation depends, too, on the form of the condition in respect to the use of the copulative or the alternative conjunction. Thus, in *Thieme v. Niagara Fire Ins. Co.*, 100 App. Div. 278, 91 N. Y. Supp. 499, it was said that where insured's husband, who lived in another house on the same lot, placed a bed in the insured house after the tenant vacated, and slept there five nights each week, carrying on his business on the premises during the day, the house was not "vacant and unoccupied" within the forfeiture clause of the policy. On the other hand, in *Herrman v. Adriatic Fire Ins. Co.*, 85 N. Y. 162, 39 Am. Rep. 644, and *Barry v. Prescott Ins. Co.*, 35 Hun (N. Y.) 601, where the condition read "vacant or unoccupied," it was held that, while the presence of furniture, etc., in the house prevented it from being vacant, it was nev-

ertheless unoccupied, within the condition. The same view was taken in *Craig v. Springfield Fire & Marine Ins. Co.*, 34 Mo. App. 481, and *Huber v. Manchester Fire Assur. Co.*, 92 Hun, 223, 36 N. Y. Supp. 873; but in the latter case it was said that the house was not vacant, so as to forfeit a policy on the furniture. In *Corrigan v. Connecticut Fire Ins. Co.*, 122 Mass. 298, and *Cook v. Continental Ins. Co.*, 70 Mo. 610, 35 Am. Rep. 438, where the facts showed unmistakably an intent on the part of the occupant to abandon the house, such intent may have been regarded as a determining factor. Generally it may be said that a definite intent to abandon the house as a place of abode will, under the circumstances of the preceding cases, justify the finding that the house is unoccupied.

American Ins. Co. v. Padfield, 78 Ill. 167; *Home Ins. Co. v. Boyd*, 19 Ind. App. 173, 49 N. E. 285; *Snyder v. Fireman's Fund Ins. Co.*, 78 Iowa, 146, 42 N. W. 630.

Intent to retain the house as a customary place of abode was also regarded as an important, if not a determining, factor in *Shackleton v. Sun Fire Office*, 55 Mich. 288, 21 N. W. 343, 54 Am. Rep. 379, where occupancy was actually begun and followed by a somewhat lengthy absence. So an intent not to abandon the house as a home is to be taken into consideration, in connection with the fact that the household goods are left in the house and it is visited daily on behalf of the insured (*McMurray v. Capital Ins. Co.*, 87 Iowa, 453, 54 N. W. 354). But even an intent to return will not excuse non-occupancy for eight or ten months (*Sleeper v. New Hampshire Fire Ins. Co.*, 56 N. H. 401).

(g) Same—Buildings other than dwellings.

Reference has already been made to the principle that, in determining whether a building is vacant and unoccupied within the meaning of the policy, the use to which the building is put must be considered. So outbuildings need not be actually occupied by the insured, if they are used as they are intended to be used (*Fritz v. Home Ins. Co.*, 78 Mich. 565, 44 N. W. 139). But it is not necessary that a building intended as a shelter for live stock should actually be occupied by the animals, if the premises as a whole are occupied by the insured (*Kimball v. Monarch Ins. Co.*, 70 Iowa, 513, 30 N. W. 862).

A church building is not necessarily vacant and unoccupied because services are not actually held therein (*Caraher v. Royal Ins.*

Co., 63 Hun, 82, 17 N. Y. Supp. 858), so long as it is furnished suitably for holding services. Nor does it affect the result that the church is the individual property of the pastor. So it was said, in *Hampton v. Hartford Fire Ins. Co.*, 47 Atl. 433, 65 N. J. Law, 265, 52 L. R. A. 344, that if church buildings are kept for use for the purposes for which they are designed, and used as occasion presents and as the convenience of the congregation may require, and there is no intent shown to abandon them for such purposes, temporary periods of nonuser, even though they exceed the 10-day limit in a policy, do not render the building vacant and unoccupied within the forfeiture clause of the policy; and on the other hand, it was said, in *American Ins. Co. v. Foster*, 92 Ill. 334, 34 Am. Rep. 134, that, though a policy on a school building is not forfeited by the usual vacation on Saturday and Sunday during the school term, it will be forfeited by the vacancy during the summer when the school is not in session, and it does not affect the result that such long vacations are usual.

This phase of the question is often presented where the building insured is devoted to business purposes. Where there has been manifested an intent to abandon a building used as a store, the fact that a few articles are left or placed therein, articles useless or unsuitable for the purpose to which the building has been devoted, the building is unoccupied within the meaning of the policy.

Limburg v. German Fire Ins. Co., 90 Iowa, 700, 57 N. W. 623, 48 Am. St. Rep. 488, 23 L. R. A. 99; *Home Ins. Co. of New York v. Scales*, 71 Miss. 975, 15 South. 134, 42 Am. St. Rep. 512.

But the fact that a building is described as "occupied for store and dwelling purposes and saloon" does not require that it must be occupied for one or all of these exact purposes in order to constitute an occupancy within the vacancy clause (*Pabst Brewing Co. v. Union Ins. Co.*, 63 Mo. App. 663). And where a building was described as "occupied as a store and dwelling," abandonment as a dwelling only does not forfeit the policy under the vacancy clause (*Burlington Ins. Co. v. Brockway*, 138 Ill. 644, 28 N. E. 799, affirming 39 Ill. App. 43).

It has been contended in some cases that the suspension of operation of a mill or factory renders the building vacant and unoccupied within the meaning of the vacancy clause. If such suspension is with the intent to abandon the use of the building, it becomes vacant and unoccupied, though some of the tools and machinery re-

main therein, and it is visited at intervals by the insured or his agents.

Keith v. Quincy Mut. Fire Ins. Co., 10 Allen (Mass.) 228; *Halpin v. Phenix Ins. Co.*, 118 N. Y. 165, 23 N. E. 482, reversing 42 Hun, 655, mem.

But if the operation of the factory is suspended temporarily only, as for the purpose of making needed repairs, and watchmen or other employes engaged in duties connected with the business are about the premises, the factory is not vacant and unoccupied.

Albion Lead Works v. Williamsburg City Fire Ins. Co. (C. C.) 2 Fed. 479; *Williams v. North German Ins. Co.* (C. C.) 24 Fed. 625; *Brighton Mfg. Co. v. Fire Ass'n* (C. C.) 33 Fed. 234; *Same v. Reliance Ins. Co.* (C. C.) 33 Fed. 235; *Same v. Reading Fire Ins. Co.* (C. C.) 33 Fed. 232; *American Fire Ins. Co. v. Brighton Cotton Mfg. Co.*, 125 Ill. 131, 17 N. E. 771, affirming 24 Ill. App. 149; *Carr v. Roger Williams Ins. Co.*, 60 N. H. 513.

Even a suspension of work for lack of power or raw material is not within the meaning of the vacancy clause, in the absence of any intent to abandon.

Whitney v. Black River Ins. Co., 9 Hun (N. Y.) 37; *Bellevue Roller Mill Co. v. London & L. Fire Ins. Co.*, 39 Pac. 196, 4 Idaho, 307.

The rule is especially applicable where the nature of the business carried on in the building is such as gives notice to the insurer that continuous operation is not contemplated, as in the case of an ice factory (*Morotock Ins. Co. v. Pankey*, 91 Va. 259, 21 S. E. 487), or ice house (*Des Moines Ice Co. v. Niagara Fire Ins. Co.*, 99 Iowa, 193, 68 N. W. 600).

If at the time a policy on an elevator building, with its tools and machinery, was issued, the elevator was not in use for hoisting purposes, and the insurer was informed that it would not be so used again, but the building was then and at the time of the fire used as a storehouse for the tools and machinery, preparatory to their removal to a new plant, the elevator was not vacant or unoccupied, within a clause of forfeiture in case it should so become and remain for 10 days (*Clifton Coal Co. v. Scottish Union & National Ins. Co.*, 102 Iowa, 300, 71 N. W. 433).

(h) Temporary absence of occupant.

Attention has already been called to the principle that, though the word "occupied" refers to the actual use of the building by human beings, it does not imply an absolutely continuous presence of human beings in the building. In view of this qualification, it would

seem to be obvious that the merely temporary absence of the occupant, when caused by the exigencies of business or ordinary social duties and pleasures, does not render the building vacant or unoccupied within the meaning of the policy.

The rule is asserted in numerous cases. Reference to the following is deemed sufficient: *Catlin v. Springfield Fire Ins. Co.*, 5 Fed. Cas. 810; *Burlington Ins. Co. v. Lowery*, 61 Ark. 108, 82 S. W. 383, 54 Am. St. Rep. 196; *McMurray v. Capital Ins. Co.*, 87 Iowa, 453, 54 N. W. 354; *Ring v. Phoenix Assur. Co.*, 145 Mass. 146, 14 N. E. 525; *Johnson v. Norwalk Fire Ins. Co.*, 175 Mass. 529, 56 N. E. 569; *Stupetski v. Transatlantic Fire Ins. Co.*, 43 Mich. 373, 5 N. W. 401, 38 Am. Rep. 195; *Shackelton v. Sun Fire Office*, 55 Mich. 288, 21 N. W. 343, 54 Am. Rep. 379; *Hill v. Ohio Ins. Co.*, 99 Mich. 466, 58 N. W. 359; *Liverpool, London & Globe Ins. Co. v. McGuire*, 52 Miss. 227; *Springfield Fire & Marine Ins. Co. v. McLimans*, 28 Neb. 846, 45 N. W. 171; *Home Fire Ins. Co. v. Peyson*, 74 N. W. 960, 54 Neb. 495; *Laselle v. Hoboken Fire Ins. Co.*, 43 N. J. Law, 468; *Hampton v. Hartford Fire Ins. Co.*, 47 Atl. 433, 65 N. J. Law, 265, 52 L. R. A. 844; *O'Brien v. Commercial Fire Ins. Co.*, 38 N. Y. Super. Ct. 517; *Vanderhoef v. Agricultural Ins. Co.*, 46 Hun (N. Y.) 328; *Cummins v. Agricultural Ins. Co.*, 67 N. Y. 260, 23 Am. Rep. 111; *Franklin Fire Ins. Co. v. Kepler*, 95 Pa. 492; *Phoenix Ins. Co. v. Burton* (Tex. Civ. App.) 39 S. W. 319; *Georgia Home Ins. Co. v. Brady* (Tex. Civ. App.) 41 S. W. 513.

As the rule is based on the theory that the condition as to nonoccupancy refers to the permanent removal and entire abandonment of the building (*Cummins v. Agricultural Ins. Co.*, 67 N. Y. 260, 23 Am. Rep. 111), it applies, though the fire occurs during such temporary absence (*Burlington Ins. Co. v. Lowery*, 61 Ark. 108, 32 S. W. 383, 54 Am. St. Rep. 196). Moreover, in cases of temporary absence, as in other instances to which attention has already been called, the intent of the absence is an important factor.

Stupetski v. Transatlantic Fire Ins. Co., 43 Mich. 373, 5 N. W. 401, 38 Am. Rep. 195; *Shackelton v. Sun Fire Office*, 55 Mich. 288, 21 N. W. 343, 24 Am. Rep. 379.

This principle is illustrated in *Raymond v. Farmers' Mut. Fire Ins. Co.*, 114 Mich. 386, 72 N. W. 254, where the policy covering farm property contained the provision that if the insured premises were vacated, and no one placed in charge, the insured should bear the risk during the vacancy, but stipulated that "temporary absence, like on a visit, does not create vacant property." The property being threatened with destruction from a forest fire, insured,

after plowing furrows around the buildings, placed his goods in a wagon and took them some distance away, returning to fight the fire with the assistance of his neighbors. His wife becoming ill, he left the others to continue fighting the fire, and drove her to town, several miles distant, returning as quickly as possible. It was held that there was no vacation of the premises within the terms of the policy.

The rule applies where the condition is that the policy shall be void if the building becomes vacant or unoccupied "and so remain" (*Laselle v. Hoboken Fire Ins. Co.*, 43 N. J. Law, 468). On the other hand, it has been said in several well-considered cases that, if the absence extends beyond the length of time limited in the policy, the vacancy or nonoccupancy is within the condition.

German Ins. Co. v. Russell, 65 Kan. 373, 69 Pac. 345, 58 L. R. A. 234; *Hoover v. Mercantile Town Mut. Ins. Co.*, 69 S. W. 42, 93 Mo. App. 111; *Moore v. Phoenix Ins. Co.*, 62 N. H. 240, 13 Am. St. Rep. 556; *Couch v. Farmers' Fire Ins. Co.*, 72 N. Y. Supp. 95, 64 App. Div. 367.

The theory of these cases is that under such circumstances there is an absolute forfeiture, so that the policy cannot be revived by a resumption of occupancy. So it was said, in *East Texas Fire Ins. Co. v. Kempner*, 87 Tex. 229, 27 S. W. 122, 47 Am. St. Rep. 99, that, where the condition makes the policy absolutely void the instant vacancy occurs, reoccupancy cannot revive it. But it was held in *McMurray v. Capital Ins. Co.*, 87 Iowa, 453, 54 N. W. 354, that the words, "or so remain for more than five consecutive days," following the words, "the premises shall not become vacant or unoccupied," do not in any sense define the words "vacant" and "unoccupied," as used in the policy, which must therefore be given the meaning which usually attaches to them, and therefore, if a building is not rendered vacant or unoccupied by a temporary absence, that effect cannot be secured by the limitation.

In other policies the condition is that forfeiture shall result if the premises "become vacant by the removal of the occupant." It would seem to be elementary that a mere temporary absence would not be within such a condition, as there is in fact no removal of the occupant.

Johnson v. Norwalk Fire Ins. Co., 175 Mass. 529, 56 N. E. 569; *Stone v. Granite State Fire Ins. Co.*, 45 Atl. 235, 69 N. H. 438.

The rule is, however, that, where a vacancy is once shown to exist, it will be presumed to continue until reoccupancy is affirma-

tively shown (*Stoltenberg v. Continental Ins. Co.*, 106 Iowa, 565, 76 N. W. 835, 68 Am. St. Rep. 323).

(1) Temporary vacancy incident to change of tenants.

Analogous to the phase of the question discussed in the preceding subdivision is that which arises where the temporary vacancy of the premises is incident to or caused by a change of tenants. It is a well-settled rule that, when the premises are described in the policy as occupied by a tenant, change of tenants is contemplated by the parties, and therefore any temporary vacancy caused by or incident to such change is not within the purview of the vacancy clause.

This rule is supported by *Lockwood v. Middlesex Mut. Assur. Co.*, 47 Conn. 553; *Traders' Ins. Co. v. Race* (Ill.) 29 N. E. 846; *Home Ins. Co. v. Mendenhall*, 45 N. E. 1078, 164 Ill. 458, 36 L. R. A. 374; *Eddy v. Hawkeye Ins. Co.*, 70 Iowa, 472, 30 N. W. 808, 59 Am. Rep. 444; *Worley v. State Ins. Co. of Des Moines*, 91 Iowa, 150, 59 N. W. 16, 51 Am. St. Rep. 334; *Dwelling House Ins. Co. v. Walsh*, 10 Ky. Law Rep. 232; *Liverpool & London & Globe Ins. Co. v. Buckstaff*, 38 Neb. 146, 56 N. W. 695, 41 Am. St. Rep. 724; *Omaha Fire Ins. Co. v. Sinnott*, 54 Neb. 522, 74 N. W. 955; *Union Ins. Co. v. McCullough*, 96 N. W. 79, 2 Neb. (Unof.) 203; *Woodruff v. Imperial Fire Ins. Co.*, 83 N. Y. 133; *Wait v. Agricultural Ins. Co.*, 13 Hun (N. Y.) 371; *Vanderhoef v. Agricultural Ins. Co.*, 46 Hun (N. Y.) 323; *State v. Tuttgerding*, 8 Ohio Dec. 74; *Insurance Co. of North America v. Hannum*, 1 Monag. (Pa.) 869; *McAnnally v. Somerset County Mut. Ins. Co.*, 2 Pittsb. R. (Pa.) 189; *Roe v. Dwelling House Ins. Co. of Boston*, 149 Pa. 94, 23 Atl. 718, 34 Am. St. Rep. 595; *Palmer v. St. Paul Fire & Marine Ins. Co.*, 44 Wis. 201; *Hotchkiss v. Phoenix Ins. Co.*, 76 Wis. 269, 44 N. W. 1106, 20 Am. St. Rep. 69.

A statement, in an application for a policy of fire insurance, that the building to be insured is tenanted, does not constitute a warranty; and therefore the policy is not forfeited by a casual vacancy occasioned by the difficulty of procuring a tenant, or by a bona fide determination to sell. *Schultz v. Merchants' Ins. Co.*, 57 Mo. 331.

The foregoing rule was also applied where the owner intended to occupy the house himself on vacation by the tenant (*Doud v. Citizens' Ins. Co.*, 141 Pa. 47, 21 Atl. 505, 23 Am. St. Rep. 263). But it has also been held that preparation on the part of the owner to move into the house vacated by his tenant would not save a forfeiture, under the condition that the policy should be void if the house should become "unoccupied" (*Barry v. Prescott Ins. Co.*, 35 Hun [N. Y.] 601). And where the owner compelled the tenant to

vacate the premises before the expiration of his lease, a vacancy caused by the delay of a prospective tenant to move into the house cannot be excused under the general rule as to change of tenants (*East Tex. Fire Ins. Co. v. Smith*, 3 Willson, Civ. Cas. Ct. App. [Tex.] § 282).

The rule as to vacancy incident to change of tenants is in most instances qualified by the condition that the period of vacancy must not be unreasonably long.

Kelley v. Home Ins. Co., 14 Fed. Cas. 243; *Worley v. State Ins. Co. of Des Moines*, 91 Iowa, 150, 59 N. W. 18, 51 Am. St. Rep. 334; *Woodruff v. Imperial Fire Ins. Co.*, 83 N. Y. 183; *State v. Tutterding*, 8 Ohio Dec. 74; *Roe v. Dwelling House Ins. Co. of Boston*, 149 Pa. 94, 23 Atl. 718, 34 Am. St. Rep. 595; *Palmer v. St. Paul Fire & Marine Ins. Co.*, 44 Wis. 201.

Four weeks was, however, regarded as an unreasonable length of time in *Craig v. Springfield Fire & Marine Ins. Co.*, 34 Mo. App. 481. But if reasonable diligence has been used, and the prospective tenant is prevented from moving in by an unavoidable casualty, it is sufficient to excuse the forfeiture (*Traders' Ins. Co. v. Race* [Ill.] 29 N. E. 846, affirming 31 Ill. App. 625). It has even been held that, if reasonable diligence to secure a new tenant is used, a vacancy of 53 days may be excused under the general rule (*Gamwell v. Merchants' & Farmers' Mut. Fire Ins. Co.*, 12 Cush. [Mass.] 167).

In some jurisdictions it has, however, been held that, though a vacancy incident to change of tenants does not render the policy absolutely void, it suspends the risk, so that, if loss occurs during such vacancy, there can be no recovery.

Ætna Ins. Co. v. Meyers, 68 Ind. 238; *Continental Ins. Co. v. Kyle*, 124 Ind. 182, 24 N. E. 727, 9 L. R. A. 81, 19 Am. St. Rep. 77; *Craig v. Springfield Fire & Marine Ins. Co.*, 34 Mo. App. 481; *Wheeler v. Phoenix Ins. Co.*, 53 Mo. App. 446; *Ridge v. Scottish Commercial Ins. Co.*, 9 Lea (Tenn.) 507.

Though the general rule seems to have been followed in *Insurance Co. of North America v. Coombs*, 19 Ind. App. 331, 49 N. E. 471, the case is to be distinguished from the other Indiana cases, in that the tenant was still engaged in moving out when the fire occurred, and a substantial portion of his furniture was still in the house.

In *East Texas Fire Ins. Co. v. Kempner*, 87 Tex. 229, 27 S. W. 122, 47 Am. St. Rep. 99, reversing (Tex. Civ. App.) 25 S. W. 999,

the policy provided that, if the premises became vacant, it should "at once become null and void" and the unearned premiums returned. The court held that, in view of the words "at once" and the provision for a return of the unearned premium, a vacancy forfeited the policy on the instant, and the fact that the vacancy was merely temporary and incident to a change of tenants did not excuse the forfeiture. On the second trial it appeared, however, that there was not in fact a vacancy during the change of tenants; but the Court of Civil Appeals in a well-considered and logical opinion (34 S. W. 393, 12 Tex. Civ. App. 533) criticises the position taken by the Supreme Court.

The reasoning of the Court of Civil Appeals is that the words "at once," on which the Supreme Court lays such stress, are not important to be considered in determining when a vacancy occurred, but only in determining what the effect shall be when a vacancy is shown. The words do not even remotely indicate that a temporary vacancy or want of occupancy will avoid the policy. They simply declare that when a vacancy exists the policy shall be void. They do not, therefore, qualify the general rule that the vacancy clause in a policy will be given effect as contemplated by the parties at the time the contract was entered into. The present contract did not in terms give to a temporary vacancy or unoccupancy the effect of forfeiting the policy, but only in general terms declared that, if a building should become vacant or unoccupied, the policy should become void. It must be assumed that the parties contemplated that one tenant might move out of, and another move into, the building, and it cannot be supposed that it was regarded as essential, in order to preserve the life of a policy, that the incoming tenant should be required to do the unusual and unheard-of thing of taking actual possession and moving into the building before the outgoing tenant had moved out and vacated it. On the contrary, it is fair to assume that a reasonable time would be allowed the incoming tenant to take possession. The reasoning of the Supreme Court would logically lead to the holding that a vacancy or unoccupancy for an hour or a fraction thereof would forfeit the policy; that even a temporary absence of the tenant, such as the closing up and absenting himself from his business on Sunday, or a removal for a time, however slight, of his furniture and goods for the purpose of repairing and cleaning the building, would forfeit the policy. Such a result was certainly not contemplated by the parties to the contract.

(j) Vacancy pending preparation for occupancy or repair of the building.

An interesting phase of the question as to the effect of a temporary vacancy is presented in certain cases where the incoming tenant has taken possession for the purpose of putting the building in condition for occupancy, but has not actually occupied the building. Such possession was held sufficient in *Rockford Ins. Co. v. Wright*, 39 Ill. App. 574, in *Home Ins. Co. v. Mendenhall*, 164 Ill.

458, 45 N. E. 1078, 36 L. R. A. 374, and in *Stensgaard v. National Fire Ins. Co.*, 36 Minn. 181, 38 N. W. 468, though in this case some one was sleeping in the building. The principle has also been approved in *Eddy v. Hawkeye Ins. Co.*, 70 Iowa, 472, 30 N. W. 808, 59 Am. Rep. 444, and *Shackelton v. Sun Fire Office*, 55 Mich. 288, 21 N. W. 343, 54 Am. Rep. 379, though it is to be observed that in the *Shackelton Case* furniture had been moved into the house and a man put in charge. The doctrine is also approved in *Dwelling House Ins. Co. v. Walsh*, 10 Ky. Law Rep. 282, but was repudiated by the Court of Appeals in *Thomas v. Hartford Fire Ins. Co.*, 53 S. W. 297, 21 Ky. Law Rep. 914. So, in *Feshe v. Council Bluffs Ins. Co.*, 74 Iowa, 676, 39 N. W. 87, where the owner, who lived some distance from the house, spent part of five days in cleaning the building in preparation for occupancy, the building was nevertheless regarded as vacant within the meaning of the policy.

Such occupancy was not sufficient to satisfy the condition that the house should be "occupied," according to *Litch v. North British & Mercantile Ins. Co.*, 136 Mass. 491; *Barry v. Prescott Ins. Co.*, 85 Hun (N. Y.) 601.

So a provision of a fire policy that mechanics may be employed in the building, repairing it, for not more than 15 days at a time, does not permit the buildings to be unoccupied during the repairs (*Limburg v. German Fire Ins. Co.*, 90 Iowa, 709, 57 N. W. 626, 48 Am. St. Rep. 468, 23 L. R. A. 99).

It was held, in *Reid v. Lancaster Fire Ins. Co.*, 90 N. Y. 382, where the policy, which was on a vessel against fire, provided that it should be void if the vessel should remain unoccupied for more than 20 days, and a loss occurred while the vessel was beached and had been then unoccupied for more than 20 days, except that workmen came occasionally for the purpose of making repairs, that no recovery could be had.

But after a partial loss under a fire policy, which renders the building untenable, the insured is not guilty of a breach of the vacancy clause of the contract, where he permits the property to remain unoccupied pending the period during which the insurer is authorized to exercise its option to repair the damaged building (*Lancashire Ins. Co. v. Bush*, 60 Neb. 116, 82 N. W. 313).

(k) Effect of breach of condition.

As there is no rule of law which requires the owner of a building to have it occupied or guarded in order to recover the insur-

ance thereon, it follows that, in the absence of a clause prohibiting vacancy, the fact that the insured building was not occupied when the loss occurred will not forfeit the policy (*Soye v. Merchants' Insurance Co.*, 6 La. Ann. 761). But if the policy provides that the insurance shall continue for one year, "while occupied by a tenant," insured is precluded from recovering anything if the building is destroyed while unoccupied (*East Texas Fire Ins. Co. v. Smith*, 3 Willson, Civ. Cas. Ct. App. [Tex.] § 281).

Where, however, the policy contains the usual condition declaring that the policy shall be void if the premises shall become vacant or unoccupied, a breach of the condition existing at the time of the loss will forfeit the policy and prevent a recovery thereon.

Reference may be made to *American Ins. Co. v. Padfield*, 78 Ill. 167; *Same v. Foster*, 92 Ill. 334, 34 Am. Rep. 134; *Schuermann v. Dwelling House Ins. Co.*, 161 Ill. 437, 43 N. E. 1093, 52 Am. St. Rep. 377; *Rogers v. Phenix Ins. Co.*, 121 Ind. 570, 23 N. E. 498; *Continental Ins. Co. v. Kyle*, 124 Ind. 132, 24 N. E. 727, 9 L. R. A. 81, 19 Am. St. Rep. 77; *Piscataqua Sav. Bank v. Traders' Ins. Co.*, 8 Kan. App. 241, 55 Pac. 496; *Robinson v. Aetna Ins. Co.*, 18 Ky. Law Rep. 865, 38 S. W. 693; *Franklin Sav. Inst. v. Central Mut. Fire Ins. Co.*, 119 Mass. 241; *Richards v. Continental Ins. Co.*, 83 Mich. 508, 47 N. W. 350, 21 Am. St. Rep. 611; *Western Assur. Co. v. McPike*, 62 Miss. 740; *Hoover v. Mercantile Town Mut. Ins. Co.*, 69 S. W. 42, 93 Mo. App. 111; *Hill v. Equitable Mut. Fire Ins. Co.*, 58 N. H. 82; *Paine v. Agricultural Ins. Co.*, 5 Thomp. & C. (N. Y.) 619; *O'Brien v. Commercial Fire Ins. Co.*, 38 N. Y. Super. Ct. 517; *Huber v. Manchester Fire Ins. Co.*, 92 Hun, 223, 36 N. Y. Supp. 873; *Alston v. Old North State Ins. Co.*, 80 N. C. 328; *Farmers' Ins. Co. v. Wells*, 42 Ohio St. 519; *Mooney v. Glens Falls Ins. Co.*, 4 Pa. Dist. R. 639; *Commercial Union Assur. Co. v. Dunbar*, 7 Tex. Civ. App. 418, 26 S. W. 628; *Maness v. Sun Ins. Co. (Tex. Civ. App.)* 32 S. W. 326; *Wustum v. City Fire Ins. Co.*, 15 Wis. 138; *Thompson v. Caledonia Fire Ins. Co.*, 92 Wis. 664, 66 N. W. 801.

So, where a policy insures several buildings, if the breach of the vacancy clause affects the building which is destroyed by the peril insured against, there can be no recovery (*Republic County Mut. Fire Ins. Co. v. Johnson* [Kan. Sup.] 76 Pac. 419).

The rule was asserted in *Bennett v. Agricultural Ins. Co.*, 50 Conn. 420; *Id.*, 51 Conn. 504, though the fire may have been smouldering at the time the tenant vacated the premises. Nor does it, as a rule, affect the question whether the loss was caused by the non-occupancy or not (*Moore v. Phoenix Ins. Co.*, 62 N. H. 240, 13 Am.

St. Rep. 556). In view of the general rule that a merely temporary vacancy is not within the condition, it has been held that the temporary absence of the occupant at the time of the fire will not affect the right of recovery (*Burlington Ins. Co. v. Lowery*, 61 Ark. 108, 32 S. W. 383, 54 Am. St. Rep. 196), and in such cases the relation of the vacancy to the cause of loss may be regarded as an important factor (*Traders' Ins. Co. v. Race*, 142 Ill. 338, 31 N. E. 392, affirming 29 N. E. 846).

Though, as will appear hereafter, there are cases which hold that a vacancy renders the policy absolutely void, the better rule seems to be that, the effect of a vacancy is merely to suspend the insurance during the existence of the vacancy.

Such is the rule asserted in *Niagara Fire Ins. Co. v. Drda*, 19 Ill. App. 70; *Detroit Fire & Marine Ins. Co. v. Chetlain*, 61 Ill. App. 450; *Stephens v. Phoenix Ins. Co.*, 85 Ill. App. 671; *Insurance Co. of North America v. Garland*, 108 Ill. 220; *Ætna Ins. Co. v. Meyers*, 68 Ind. 238; *Ring v. Phoenix Assur. Co.*, 145 Mass. 426, 14 N. E. 525; *Wheeler v. Phoenix Ins. Co.*, 58 Mo. App. 446; *Laselle v. Hoboken Fire Ins. Co.*, 43 N. J. Law, 468.

It is to be noted, however, that in some of these cases the condition declared the policy void if the premises become vacant "and so remain," and in others the policy declared that it should be void "so long as the building shall be unoccupied."

While the premises are vacant, the risk is that of the insured (*Niagara Fire Ins. Co. v. Drda*, 19 Ill. App. 70), and if a loss occurs there can be no recovery.

Ætna Ins. Co. v. Meyers, 68 Ind. 238; *Ridge v. Scottish Commercial Ins. Co.*, 9 Lea (Tenn.) 507.

A provision in a fire insurance policy that the policy should be void and inoperative during the time the premises remain vacant, without the assent of the insurers, is valid, and during such time the policy is rendered void. *Baldwin v. German Ins. Co. of Freeport*, Ill., 75 N. W. 326, 105 Iowa, 379.

It naturally follows, if the risk is only suspended, that, if the premises again become occupied, the liability under the policy again attaches.

Stephens v. Phoenix Ins. Co., 85 Ill. App. 671; *Ring v. Phoenix Assur. Co.*, 145 Mass. 426, 14 N. E. 525.

The same rule is asserted in *Insurance Co. of North America v. Garland*, 108 Ill. 220, though it was also said that for any unreasonable delay in reoccupying the premises the company might have

the right to declare the policy forfeited altogether, but it was not bound to do so.

But it was held, in *Moore v. Phoenix Ins. Co.*, 62 N. H. 240, 13 Am. St. Rep. 556, that, if the condition is that the policy shall be void if the premises remain vacant more than ten days, the effect of the condition is not that the policy shall be only suspended during nonoccupancy after the ten days, but that it becomes absolutely void. In such cases the reoccupancy of the premises cannot have the effect of reviving the policy.

German Ins. Co. v. Russell, 65 Kan. 373, 69 Pac. 345, 58 L. R. A. 234; *Couch v. Farmers' Fire Ins. Co.*, 72 N. Y. Supp. 95, 64 App. Div. 367; *East Texas Fire Ins. Co. v. Kempner*, 87 Tex. 229, 27 S. W. 122, 47 Am. St. Rep. 99, reversing *Id.* (Tex. Civ. App.) 25 S. W. 999.

It has been asserted in some cases that a breach of the condition against vacancy does not render the policy void ipso facto, but merely voidable at the option of the insurer.

Landers v. Watertown Fire Ins. Co., 86 N. Y. 414, 40 Am. Rep. 554; *Gans v. St. Paul Fire & Marine Ins. Co.*, 43 Wis. 108, 28 Am. Rep. 535.

But, even under such a principle, if the loss occurs while the vacancy exists, the company is not necessarily rendered liable because, knowing the fact, it has not in the meantime forfeited the policy (*Stephens v. Phoenix Assur. Co.*, 85 Ill. App. 671). If, however, it does not exercise its rights in this regard, and the premises again become occupied, and are so occupied when the loss occurs, liability on the policy again attaches. If the condition provides for notice to be given to the insurer on the occurrence of a vacancy, the company must, on receipt of the notice, declare its option to forfeit the policy, or it will remain in effect.

Strunk v. Firemen's Ins. Co. of Chicago, 160 Pa. 345, 28 Atl. 779, 40 Am. St. Rep. 721; *Wakefield v. Orient Ins. Co.*, 50 Wis. 532, 7 N. W. 647.

(1) Same—As dependent on increase of risk.

When the policy contains an absolute condition against vacancy, a breach thereof will forfeit the insurance, irrespective of the question of increase of risk. The theory is that by such condition the parties have agreed that vacancy is per se an increase of risk.

Dennison v. Phoenix Ins. Co., 52 Iowa, 457, 8 N. W. 500; *Moore v. Phoenix Fire Ins. Co.*, 64 N. H. 140, 6 Atl. 27, 10 Am. St. Rep. 384; *Halpin v. Aetna Fire Ins. Co.*, 10 N. Y. St. Rep. 344; *Galveston Ins. Co. v. Long*, 51 Tex. 89.

In the absence of such a condition, there is not, necessarily, an increase of risk by vacancy (*Becker v. Farmers' Mut. Ins. Co.*, 48 Mich. 610, 12 N. W. 874), and consequently an increase of risk must be shown as a basis for forfeiture (*Eureka Fire & Marine Ins. Co. v. Baldwin*, 57 N. E. 57, 62 Ohio St. 368).

As vacancy is not necessarily an increase of risk, within the general condition against any change in the premises increasing the hazard, where forfeiture is based on an alleged breach of that condition, increase of risk is the essential factor, and must be shown.

Luce v. Dorchester Ins. Co., 105 Mass. 297, 7 Am. Rep. 522; *Residence Fire Ins. Co. v. Hannawold*, 37 Mich. 108; *Liverpool, London & Globe Ins. Co. v. McGuire*, 52 Miss. 227; *Cornish v. Farm Buildings Fire Ins. Co.*, 74 N. Y. 295, affirming 10 Hun. 466; *Halpin v. Insurance Co. of North America*, 10 N. Y. St. Rep. 345; *Gilliat v. Pawtucket Mut. Fire Ins. Co.*, 8 R. I. 282, 91 Am. Dec. 229; *Georgia Home Ins. Co. v. Kinnier's Adm'r*, 28 Grat. (Va.) 88; *Hawkes v. Dodge County Mut. Ins. Co.*, 11 Wis. 188.

But, in determining whether the risk has been increased by vacancy, comparison must be made with the risk that exists when the house is occupied by tenants of average character, and the fact that some tenants are undesirable and render the risk more hazardous than others cannot be taken into consideration (*Luce v. Dorchester Mut. Fire Ins. Co.*, 110 Mass. 361).

A statute of Maine provided that a policy should not be forfeited by breach of condition, unless the risk be increased.⁵ This statute was held to apply to the condition relating to vacancy, and the insurer could evade the effect thereof by inserting an absolute condition for forfeiture if the property became vacant or unoccupied (*Cannell v. Phoenix Ins. Co.*, 59 Me. 582). Under this statute increase of risk must be shown before forfeiture can be declared by reason of the vacancy of the premises.

Cannell v. Phoenix Ins. Co., 59 Me. 582; *Thayer v. Providence Wash. Ins. Co.*, 70 Me. 531; *Lancy v. Home Ins. Co.*, 82 Me. 492, 20 Atl. 79; *White v. Phoenix Ins. Co.*, 83 Me. 279, 22 Atl. 167; *Id.*, 85 Me. 97, 26 Atl. 1049.

But the situation of the building and the long continuance of the vacancy may raise a presumption of increase of risk within the stat-

⁵ Pub. Laws 1861, c. 34; Rev. St. incorporated in the Revised Statutes of 1883, c. 49, § 20. But this section is not 1903.

ute (*Jones v. Granite State Fire Ins. Co.*, 90 Me. 40, 37 Atl. 326). This presumption may be overcome by other facts (*Hanscom v. Home Ins. Co.*, 90 Me. 333, 38 Atl. 324).

The Missouri statute provides "that the warranty of any fact or condition hereafter incorporated in or made a part of any fire, tornado, or cyclone policy of insurance, purporting to be made or assented to by the assured, which shall not materially affect the risk insured against, shall be deemed, taken, and construed as representations only in any suits at law or in equity brought upon such policy in any of the courts of this state." * The word "condition," as used in this statute, refers only to facts existing at the time the policy is issued, and the statute does not limit the effect of conditions inserted in the policy (*Hoover v. Mercantile Town Mut. Ins. Co.*, 93 Mo. App. 111, 69 S. W. 42).

A Minnesota statute provides that, if the insured premises shall become vacant by the removal of the owner or occupant and so remain vacant for more than thirty days without the assent of the insurer, the policy shall be void.[†] This provision is not modified by the further provision * declaring that, in the absence of any change increasing the risk, the whole amount of the policy shall, in case of a total loss, be paid; and consequently it is not necessary to allege an increase of risk, where breach of the vacancy clause is relied on (*Doten v. Ætna Ins. Co.*, 77 Minn. 474, 80 N. W. 630).

(m) Same—As dependent on knowledge and good faith of insured.

Where a policy of insurance contains an absolute condition that it shall be void if the building be or becomes vacant or unoccupied, a forfeiture does not depend on the insured's knowledge of the vacancy.

Schuermann v. Dwelling House Ins. Co., 161 Ill. 437, 43 N. E. 1093, 52 Am. St. Rep. 377, affirming 57 Ill. App. 200; *Moore v. Phoenix Ins. Co.*, 64 N. H. 140, 6 Atl. 27, 10 Am. St. Rep. 384; *Farmers' Ins. Co. v. Wells*, 42 Ohio St. 519.

So, too, it does not affect the result that the insured has in good faith and with due diligence attempted to keep the premises occupied.

Niagara Fire Ins. Co. v. Drda, 19 Ill. App. 70; *McClure v. Watertown Fire Ins. Co.*, 90 Pa. 277, 35 Am. Rep. 656.

* Rev. St. 1899, § 7974.

* Laws 1895, c. 175, § 25.

† Laws 1895, c. 175, § 53.

But in *German Ins. Co. v. Davis*, 40 Neb. 700, 59 N. W. 698, where the tenant vacated the property the evening before the fire, the fact that the insured had no knowledge thereof was regarded as important.

Where the policy declares that it shall be void if the premises "become vacant or unoccupied, or the risk is increased * * * by any means within the control of the insured," a vacancy, to afford a basis for forfeiture must be within the control of the insured.

Atlantic Ins. Co. v. Manning, 3 Colo. 224; *American Cent. Ins. Co. v. Clarey*, 28 Ill. App. 195.

And when a vacancy has occurred the insured, in order to excuse a forfeiture, must show that the vacancy was beyond his control (*North American Fire Ins. Co. v. Zaenger*, 63 Ill. 464).

On the other hand, it has been held, in Iowa (*Dennison v. Phoenix Ins. Co.*, 52 Iowa, 457, 3 N. W. 500) and Minnesota (*Moriarty v. Home Ins. Co.*, 53 Minn. 549, 55 N. W. 740), that the phrase "by any means within the control of insured" does not qualify the condition as to vacancy.

It was held, in *Chamberlain v. New Hampshire Fire Ins. Co.*, 55 N. H. 249, that where the insured, by reason of his ignorance of the vacation of the premises, failed to give notice thereof to the insurer, such failure is a "mistake," within the meaning of Gen. St. c. 157, § 2, providing that no policy shall be avoided by reason of any mistake or misrepresentation unless intentionally and fraudulently made. But this case is practically overruled by *Sleeper v. N. H. Fire Ins. Co.*, 56 N. H. 401, where it was said that the "mistakes" referred to in the statute are those that occur in making the contract, not in its performance.

The Ohio statute provides that "in the absence of any change increasing the risk without the consent of the insurer, and also of intentional fraud on the part of the insured, in case of total loss the whole amount mentioned in the policy or renewal on which the insurers receive a premium shall be paid, and in case of a partial loss the full amount of the partial loss shall be paid." * It has been held that, in the absence of fraud by insured, or an increase of risk, a breach of the condition of a policy that it should be void if the premises were vacant without the consent of the company is no defense to an action on the policy (*Moody v. Amazon Ins. Co.*, 52 Ohio St. 12, 38 N. E. 1011, 26 L. R. A. 313, 49 Am. St. Rep. 699).

* Rev. St. § 3843.

(m) Questions of practice.

It has been held in Indiana that, where the policy provides that it shall cease to be valid if the premises cease to be occupied, the complaint must aver that the house was occupied at the time of the fire (*Ætna Ins. Co. v. Black*, 80 Ind. 513). But the general rule seems to be that the condition against vacancy is a condition subsequent, breach of which need not be negatived in a complaint thereon, where there is an averment that all the conditions of the policy have been performed.

Phoenix Ins. Co. v. Pickel, 119 Ind. 155, 21 N. E. 546, 12 Am. St. Rep. 398; *Same v. Golden*, 121 Ind. 524, 23 N. E. 503; *Home Ins. Co. v. Boyd*, 19 Ind. App. 173, 49 N. E. 285; *Insurance Co. of North America v. Coombs*, 19 Ind. App. 331, 49 N. E. 471.

That is to say, it devolves on the company to plead a breach of the condition. The same principle has been asserted in New York (*Woodruff v. Imperial Fire Ins. Co.*, 83 N. Y. 133). The defense may, however, be set up under the general issue.

Western Assur. Co. v. Mason, 5 Ill. App. 141; *Home Ins. Co. v. Field*, 42 Ill. App. 392; *Emmons v. Home Ins. Co.*, 39 Atl. 775, 1 Pennewill (Del.) 83.

A mere change of occupancy cannot be made available under an answer alleging breach of the condition against vacancy (*Western Home Ins. Co. v. Thorpe*, 40 Kan. 255, 19 Pac. 631).

(n) Same—Evidence.

The burden of showing a vacancy in breach of the condition is on the insurer.

Hoover v. Mercantile Town Mut. Ins. Co., 69 S. W. 42, 93 Mo. App. 111; *Williams v. Niagara Fire Ins. Co.*, 50 Iowa, 561.

And so, too, the burden is on the insurer to show an increase of risk (*Eakin v. Home Ins. Co.*, 1 White & W. Civ. Cas. Ct. App. [Tex.] § 370). But, in view of the Maine statute, this burden may be lifted by the presumption of increase of risk from a vacancy of the premises.

White v. Phoenix Ins. Co., 83 Me. 279, 22 Atl. 167; *Id.*, 85 Me. 97, 26 Atl. 1049; *Jones v. Granite State Fire Ins. Co.*, 90 Me. 40, 37 Atl. 323.

On an issue as to when the insured dwelling house was vacated, a dated receipt showing when the last occupant leased another res-

idence is inadmissible (*Piscataqua Sav. Bank v. Traders' Ins. Co.*, 55 Pac. 496, 8 Kan. App. 241).

While evidence of a general custom of insurance companies in regard to insurance on vacant property is admissible, as bearing on the question of increase of risk (*Kirby v. Phoenix Ins. Co.*, 13 Lea [Tenn.] 340), evidence as to the usage of a particular company is not admissible (*Luce v. Dorchester Ins. Co.*, 105 Mass. 297, 7 Am. Rep. 522). The question is not one on which expert evidence is admissible.

Joyce v. Maine Ins. Co., 45 Me. 168, 71 Am. Dec. 536; *Cannell v. Phoenix Ins. Co.*, 59 Me. 582; *Thayer v. Providence Washington Ins. Co.*, 70 Me. 531; *Luce v. Dorchester Ins. Co.*, 105 Mass. 297, 7 Am. Rep. 522; *Liverpool & London & Globe Ins. Co. v. McGuire*, 52 Mass. 227.

A special condition avoiding a policy in case the dwelling became "vacant and unoccupied" controls a general condition avoiding the policy in case of an increase of risk "internally or externally," unless proper notice in writing be given, and therefore renders inadmissible evidence that the fact that the dwelling was merely "unoccupied" increased the risk, so as to avoid the policy. *Herrman v. Merchants' Ins. Co.*, 81 N. Y. 184, 37 Am. Rep. 488. This seems to be contrary to the opinion expressed in *Cornish v. Farn Buildings Fire Ins. Co.*, 74 N. Y. 295.

The statements in the proofs of loss are not conclusive as to the vacancy of the premises (*Cummins v. Agricultural Ins. Co.*, 67 N. Y. 260, 23 Am. Rep. 111), but, if introduced without limitation, may be considered as a whole, though a statement therein as to vacancy will defeat recovery (*North American Fire Ins. Co. v. Zaenger*, 63 Ill. 464).

The sufficiency of the evidence to show a vacancy was considered in *Home Ins. Co. of New York v. Wood*, 47 Kan. 521, 28 Pac. 167.

(p) Same—Questions for jury.

Though, as already shown, what is meant by "vacant" and "unoccupied" is a question of law, the terms being defined, whether the facts show the premises to have been vacant or unoccupied is a question for the jury.

Western Assur. Co. v. Mason, 5 Ill. App. 141; *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64, 34 Am. Rep. 106; *Rockford Ins. Co. v. Storig*, 137 Ill. 646, 24 N. E. 674, affirming 81 Ill. App. 486; *Schuermann v. Dwelling House Ins. Co.*, 161 Ill. 437, 43 N. E. 1093, 52 Am. St. Rep. 377; *Home Ins. Co. v. Mendenhall*, 45 N. E. 1078, 164 Ill. 458, 36 L. R. A. 374; *Des Moines Ice Co. v. Niagara Fire Ins.*

Co., 68 N. W. 600, 99 Iowa, 193; Home Ins. Co. v. Wood, 47 Kan. 521, 28 Pac. 167; Dwelling House Ins. Co. v. Osborn, 1 Kan. App. 197, 40 Pac. 1099; Johnson v. Norwalk Fire Ins. Co., 56 N. E. 569, 175 Mass. 529; German-American Ins. Co. v. Buckstaff, 38 Neb. 135, 56 N. W. 692; Stone v. Granite State Fire Ins. Co., 45 Atl. 235, 69 N. H. 438; Hampton v. Hartford Fire Ins. Co., 47 Atl. 433, 65 N. J. Law, 265, 52 L. R. A. 344; Wait v. Agricultural Ins. Co., 13 Hun (N. Y.) 371; Woodruff v. Imperial Fire Ins. Co., 83 N. Y. 133.

So it is said, in *O'Brien v. Commercial Fire Ins. Co.*, 38 N. Y. Super. Ct. 517, that it is a question for the jury whether or not one leaving his premises did so with intent not to return; and whether there has been an increase of risk by the vacancy is also a question for the jury.

Lockwood v. Middlesex Mut. Assur. Co., 47 Conn. 553; *Gamwell v. Merchants' & Farmers' Mut. Fire Ins. Co.*, 12 Cush. (Mass.) 167; *Thayer v. Providence Wash. Ins. Co.*, 70 Me. 531; *Cornish v. Farm Buildings Fire Ins. Co.*, 74 N. Y. 295, affirming 10 Hun. 466; *Eureka Fire & Marine Ins. Co. v. Baldwin*, 57 N. E. 57, 62 Ohio St. 368.

12. KEEPING AND USE OF PROHIBITED ARTICLES AS GROUND OF FORFEITURE.

- (a) In general.
- (b) Construction of condition.
- (c) Same—As to articles prohibited.
- (d) Permits and effect thereof.
- (e) What constitutes a breach of condition.
- (f) Same—Temporary or incidental keeping or use.
- (g) Same—Prohibited articles as part of stock in trade.
- (h) Same—Articles necessarily or customarily used in business.
- (i) Effect of breach of condition.
- (j) Same—As dependent on increase of risk.
- (k) Same—As dependent on relation to time and cause of loss.
- (l) Same—Acts of third persons.
- (m) Questions of practice.

(a) In general.

Among the hazards to which insured property is exposed is that resulting from the presence, on the premises, of articles regarded by insurers as peculiarly liable to cause or increase the loss. In the earlier forms of policies, the insurer attempted to eliminate this hazard, either by the description of the property insured as consisting of "not hazardous" merchandise, or by requiring the insured to

make representations as to the presence of specific articles on the premises. In the former case (*Richards v. Protection Ins. Co.*, 30 Me. 273), the court regarded the description as a continuing warranty. In the latter case (*Gould v. York County Mut. Fire Ins. Co.*, 47 Me. 403, 74 Am. Dec. 494), the court regarded the representation as one in *præsenti* only.

In other cases the policy contained a clause prohibiting the storing or keeping of articles denominated as hazardous, extrahazardous, or specially hazardous, lists of such articles being attached to the policy, or a clause prohibiting the storing or keeping of specific articles named. Sometimes the clause took the form of a provision that the use of certain named articles should subject the insured to an additional premium. Such conditions have in some cases been regarded as in the nature of promissory or continuing warranties.

Traders' Ins. Co. v. Catlin, 59 Ill. App. 162, affirmed in 163 Ill. 256, 45 N. E. 255, 35 L. R. A. 595, and *Westfall v. Hudson River Fire Ins. Co.*, 12 N. Y. 280, reversing 9 N. Y. Super. Ct. 490, where the lower court regarded the clause as an exception of risk.

Such provisions may, indeed, take the form of exceptions of risk, as in *Jones v. Howard Ins. Co.*, 10 N. Y. St. Rep. 120, and *Matson v. Farm Buildings Ins. Co.*, 73 N. Y. 310, 29 Am. Rep. 149; but generally they are in the nature of conditions subsequent, which are a part of the contract (*Mead v. Northwestern Ins. Co.*, 7 N. Y. 530), by which the insured is bound by his acceptance of the policy, though there was no application and no representation as to the use of the prohibited articles (*McFarland v. St. Paul Fire & Marine Ins. Co.*, 46 Minn. 519, 49 N. W. 253). This principle seems to be justified by the rule that the existence of such a condition in the policy calls for a disclosure of the intent to keep or use the prohibited article (*Turnbull v. Home Fire Ins. Co.*, 83 Md. 312, 34 Atl. 875).

Where the action is on an oral contract of insurance, the existence of the contract being denied, the insurer cannot also bind the insured by a condition against the keeping of certain articles which would have been included in the policy, had one been issued (*Clarkson v. Western Assur. Co.*, 92 Hun, 527, 37 N. Y. Supp. 53).

(b) Construction of condition.

Though the form of the condition varies in different policies, it declares substantially that, in the absence of agreement indorsed

thereon, the policy shall become void if certain named articles are kept, or stored, or used on the premises.

A common form of the condition found in the standard policies is:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitroglycerine, or other explosives, phosphorus, or petroleum, or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law, but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light)."

Where the policy is on a building, and provides that the article named shall not be stored or kept on the premises, the word "premises" must be construed as referring to the building insured, and not to the ground outside the building, or an outhouse detached from the insured building.

Sperry v. Insurance Co. of North America (C. C.) 22 Fed. 516; *La Force v. Williams City Fire Ins. Co.*, 43 Mo. App. 518; *Hanover Fire Ins. Co. v. Stoddard*, 73 N. W. 291, 52 Neb. 745; *Rau v. Westchester Fire Ins. Co.*, 55 N. Y. Supp. 459, 36 App. Div. 179; *Queen Ins. Co. v. Sinclair*, 1 Ohio Cir. Ct. R. 496, 1 O. C. D. 276; *Allemania Fire Ins. Co. v. Pitts Exposition Society* (Pa.) 11 Atl. 572; *Fireman's Fund Ins. Co. v. Shearman*, 20 Tex. Civ. App. 243, 50 S. W. 598; *Northwestern Mutual Life Ins. Co. v. Germania Fire Ins. Co.*, 40 Wis. 446.

But, where the property is described as a "three-story building occupied as a store and situated at No. 72 E. street," a one-story addition opening into the main building, used as part of the store and always included in the designation by street number, is part of the premises within the condition (*Boyer v. Grand Rapids Fire Ins. Co.*, 124 Mich. 455, 83 N. W. 124, 83 Am. St. Rep. 338). So, where a policy provided that it would be void if naphtha was kept or used on the premises, the use of a naphtha torch for burning off old paint on the building is a use on the premises, though no naphtha was at any time inside of the building (*First Congregational Church v.*

Holyoke Mut. Fire Ins. Co., 158 Mass. 475, 33 N. E. 572, 19 L. R. A. 587, 35 Am. St. Rep. 508).

Where the policy is on personal property only, the application of the prohibitory clause depends on the wording of the condition. If the condition prohibits the keeping or use of the article on "the premises insured," it is obvious that it is not applicable, as the premises are not insured.

Leggett v. Aetna Ins. Co., 10 Rich. Law (S. C.) 202; *Mosley v. Vermont Mut. Fire Ins. Co.*, 55 Vt. 142.

So, where the property insured was machinery in a mill, the mill must be regarded as the "premises" described in the policy, and a prohibited article kept in an engine house adjoining the mill is not on the premises (*Carlin v. Western Assur. Co.*, 57 Md. 515, 40 Am. Rep. 440). But, where the condition prohibits the keeping of the article "in the above-described building," it is applicable, though the subject of the insurance is personalty contained in such building (*Kennefick-Hammond Co. v. Norwich Union Fire Ins. Soc. [Mo. App.]* 80 S. W. 694).

In *Stettiner v. Granite Ins. Co.*, 12 N. Y. Super. Ct. 594, it was held that a condition prohibiting the lighting of the premises insured by camphene or spirit gas, though inapt, applies to a policy on goods, as well as to one on the building.

The ordinary provision in a policy of fire insurance, prohibiting the storing or keeping of certain hazardous articles, has reference to a storing or keeping in a mercantile sense in considerable quantities with a view to traffic, or when storing and safe-keeping is the sole or principal object of the deposit, not where the keeping is incidental, and only for the purpose of consumption.

Bayly v. London & L. Ins. Co., 2 Fed. Cas. 1087; *Wheeler v. American Central Ins. Co.*, 6 Mo. App. 235; *O'Neil v. Buffalo Fire Ins. Co.*, 3 N. Y. 122; *Williams v. Fireman's Fund Ins. Co.*, 54 N. Y. 569, 13 Am. Rep. 620; *Mears v. Humboldt Ins. Co.*, 92 Pa. 15, 37 Am. Rep. 647; *Northwestern Mutual Life Ins. Co. v. Germania Fire Ins. Co.*, 40 Wis. 446.

The clause has, indeed, been more liberally construed, and it is held in several well-considered cases that, even if the articles are kept for sale in the ordinary course of retail trade, they are not "stored," within the meaning of the condition.

Longhurst v. Star Ins. Co., 19 Iowa, 364; *Moore v. Protection Ins. Co.*, 29 Me. 97, 48 Am. Dec. 514; *Richards v. Same*, 30 Me. 273;

Phoenix Ins. Co. v. Taylor, 5 Minn. 492 (Gil. 393); *Rafferty v. New Brunswick Fire Ins. Co.*, 18 N. J. Law, 480, 38 Am. Dec. 525; *Langdon v. New York Equitable Ins. Co.*, 1 N. Y. Super. Ct. 253.

It must appear that the building is appropriated to the purpose of storing the article in a mercantile sense (*Hynds v. Schenectady County Mutual Ins. Co.*, 11 N. Y. 554). So, where gunpowder was deposited in a building for the purpose of blowing it up to prevent the spread of a conflagration, it was not a "storing" of the powder within the condition (*City Fire Ins. Co. v. Corlies*, 21 Wend. [N. Y.] 367, 34 Am. Dec. 258). The word "kept" has also been construed as referring to a keeping for sale, and not to prohibit a keeping for use in the ordinary way (*Putnam v. Commonwealth Ins. Co.* [C. C.] 4 Fed. 753).

In accordance with the general rule that provisions relating to forfeiture should, when ambiguous, be so construed as to prevent forfeiture, the courts have, as a rule, construed the condition as to the keeping and use of hazardous articles liberally in favor of the insured, whenever there is an ambiguity in such condition. Thus, where the policy provided for forfeiture if there were kept on the premises articles denominated as hazardous, extrahazardous, or specially hazardous, gunpowder being included in the latter class, except as specially provided for, and recited further: "It is conditioned that no greater amount than 25 pounds of gunpowder shall at any time be placed in the building described, said powder to be kept in tin or other metallic canisters"—it was held that the assured might keep on hand without further permit a quantity of powder less than 25 pounds in tin or other metallic canisters (*Bowman v. Pacific Ins. Co.*, 27 Mo. 152). So, where the policy was condition to be void if gunpowder, phosphorus, etc., were kept on the premises, or if camphene, burning fluid, etc., were kept for sale, stored, or used on the premises in quantities exceeding one barrel at any one time, without permission, the condition was construed so as to apply the clause, "in quantities exceeding one barrel at any one time," to gunpowder, and thus prevent a forfeiture of the policy for the keeping of any less quantity than one barrel on the premises (*Phoenix Ins. Co. v. Slaughter*, 12 Wall. 404, 20 L. Ed. 444). The clause, "gunpowder is not insurable unless by special agreement," in a policy which permitted the presence of extrahazardous articles in the building, is not a condition under which forfeiture may be claimed if gunpowder is stored in the building, but merely a declaration that it could not be insured, under the class of

extrahazardous goods, at the rate specified in that class, and would be excluded from an estimate of loss, unless specially insured (*Duncan v. Sun Fire Ins. Co.*, 6 Wend. [N. Y.] 488, 22 Am. Dec. 539).

(c) Same—As to articles prohibited.

The condition varies in different policies as to the articles prohibited. In the earlier form of policy the condition generally prohibited the keeping of articles denominated as hazardous or extra-hazardous. Later forms specified certain articles, such as camphene, spirit gas, burning fluid, rags and waste, gunpowder and other explosives, benzine, naphtha, and other inflammable oils. One of the present forms of the condition has been given in the preceding subdivision. Whether the condition is general, prohibiting the keeping of hazardous articles, or specifies certain articles as prohibited, it is, of course, important to determine just what articles are included within the prohibitory clause. So far as the general condition prohibiting the keeping of hazardous articles is concerned, it is evident that an article may be hazardous in the sense that its presence in the building increases the danger of fire, or in the sense that it is especially liable to damage, and therefore increases the amount of loss. It is on the latter ground that among hazardous articles have been classed crockery and glassware (*Franklin Fire Ins. Co. v. Updegraff*, 43 Pa. 350), and spirituous liquors (*People's Ins. Co. v. Kuhn*, 12 Heisk. [Tenn.] 515). In a well-considered case (*Rathbone v. City Fire Ins. Co.*, 31 Conn. 193) it has, however, been said that the reasonable construction of the condition would make it apply only to that class of articles by which the danger of fire is increased. So lime will be regarded as a hazardous article, if stored where it is liable to become wet (*School District No. 116 v. German Ins. Co.*, 7 S. D. 458, 64 N. W. 527).

In some policies the condition is that the insured shall become void if gunpowder or "other articles subject to legal restriction" are kept on the premises in greater quantities or in a different manner than the law provides, and it has been held that the clause "other articles subject to legal restriction" refers only to articles intrinsically dangerous, the keeping of which might have a natural tendency to increase the risk of loss, and not to articles not dangerous, the sale or keeping of which is regulated by law.

Niagara Fire Insurance Co. v. De Graff, 12 Mich. 124; *Hinckley v. Germania Fire Ins. Co.*, 140 Mass. 38, 1 N. E. 737, 54 Am. Rep. 445.

When the policy contains a condition prohibiting the keeping or use of specific articles on the premises, the question often arises whether the article kept or used is the article specified. Here, again, the courts generally construe the policy strictly, so as to prevent a forfeiture. Thus, though fireworks usually contain gunpowder, keeping fireworks has been held not to be a violation of the clause prohibiting the keeping of gunpowder (*Tischler v. California Farmers' Mut. Fire Ins. Co.*, 66 Cal. 178, 4 Pac. 1169). But fireworks are not included in a permit to keep firecrackers (*Steinbach v. Relief Fire Ins. Co.*, 13 Wall. 183, 20 L. Ed. 615). A prohibition against the keeping of nitroglycerine includes dynamite or giant powder (*Sperry v. Springfield Fire & Marine Ins. Co.* [C. C.] 26 Fed. 234). Flashlight powder, used by photographers, is an explosive, within a clause prohibiting gunpowder or other explosives (*Lutz v. Royal Ins. Co.*, 205 Pa. 159, 54 Atl. 721). It cannot, however, be said that alcohol and kerosene of a certain quality are explosives (*Willis v. Germania & Hanover Fire Ins. Co.*, 79 N. C. 285).

Where a policy prohibits the use of "camphene or spirit gas," it cannot be said as a matter of law that the use of "burning fluid" was within the prohibition (*Stettiner v. Granite Ins. Co.*, 12 N. Y. Super. Ct. 594). And where the prohibition is against "camphene, spirit gas, or burning fluid," the burning fluid, to be within the prohibition, must be of the same nature as camphene or spirit gas (*Wheeler v. American Central Ins. Co.*, 6 Mo. App. 235). Consequently naphtha, though used for illuminating purposes, is not a burning fluid within the condition (*Putnam v. Commonwealth Ins. Co.* [C. C.] 4 Fed. 753); nor is lard oil (*Carlin v. Western Assur. Co.*, 57 Md. 515, 40 Am. Rep. 440). Nor can it be said as a matter of law that gin or turpentine are inflammable liquids, within a clause prohibiting such liquids (*Mosley v. Vermont Mut. Fire Ins. Co.*, 55 Vt. 142). But, if the condition prohibits the use of "camphene, burning fluid, or refined coal or earth oils," since camphene and burning fluid are highly explosive, the words "refined coal or earth oils" must be regarded as referring to products which are also highly explosive, such as naphtha, benzine, and gasoline, and do not include kerosene (*Bennett v. North British & Mercantile Ins. Co.*, 8 Daly [N. Y.] 471). A prohibition against keeping petroleum or refined coal and earth oils includes gasoline (*Kings County Fire Ins. Co. v. Swigert*, 11 Ill. App. 590). But an illuminating fluid, composed of gasoline, soda, salt, and camphor, is not included in a pro-

hibition of gasoline, in the absence of expert evidence that the fluid and gasoline are the same (*Phoenix Ins. Co. v. Shearman*, 17 Tex. Civ. App. 456, 43 S. W. 930). So the use of gasoline vapor for lighting purposes is not within a clause prohibiting the use of gasoline, where the gasoline was stored in a tank underground, some distance away from the building.

Arkell v. Commerce Ins. Co., 69 N. Y. 191, 25 Am. Rep. 168; *Queen Ins. Co. v. Sinclair*, 1 Ohio Cir. Ct. R. 496, 1 O. C. D. 276.

Headlight oil, being a refined product of petroleum, is within a condition prohibiting the use of kerosene oil and other fluids manufactured from earth or coal oil (*Couch v. Rochester German Fire Ins. Co.*, 25 Hun [N. Y.] 469).

(d) Permits and effect thereof

Where the insurance was on "such articles as are usually kept" in a paint shop, and it was shown that benzine was usually kept in such a shop, the insurance of the article was equivalent to an "agreement indorsed on the policy," within a condition declaring that the policy, "unless otherwise provided by agreement hereon, or added hereto, shall be void * * * if * * * there be kept, used, or allowed, on the above-described premises, benzine," etc. (*Mascott v. Granite State Fire Ins. Co.*, 68 Vt. 253, 35 Atl. 75). The rule was also applied in *Phenix Ins. Co. v. Walters*, 24 Ind. App. 87, 56 N. E. 257, 79 Am. St. Rep. 257, where the keeping of dynamite in a hardware store was involved. Under a clause providing that the use of certain articles will subject the property insured to an additional premium, which must be indorsed on the policy, the court held that, as it was the premium that was required to be indorsed, and not permission to use the article, if such additional premium was actually paid and accepted, the mere failure to make the indorsement would not forfeit the insurance (*Hunt v. Hudson River Fire Ins. Co.*, 9 N. Y. Super. Ct. 481). Where by mistake the permit is not indorsed on the policy, it may be shown by parol (*Insurance Co. of North America v. Melvin*, 1 Walk. [Pa.] 362).

Permits will, however, be strictly construed as to time and extent, and a permit to keep fireworks for 15 days will not operate to allow the keeping of fireworks after the expiration of that period (*Betcher v. Capital Fire Ins. Co.*, 78 Minn. 240, 80 N. W. 971). So a permit to keep kerosene for use for lights refers only to lights on

the premises, and does not permit the keeping of kerosene for any other purpose, so that the policy becomes void if kerosene is drawn in a manner not permitted by the policy for the use of a neighbor (*Gunther v. Liverpool & London & Globe Ins. Co.* [C. C.] 34 Fed. 501). Where the condition permitted the use of kerosene oil under certain conditions, a special agreement permitting the keeping of "paints, oils," etc., did not supersede the printed provision as to kerosene, or protect the policy from forfeiture for the use of kerosene in a different manner from that specified (*Vandervolgen v. Manchester Fire Assur. Co.*, 123 Mich. 291, 82 N. W. 46). In the absence of any stipulation as to the manner in which gunpowder shall be kept it is not a violation of the permit that part of it is in the form of squibs (*Mechanics' & Traders' Ins. Co. v. Floyd* [Ky.] 49 S. W. 543).

Where permission was given to use gasoline gas for lighting, "the generator being underground about 60 feet from" the building, the implied privilege to store gasoline on the premises, arising from the privilege to use the apparatus, could in no manner be extended beyond the permission to store it as needed for use in the apparatus. The proper place to store gasoline for such use was in the apparatus itself, and when the apparatus was not in use there was no privilege for the storage of gasoline anywhere else.

Liverpool & London & Globe Ins. Co. v. Gunther, 116 U. S. 113, 6 Sup. Ct. 306, 29 L. Ed. 575, reversing *Gunther v. Liverpool & London & Globe Ins. Co.* (C. C.) 85 Fed. 846.

In *Winans v. Allemania Fire Ins. Co.*, 38 Wis. 342, it was held that a written permission to light the premises with gasoline, when the generator should be removed 30 feet from the building, does not prevail over a parol consent given by the agent at the time of the insurance to continue the use of the gasoline until kerosene lamps could be installed; hence the insurer could not claim a forfeiture on the ground that gasoline had been used.

As the terms "hazardous," "extrahazardous," and "specially hazardous" have well-defined meanings, a permit to carry "hazardous" articles cannot be extended to articles described in the schedule attached to the policy as "extrahazardous" (*Pindar v. Continental Ins. Co.*, 38 N. Y. 364, 97 Am. Dec. 795). Where the policy prohibited the use of camphene, spirit gas, burning fluid, or chemical oils, a permit to use refined coal oil, kerosene, or other carbon oil for lights, is a mere exception to the prohibitory clause, and does

not forbid the use of any other illuminant, save those enumerated, if such other illuminant is not mentioned in the prohibitory clause (*Carlin v. Western Assurance Co.*, 57 Md. 515, 40 Am. Rep. 440). A permit as to the storage of prohibited articles, given by the original insurer, will not evade forfeiture of a policy of reinsurance containing a condition prohibiting the storage of such articles (*St. Nicholas Ins. Co. v. Merchants' Mut. Fire & Marine Ins. Co.*, 83 N. Y. 604).

It would seem from the abstract published in 21 Alb. Law J. 153, that the Court of Appeals of New York decided, in *Shipman v. Oswego & Onondaga Ins. Co.*, that, where the keeping of gunpowder is prohibited, permission "to keep 25 pounds of gunpowder inclosed in the cans" is not a waiver of the prohibition, but merely a modification, so that the keeping of a small amount in a wooden keg is a violation of the policy. The report in the Albany Law Journal, however, states that the opinion was by Rapallo, J., and that the judgment of the lower court was reversed. In the official report (79 N. Y. 627) it is stated that the judgment of the lower court was affirmed without opinion, "except Rapallo, J., dissenting and reading opinion." Whether the abstract in the Albany Law Journal states the decision of the majority, or merely the opinion of Judge Rapallo, cannot be determined.

The fact that under the Code no one is permitted to keep on hand at one time more than 50 pounds of gunpowder does not affect the validity of a permit to keep 75 pounds, as such permit does not require that amount to be kept (*State Ins. Co. v. Hughes*, 10 Lea [Tenn.] 461).

(e) What constitutes a breach of condition.

In the absence of a specific prohibition, the keeping of an article generally considered hazardous in a reasonable quantity for the insured's own use will not afford a ground for forfeiture (*White v. Mutual Fire Assur. Co.*, 8 Gray [Mass.] 566). To constitute a breach of condition prohibiting the storing or vending of a certain article, there must be kept on the premises such a quantity as under a fair construction of the policy would amount to a substantial violation of the condition (*Bayly v. London & L. Ins. Co.*, 2 Fed. Cas. 1087). A mere technical violation of the condition is not sufficient (*Fireman's Ins. Co. v. Cecil*, 12 Ky. Law Rep. 48, 259). It was held, in *Williams v. Fireman's Fund Ins. Co.*, 54 N. Y. 569, 13 Am. Rep. 620, that a clause declaring that, if petroleum shall be stored in the premises without written permission, the policy shall be void,

does not prohibit the keeping of petroleum for medicinal purposes, and therefore, keeping a small quantity of petroleum for such purposes does not work a forfeiture of the policy; but in *Williams v. People's Fire Ins. Co.*, 57 N. Y. 274, involving a policy on the same property, it was said that, while such a use of petroleum did not forfeit the policy under the prohibitory clause, it could be relied on as a breach of the condition against increase of risk. It is intimated, in *Boyer v. Grand Rapids Fire Ins. Co.*, 124 Mich. 455, 83 N. W. 124, 83 Am. St. Rep. 338, that the use of gasoline in a reasonable way for necessary repairs would not amount to a breach of condition that gasoline should not be allowed on the premises.

Owing to the variations in the form of the condition, it is impossible to deduce any general rule as to the uses which will be permitted under the prohibitory clause. It has been held in New York (*Buchanan v. Exchange Fire Ins. Co.*, 61 N. Y. 26) that, though a clause in a policy of fire insurance prohibiting the storing or use upon the insured premises of "petroleum, rock, or earth oil," prohibits the storing or use of kerosene oil, yet, there being in the policy another clause prohibiting the lighting of the premises by means of certain named inflammable substances, not including kerosene, lighting the building with kerosene, and keeping on hand therein a reasonable quantity for that purpose, is not a breach of the condition. So it has been held in Texas that a prohibition in a fire insurance policy of the use of gasoline, any custom "of trade or manufacture" to the contrary notwithstanding, does not preclude proof of a custom of using gasoline for domestic purposes to explain or avoid the prohibition.

American Central Ins. Co. v. Green, 16 Tex. Civ. App. 531, 41 S. W. 74; *Northern Assur. Co. of London, England, v. Crawford*, 24 Tex. Civ. App. 574, 59 S. W. 916.

The use of a small quantity of gasoline for such an ordinary domestic use as cleaning clothes does not amount to a breach.

La Force v. Williams City Fire Ins. Co., 43 Mo. App. 518; *Columbia Planing Mill Co. v. American Fire Ins. Co.*, 59 Mo. App. 204.

The incidental use of benzine for cleaning machinery is not a breach (*Mears v. Humboldt Ins. Co.*, 92 Pa. 15, 37 Am. Rep. 647).

Where the policy prohibited the use of refined coal or earth oils, but it was known to the agent, when the policy was issued, that the insured used kerosene for lighting the building, it was held that

there was no breach (*Bennett v. North British & Mercantile Ins. Co.*, 81 N. Y. 273, 37 Am. Rep. 501). Though the decision is based to some extent on the agent's knowledge of the use of kerosene, the court also takes the position that the condition does not absolutely prohibit the use of kerosene for lighting, and, moreover, it is possible that the insured did not know that kerosene is a product of coal or earth oil. On the other hand it has been held in Minnesota (*McFarland v. St. Paul Fire & Marine Ins. Co.*, 46 Minn. 519, 49 N. W. 253) that the description of the property insured as a dwelling does not imply consent to the use of gasoline therein, though it was in use at the time the policy was issued. A condition prohibiting the use of petroleum for lighting in stores, warehouses, and factories does not prevent its use as a light in a sleeping apartment (*Williams v. Fireman's Fund Ins. Co.*, 54 N. Y. 569, 13 Am. Rep. 620). But, where a condition prohibits the use of petroleum or kerosene, an exception permitting the use for lights in dwellings cannot be extended, so as to justify the use of kerosene for lights in a store or factory.

Cerf v. Home Ins. Co., 44 Cal. 320, 18 Am. Rep. 165; *Couch v. Rochester German Fire Ins. Co.*, 25 Hun (N. Y.) 469.

So an exception permitting the use of kerosene for lighting will not justify its use as fuel to generate steam in a factory (*White v. Western Assur. Co.* [Pa.] 6 Atl. 113, 18 Wkly. Notes Cas. 279); but it will justify a use for cooking purposes (*Snyder v. Dwelling House Ins. Co.*, 37 Atl. 1022, 59 N. J. Law, 544, 59 Am. St. Rep. 625).

(f) Same—Temporary or incidental keeping or use.

Attention has already been called to the principle that in the construction of the condition "stored" and "kept" imply something more than an occasional or temporary presence of the prohibited article on the premises. We may therefore deduce the converse rule that the occasional introduction of the prohibited article into the building for some merely temporary purpose is not a breach of the condition (*O'Niel v. Buffalo Fire Ins. Co.*, 3 N. Y. 122), as, for instance, the presence of oil and turpentine in a house for the use of painters engaged in repainting the building. The purpose of the prohibitory clause is to provide against the danger that would arise from the habitual, constant, or continued exposure of the property, through the presence of the dangerous article (*Springfield Fire &*

Marine Ins. Co. v. Wade, 95 Tex. 598, 68 S. W. 977, 58 L. R. A. 714, 93 Am. St. Rep. 870). Where the condition provides that the policy shall be void if "there be kept, used, or allowed" certain articles on the premises, the word "allowed" is to be construed as meaning "allowed to be kept or used," and does not refer to the temporary presence of the prohibited article.

London & Lancashire Fire Ins. Co. v. Fischer, 92 Fed. 500, 84 O. C. A. 503; Springfield Fire & Marine Ins. Co. v. Wade, 95 Tex. 598, 68 S. W. 977, 58 L. R. A. 714, 93 Am. St. Rep. 870.

So, under a condition prohibiting the insured to "keep, have, or use" certain articles, there is no breach of condition by an exceptional use of the articles in an emergency (Mears v. Humboldt Ins. Co., 92 Pa. 15, 37 Am. Rep. 647). Nor is a mere temporary non-compliance with the terms of a permit a breach of the condition, if there is a substantial compliance. Thus, where the permit is to keep one barrel of benzine "in tin cans," the temporary presence of a wooden barrel of benzine while the contents are being transferred to tin cans is not a breach (Maryland Fire Ins. Co. v. Whiteford, 31 Md. 219, 100 Am. Rep. 45). Similarly, where the permit was to keep on hand 75 pounds of gunpowder, the accidental presence of more than that amount will not forfeit the policy (State Ins. Co. v. Hughes, 10 Lea [Tenn.] 461). Generally speaking there must be a purpose or intent that the keeping or use shall be habitual or permanent (Leggett v. Ætna Ins. Co., 10 Rich. Law [S. C.] 202). And, as said in Boyer v. Grand Rapids Fire Ins. Co., 124 Mich. 455, 83 N. W. 124, 83 Am. St. Rep. 338, the principle as to temporary use cannot be invoked if the hazardous article was brought into the building for a purpose not temporary or incidental, as where gasoline was brought into the building for use in a gasoline stove. The court on this ground distinguished the present case from Smith v. German Ins. Co., 107 Mich. 270, 65 N. W. 236, 30 L. R. A. 368, where gasoline was brought into the building for the use of painters engaged in burning off the old paint preparatory to repainting.

That mere temporary or incidental presence or use of the prohibited article is not a breach of the condition is also asserted in Lounsbury v. Protection Ins. Co., 8 Conn. 459, 21 Am. Dec. 686; Fireman's Ins. Co. v. Cecil, 12 Ky. Law Rep. 48; Id., 259; La Force v. Williams City Fire Ins. Co., 43 Mo. App. 518; Columbia Planing Mill Co. v. American Fire Ins. Co., 59 Mo. App. 204; Hynds v. Schenectady County Mut. Ins. Co., 11 N. Y. 554, affirming 16 Barb.

119; *Merchants' & Manufacturers' Mut. Ins. Co. v. Washington Mut. Ins. Co.*, 1 Handy, 408, 12 Ohio Dec. 209; *Angier v. Western Assur. Co.*, 10 S. D. 82, 71 N. W. 761, 66 Am. St. Rep. 685; *Fireman's Fund Ins. Co. v. Shearman*, 50 S. W. 598, 20 Tex. Civ. App. 843.

The contrary rule was asserted in *Wheeler v. Traders' Ins. Co.*, 62 N. H. 326, 13 Am. St. Rep. 582, and 62 N. H. 450; but on a subsequent appeal reported in 1 Atl. 293, it was held that, if the use to which the prohibited article was put was customary and necessary in the insured's business, there was no breach. It has been held that, under the condition as to increase of risk, the increase contemplated must be something permanent and habitual (*Leggett v. Aetna Ins. Co.*, 10 Rich. Law [S. C.] 202). Thus the use on one occasion only of kerosene in kindling a fire would not avoid the policy under such condition (*Angier v. Western Assur. Co.*, 10 S. D. 82, 71 N. W. 761, 66 Am. St. Rep. 685). On the other hand, it has been held in Pennsylvania (*Heron v. Phoenix Mut. Fire Ins. Co.*, 180 Pa. 257, 36 Atl. 740, 40 Wkly. Notes Cas. 55, 36 L. R. A. 517, 57 Am. St. Rep. 638) that a condition that the policy on a dwelling should be void if the hazard were increased or fireworks allowed on the premises was broken if fireworks were brought into the house on July 3 to be used the next day. Of course, where the prohibitory clause is in fact an exception of risk, the temporary presence of the hazardous article is a breach of condition, the loss resulting therefrom (*Matson v. Farm Buildings Ins. Co.*, 73 N. Y. 310, 29 Am. Rep. 149, reversing 9 Hun, 415).

(g) Same—Prohibited articles as part of stock in trade.

Where the policy covers a stock of merchandise, and the article prohibited is one usually kept for sale as a part of such stock, the general rule is that the presence of such article in the stock is not a breach of the prohibitory clause.

This rule is asserted in *Phenix Ins. Co. v. Walters*, 56 N. E. 257, 24 Ind. App. 87, 79 Am. St. Rep. 257; *Moore v. Protection Ins. Co.*, 29 Me. 97, 48 Am. Dec. 514; *Elliott v. Hamilton Mut. Ins. Co.*, 18 Gray (Mass.) 139; *Whitmarsh v. Conway Fire Ins. Co.*, 18 Gray (Mass.) 359, 77 Am. Dec. 414; *Phoenix Ins. Co. v. Taylor*, 5 Minn. 492 (Gil. 893); *Fink v. Lancashire Ins. Co.*, 60 Mo. App. 673; *Barnard v. National Fire Ins. Co.*, 27 Mo. App. 26; *Renshaw v. Missouri State Mut. Fire & Marine Ins. Co.*, 103 Mo. 595, 15 S. W. 945, 23 Am. St. Rep. 904; *New York Equitable Ins. Co. v. Langdon*, 6 Wend. (N. Y.) 623; *Barnum v. Merchants' Fire Ins. Co.*,

97 N. Y. 188; *Steinbach v. Relief Fire Ins. Co.*, 12 Hun (N. Y.) 640; *Jones v. Howard Ins. Co.*, 10 N. Y. St. Rep. 120; *Collins v. Farmville Ins. & Banking Co.*, 79 N. C. 279, 28 Am. Rep. 322; *Leggett v. Aetna Ins. Co.*, 10 Rich. Law (S. C.) 202; *Mascott v. Granite State Fire Ins. Co.*, 68 Vt. 253, 35 Atl. 75. The doctrine was also approved, though not involved, in *James v. Lycoming Ins. Co.*, 18 Fed. Cas. 809.

Generally speaking, the principle is based on the general doctrine that the written portion of the contract must prevail over a repugnant printed portion, and therefore a written clause, describing the property insured as merchandise "usually kept in" a certain kind of store, will prevail over a printed condition, prohibiting the keeping of certain articles, if in fact such articles are usually a part of a stock of merchandise such as that described.

Reference may be made to *Plinsky v. Germania Fire & Marine Ins. Co.* (C. C.) 32 Fed. 47; *Tubb v. Liverpool & London & Globe Ins. Co.*, 106 Ala. 651, 17 South. 615; *Yoch v. Home Mut. Ins. Co.*, 111 Cal. 508, 44 Pac. 189, 34 L. R. A. 857; *Phoenix Ins. Co. v. Taylor*, 5 Minn. 492 (Gil. 398); *Liverpool & London & Globe Ins. Co. v. Van Os*, 63 Miss. 481, 56 Am. Rep. 810; *Ackley v. Phenix Ins. Co.*, 25 Mont. 272, 64 Pac. 665; *Phoenix Ins. Co. v. Flemming*, 44 S. W. 464, 65 Ark. 54, 89 L. R. A. 789, 67 Am. St. Rep. 900.

But in *Jones v. Firemen's Fund Ins. Co.*, 2 Daly (N. Y.) 307, affirmed in 51 N. Y. 818, it was held that, where the keeping of the article was forbidden by city ordinance, it could not be regarded as permitted by the written portion of the policy.

The fact that the condition is reinforced by the clause "any usage or custom of trade to the contrary notwithstanding" does not affect the question.

Yoch v. Home Mut. Ins. Co., 111 Cal. 508, 44 Pac. 189, 34 L. R. A. 857; *Ackley v. Phenix Ins. Co. of Brooklyn*, 25 Mont. 272, 64 Pac. 665.

Since such articles are usually kept in such stores, the insurer must be presumed to have known that fact and to have intended to cover them by the policy.

Yoch v. Home Mutual Ins. Co., 111 Cal. 508, 44 Pac. 189, 34 L. R. A. 857; *Ackley v. Phenix Ins. Co. of Brooklyn*, 25 Mont. 272, 64 Pac. 665; *Pittsburgh Ins. Co. v. Frazee*, 107 Pa. 521.

It must, however, clearly appear that the articles are usually included in a stock such as that described.

Plinsky v. Germania Fire & Marine Ins. Co. (C. C.) 32 Fed. 47; *Mitchell v. Potomac Ins. Co.*, 183 U. S. 42, 22 Sup. Ct. 22, 46 L. Ed. 74;

Tubb v. Liverpool & London & Globe Ins. Co., 106 Ala. 651, 17 South. 615; *Liverpool & London & Globe Ins. Co. v. Van Os*, 63 Miss. 481, 56 Am. Rep. 810.

Thus, in *Whitmarsh v. Conway Fire Ins. Co.*, 16 Gray (Mass.) 359, 77 Am. Dec. 414, the fact that the prohibited article was customarily kept for sale in a store of the kind described was abundantly shown by the evidence; but in *Whitmarsh v. Charter Oak Fire Ins. Co.*, 2 Allen (Mass.) 581, it was held that, as there was no evidence that the prohibited articles constituted a part of the stock ordinarily kept by such store, the court could not judicially know that such was the fact, and the policy was, therefore, avoided.

So it may be shown that white cotton rags are properly part of the stock of a country store (*Elliott v. Hamilton Mut. Ins. Co.*, 13 Gray [Mass.] 139), and that benzine (*Phoenix Ins. Co. v. Flemming*, 44 S. W. 464, 65 Ark. 54, 39 L. R. A. 789, 67 Am. St. Rep. 900) and saltpeter (*Collins v. Farmville Ins. & Banking Co.*, 79 N. C. 279, 28 Am. Rep. 322) are properly included in a stock of drugs. Dynamite may be shown to be a customary part of the stock of a hardware store (*Phenix Ins. Co. v. Walters*, 24 Ind. App. 87, 56 N. E. 257, 79 Am. St. Rep. 257), and gunpowder to be a customary part of the stock of a general store (*Leggett v. Aetna Ins. Co.*, 10 Rich. Law [S. C.] 202).

So, too, it must appear that the article was in fact kept as part of the stock, and not for any other purpose (*Cassimus v. Scottish Union & National Ins. Co.*, 135 Ala. 256, 33 South. 163); and, though the article might be kept as part of the usual stock sold by the insured, this does not give him the right to manufacture it on the premises (*Lutz v. Royal Ins. Co.*, 205 Pa. 159, 54 Atl. 721).

Moreover, though the article is one usually kept in stores of the kind described, if a permit is given to keep a certain amount of such article (*Pittsburgh Ins. Co. v. Frazee*, 107 Pa. 521), or that it may be kept in a certain manner (*Vandervolgen v. Manchester Fire Assur. Co.*, 123 Mich. 291, 82 N. W. 46), the permit must be complied with, notwithstanding the insured's rights might be greater under the general doctrine.

So, where the policy is on the insured's stock "and other articles in his line of business," with a privilege to keep firecrackers, and requiring hazardous articles, such as fireworks, if kept, to be specially written, the policy is avoided by storing fireworks on the premises without leave inserted in writing. Fireworks are not in-

cluded by the term "firecrackers," nor can they be brought under the phrase "other articles in his line of business," in view of the express requirement that leave to keep them shall be obtained in writing and an additional premium paid. (*Steinbach v. Relief Fire Ins. Co.*, 13 Wall. 183, 20 L. Ed. 615.)

The presence of the prohibited article cannot be made a basis of forfeiture under the clause forbidding the use of the premises for any hazardous purpose, if there is no schedule showing what is considered a hazardous business or hazardous article (*Renshaw v. Missouri State Mutual Fire & Marine Ins. Co.*, 103 Mo. 595, 15 S. W. 945, 23 Am. St. Rep. 904); nor under the clause declaring that extrahazardous goods, to be covered, must be specially written, if the policy covers only furniture and fixtures, as the indorsement is required only when the policy is intended to cover the extrahazardous articles (*Barnum v. Merchants' Fire Ins. Co.*, 97 N. Y. 188).

Where the policy covers a general stock of merchandise, and especially excepts certain hazardous articles, the rule does not apply.

Pindar v. Continental Ins. Co., 88 N. Y. 364, 97 Am. Dec. 795; *Lancaster Fire Ins. Co. v. Lenhelm*, 89 Pa. 497, 33 Am. Rep. 778; *Birmingham Fire Ins. Co. v. Kroegher*, 83 Pa. 64, 24 Am. Rep. 147.

And, though a general exception of hazardous articles is sufficient, in the absence of evidence that such articles are usually included in the stock described (*Whitmarsh v. Charter Oak Fire Ins. Co.*, 2 Allen [Mass.] 581), a mere condition that the hazardous article must be specially mentioned is not such an exception (*Franklin Fire Ins. Co. v. Updegraff*, 43 Pa. 350). It was held, in *Niagara Fire Ins. Co. v. De Graff*, 12 Mich. 124, that where the goods insured were described as "groceries," and this term was found to include certain hazardous articles, they were so specially provided for, within the meaning of the policy.

The rule that the prohibition does not refer to articles usually part of the stock described has been disapproved in some jurisdictions.

Reference may be made to *Cobb v. Insurance Co. of North America*, 17 Kan. 492; *Western Assur. Co. v. Rector*, 85 Ky. 294, 8 S. W. 415, reversing 7 Ky. Law Rep. 524, and overruling *American Fire Ins. Co. v. Nugent*, 7 Ky. Law Rep. 598; *Davern v. Merchants' & Planters' Ins. Co.*, 7 La. Ann. 344; *Beer v. Forest City Mut. Ins. Co.*, 89 Ohio St. 109; *People's Ins. Co. v. Kuhn*, 12 Helsk. (Tenn.) 515.

The theory of these cases probably is that evidence to show that the articles were usually part of the stock is inadmissible, as tending to vary a written contract.

Sperry v. Springfield Fire & Marine Ins. Co. (O. C.) 26 Fed. 234; *Beer v. Forest City Mut. Ins. Co.*, 89 Ohio St. 109.

The same doctrine was announced in *Macomber v. Howard Fire Ins. Co.*, 7 Gray (Mass.) 257; but the opposite rule prevails in Massachusetts (*Whitmarsh v. Conway Fire Ins. Co.*, 16 Gray, 359, 77 Am. Dec. 414) and in Georgia (*Maril v. Connecticut Fire Ins. Co.*, 95 Ga. 604, 23 S. E. 463, 30 L. R. A. 835, 51 Am. St. Rep. 102).

Parol evidence was regarded as inadmissible in *Steinbach v. Relief Fire Ins. Co.*, 18 Wall. 183, 20 L. Ed. 615, not, however, on the ground that there was a printed condition requiring written permission to keep the prohibited article, as said in *Mitchell v. Potomac Ins. Co.*, 16 App. D. C. 241, but because the condition required an extra premium to be paid in case such article was kept, and it had already been shown that only the ordinary premium had been paid.

(h) Same—Articles necessarily or customarily used in business.

A question similar to that discussed in the preceding subdivision arises where the prohibited article is one necessary to or usually used in the business carried on in the building, or in connection with the property insured. This issue was involved in the early case of *Harper v. Albany Mutual Ins. Co.*, 17 N. Y. 194, where the property was insured as a printing office, and it was held that the use of camphene for cleaning type, being customary among printers, would not forfeit the policy, though the use of camphene was prohibited by the usual condition. So, in the leading case of *Citizens' Ins. Co. v. McLaughlin*, 53 Pa. 485, where the policy contained a clause prohibiting the storing of benzole on the premises, it was held that this did not prevent the use of benzole in the business (the manufacture of patent leather) carried on; such use being both customary and necessary. The question has been raised in numerous cases, and it may now be regarded as a settled rule that, where the use of the article is necessary to or customary in the business carried on in connection with the property insured, such use will not forfeit the policy under the condition prohibiting the keeping and use of such article.

The rule is supported by *Maril v. Connecticut Fire Ins. Co.*, 95 Ga. 604, 23 S. E. 463, 30 L. R. A. 835, 51 Am. St. Rep. 102; *Commercial*

Ins. Co. v. Mehlman, 48 Ill. 313, 95 Am. Dec. 543; *Carlin v. Western Assur. Co.*, 57 Md. 515, 40 Am. Rep. 440; *Wheeler v. Traders' Ins. Co. (N. H.)* 1 Atl. 293; *Harper v. New York City Ins. Co.*, 22 N. Y. 441, affirming 14 N. Y. Super. Ct. 520; *City of New York v. Hamilton Fire Ins. Co.*, 23 N. Y. Super. Ct. 537; *Baumgardner v. Insurance Co.*, 1 Wkly. Notes Cas. (Pa.) 119; *Faust v. American Fire Ins. Co. of Philadelphia*, 91 Wis. 158, 64 N. W. 883, 30 L. R. A. 783, 51 Am. St. Rep. 876.

The rule is based on the theory that the description of the property insured as used for a certain business amounts to license to the insured to keep and use all articles necessary to and usually employed in such business (*Bryant v. Poughkeepsie Mut. Ins. Co.*, 17 N. Y. 200, affirming 21 Barb. 154). The necessity for the use of the article need not be absolute, and the rule is not affected by the fact that some other article might be substituted for the one used, if the latter was the one customarily employed for the purpose.

Hall v. Insurance Co. of North America, 58 N. Y. 292, 17 Am. Rep. 255; *Fraim v. National Fire Ins. Co.*, 170 Pa. 151, 32 Atl. 613, 37 Wkly. Notes Cas. 39, 50 Am. St. Rep. 753.

As in the cases where the article is usually kept in stock, the theory is that the written description of the use of the property insured prevails over the printed condition.

Reference may be made to *Marl v. Connecticut Fire Ins. Co.*, 95 Ga. 604, 23 S. E. 463, 30 L. R. A. 835, 51 Am. St. Rep. 102; *Russell v. Manufacturers' & Builders' Fire Ins. Co.*, 50 Minn. 409, 52 N. W. 906; *Archer v. Merchants' & Manufacturers' Ins. Co.*, 43 Mo. 434; *Harper v. Albany Mut. Ins. Co.*, 17 N. Y. 194; *Bryant v. Poughkeepsie Mut. Ins. Co.*, Id. 200, affirming 21 Barb. 154; *Hall v. Insurance Co.*, 58 N. Y. 292, 17 Am. Rep. 255; *Barnum v. Merchants' Fire Ins. Co.*, 97 N. Y. 188; *Faust v. American Fire Ins. Co.*, 91 Wis. 158, 64 N. W. 883, 30 L. R. A. 783, 51 Am. St. Rep. 876; *Thorne v. Aetna Ins. Co.*, 102 Wis. 593, 78 N. W. 920.

The insurer is presumed to know that the article is necessarily or generally used in the business, and to assume the risk attendant on such use.

Archer v. Merchants' & Manufacturers' Ins. Co., 43 Mo. 434; *Citizens' Ins. Co. v. McLaughlin*, 58 Pa. 485; *Fraim v. National Fire Ins. Co.*, 170 Pa. 151, 32 Atl. 613, 37 Wkly. Notes Cas. 39, 50 Am. St. Rep. 753; *Fraim v. Manchester Fire Assur. Co.*, 170 Pa. 166, 32 Atl. 616; *Mascott v. First Nat. Fire Ins. Co.*, 69 Vt. 116, 37 Atl. 255.

Even where the policy provides that the insurer shall not be liable for a loss resulting from the use of the prohibited article, such condition must be construed as referring only to use in a manner different from that necessary or customary in the business, and not to a use justified by custom (*Harper v. City Ins. Co.*, 22 N. Y. 441, affirming 14 N. Y. Super. Ct. 520). The converse of this principle is also true—that, to justify the application of the rule, the use of the article must be one naturally connected with the processes or business carried by the insured. It is on this principle that it was held (*White v. Western Assur. Co.* [Pa.] 6 Atl. 113, 18 Wkly. Notes Cas. 279) that under a condition that the policy shall become void if petroleum is kept on the premises, except for lighting purposes, it will be forfeited if petroleum is kept on the premises for habitual use as fuel with which to generate steam to run machinery. The use of petroleum for the purpose was not so necessary as to invoke the operation of the rule. In this respect the case was regarded as distinguishable from *Citizens' Ins. Co. v. McLaughlin*, 53 Pa. 485. The principle has also been applied where gasoline was used to illustrate the use of a gasoline stove offered for sale (*Fischer v. London & L. Fire Ins. Co.* [C. C.] 83 Fed. 807). Neither can the use of the prohibited article be justified under the rule, where the business carried on in the building is changed to one different from that described in the policy. Thus, where a building used for the sale of "cabinet ware" is used for finishing such ware, the use of articles necessary in finishing cannot be justified (*Appleby v. Astor Fire Ins. Co.*, 54 N. Y. 253). Where a building is described as used for mercantile purposes, but is changed to a restaurant, the use of gasoline, though necessary in a restaurant, cannot be justified under the rule (*Garretson v. Merchants' & Bankers' Ins. Co.*, 92 Iowa, 293, 60 N. W. 540). On somewhat similar grounds it was held, in *Lutz v. Royal Ins. Co. of Liverpool*, 205 Pa. 159, 54 Atl. 721, that, though it is customary for dealers in photographic supplies to deal in flashlight powder, the manufacture thereof on the premises is not a necessary part of the business.

(1) Effect of breach of condition.

When there is merely a statement in *præsent*i in relation to the keeping of a hazardous article, forfeiture cannot be predicated on the subsequent presence of the article on the insured premises (*Gould v. York County Mut. Fire Ins. Co.*, 47 Me. 403, 74 Am. Dec. 494). But when there is an absolute condition prohibiting the

keeping or use of a certain article, or a condition prohibiting the keeping or use, except in a certain manner or on payment of an additional premium, a failure to comply with such condition will, of course, forfeit the policy.

Reference to the following cases is deemed sufficient: *Gunther v. Liverpool & London & Globe Ins. Co.* (C. C.) 34 Fed. 501; *Traders' Ins. Co. v. Catlin*, 59 Ill. App. 162; *Norwaysz v. Thuringia Ins. Co.*, 204 Ill. 334, 68 N. E. 551, affirming 104 Ill. App. 390; *Davern v. Merchants' & Planters' Ins. Co.*, 7 La. Ann. 344; *Turnbull v. Home Fire Ins. Co.*, 83 Md. 312, 34 Atl. 875; *Boyer v. Grand Rapids Fire Ins. Co.*, 124 Mich. 455, 83 N. W. 124, 83 Am. St. Rep. 338; *McFarland v. St. Paul Fire & Marine Ins. Co.*, 46 Minn. 519, 49 N. W. 253; *Westfall v. Hudson River Fire Ins. Co.*, 12 N. Y. 289; *Pindar v. Continental Ins. Co.*, 38 N. Y. 364, 97 Am. Dec. 795; *Jones v. Howard Ins. Co.*, 10 N. Y. St. Rep. 120.

Nor is the insurer required to do any affirmative act declaring a forfeiture for violation of the condition.

Betcher v. Capital Fire Ins. Co., 78 Minn. 240, 80 N. W. 971; *Williams v. People's Fire Ins. Co.*, 57 N. Y. 274.

And in the *Williams Case* it was held that a provision in the policy, authorizing the insurer, in case the premises should be occupied or used so as to increase the risk, to terminate the insurance upon notice and return of the unearned premium, relates only to acts of third persons over whom the insurer has no control.

(j) Same—As dependent on increase of risk.

It has been held in some cases that, to forfeit the policy because of the use of prohibited articles, there must have been an increase of risk.

Traders' Ins. Co. v. Catlin, 163 Ill. 256, 45 N. E. 255, 85 L. R. A. 595; *Grand Rapids Hydraulic Co. v. American Fire Ins. Co.*, 93 Mich. 396, 53 N. W. 538.

On the other hand, the rule has been laid down in Pennsylvania and Kentucky that, where there is a special prohibition as to the keeping or use of specific articles, a breach of the condition forfeits the policy, irrespective of the question of increase of risk.

Heron v. Phoenix Mut. Fire Ins. Co., 36 Atl. 740, 180 Pa. 257, 40 Wkly. Notes Cas. 55, 36 L. R. A. 517, 57 Am. St. Rep. 638; *Phoenix Ins. Co. v. Lawrence*, 4 Metc. (Ky.) 9, 81 Am. Dec. 521; *Fireman's Ins. Co. v. Cecil*, 12 Ky. Law Rep. 48; *Id.*, 259.

But it is conceded in the Cecil Case that the principle would not apply when there was a merely technical violation of the condition.

A clause specifically prohibiting the use of an article will not be qualified by the clause forfeiting the policy if the risk be increased by any means within the control of the insured (*Norwaysz v. Thuringia Ins. Co.*, 204 Ill. 334, 68 N. E. 551, affirming 104 Ill. App. 390). On the other hand, a provision against increase of risk by acts of the insured is not modified by a clause classifying certain articles as hazardous; and, if the presence of an article actually hazardous increases the risk, the fact that it was not named in the classification does not affect the result (*Dittmer v. Germania Insurance Co.*, 23 La. Ann. 458, 8 Am. Rep. 600).

In *Williams v. People's Fire Ins. Co.*, 57 N. Y. 274, it was held that, though the use of petroleum for medicinal purposes was not expressly prohibited by a condition against the sale or storage of petroleum and its use for lighting, yet, as such condition did not expressly permit the use of petroleum for medicinal purposes, the insurer might rely on a condition against increase of risk, though such condition was not pleaded. The ground of the decision was that evidence showing a breach of such condition was admitted without objection, and *Williams v. Mechanics' & Traders' Fire Ins. Co.*, 54 N. Y. 577, was cited as authority. It is to be observed, however, that in the cited case the evidence was wholly admissible under the issue that was pleaded, and consequently there was no ground on which objection could be made, and the court held that the failure to object could not be regarded as a waiver of plaintiff's right to insist that the issue to which it was attempted to apply the evidence subsequently was not made by the pleadings.

There must, however, be something more than a merely temporary increase of risk, adding nothing to the general hazard. There must be an actual increase of danger to the premises (*Bentley v. Lumbermen's Ins. Co.*, 191 Pa. 276, 43 Atl. 209). Thus the use of kerosene oil in kindling a fire in a cook stove, on only one occasion, though a negligent act, did not "increase the hazard," in the sense in which such term is used in the condition (*Angier v. Western Assur. Co.*, 71 N. W. 761, 10 S. D. 82, 66 Am. St. Rep. 685). The increase must be in something permanent and habitual (*Leggett v. Ætna Ins. Co.*, 10 Rich. Law [S. C.] 202), and exposing the property to a substantial and real danger.

Wheeler v. Traders' Ins. Co., 62 N. H. 326, 18 Am. St. Rep. 582; *School Dist. No. 116 of Minnehaha County v. German Ins. Co.*, 7 S. D. 458, 64 N. W. 527.

The use of a gasoline torch to remove the old paint from the building did not, as a matter of law, increase the hazard, within a provision in the policy avoiding it in case the hazard is increased without the consent of the insurer (*Smith v. German Ins. Co.*, 107 Mich. 270, 65 N. W. 236, 30 L. R. A. 368). So, too, the mere fact that an article is classified as hazardous does not necessarily indicate that its presence will increase the risk (*Moore v. Protection Ins. Co.*, 29 Me. 97, 48 Am. Dec. 514), especially when it is present only in moderate quantities consistent with ordinary and customary use (*Wheeler v. American Cent. Ins. Co.*, 6 Mo. App. 235). But, even if the storage of a moderate quantity of the article is permitted under the policy, the presence of a large additional quantity may result in an increase of the risk, so as to forfeit the policy (*Alston v. Greenwich Ins. Co.*, 100 Ga. 282, 29 S. E. 266).

(k) Same—As dependent on relation to time and cause of loss.

It has, however, been laid down in some cases that, in the absence of a special stipulation to the contrary, the effect of a breach of the condition depends on its relation to the time of loss; and, if the breach is merely temporary, the effect thereof is only to suspend the policy during the breach, and not to forfeit it absolutely.

Traders' Ins. Co. v. Catlin, 163 Ill. 256, 45 N. E. 255, 35 L. R. A. 595, affirming 59 Ill. App. 162; *Maryland Fire Ins. Co. v. Whiteford*, 31 Md. 219, 100 Am. Rep. 45; *Mutual Fire Ins. Co. v. Coatesville Shoe Factory*, 80 Pa. 407.

Especially will that be the effect where the prohibition declares that "from thenceforth, so long as the same shall be so appropriated, applied, or used," the policy shall cease and be of no force or effect.

Putnam v. Commonwealth Ins. Co. (C. O.) 4 Fed. 753; *Lounsbury v. Protection Ins. Co.*, 8 Conn. 459, 21 Am. Dec. 686; *Phoenix Ins. Co. v. Lawrence*, 4 Metc. (Ky.) 9, 81 Am. Dec. 521; *Moore v. Protection Ins. Co.*, 29 Me. 97, 48 Am. Dec. 514.

It has been held in Illinois that the effect of a breach of the condition is dependent on the relation of the breach to the cause of loss.

Crete Farmers' Mut. Township Ins. Co. v. Miller, 70 Ill. App. 599; *Traders' Ins. Co. v. Catlin*, 163 Ill. 456, 45 N. E. 255, 35 L. R. A. 595. But the doctrine is not followed in a later case (*Norwaya v. Thuringia Ins. Co.*, 68 N. E. 551, 204 Ill. 834).

The principle seems also to be approved in *Jones v. Howard Ins. Co.*, 117 N. Y. 103, 22 N. E. 578; but it is to be observed that the prohibitory clause in that case was regarded as an exception of risk, rather than a condition subsequent, and in *Matson v. Farm Buildings Ins. Co.*, 73 N. Y. 310, 29 Am. Rep. 149, reversing 9 Hun, 415, where the prohibited article was used on only one occasion, the court, on the ground that the clause was an exception of risk, held that, as the loss was occasioned by such use, the policy was forfeited.

In any event, the weight of authority undoubtedly is that the breach of a condition prohibiting the use of certain articles forfeits the policy, irrespective of its relation to the cause of loss.

Bastian v. British American Assur. Co., 143 Cal. 287, 77 Pac. 63, 66 L. R. A. 255; *Norways v. Thuringia Ins. Co.*, 204 Ill. 334, 68 N. E. 551, affirming 104 Ill. App. 390; *Phoenix Ins. Co. v. Lawrence*, 4 Metc. (Ky.) 9, 81 Am. Dec. 521; *Turnbull v. Home Fire Ins. Co.*, 83 Md. 312, 34 Atl. 875; *Williams v. People's Fire Ins. Co.*, 57 N. Y. 274; *Pennsylvania Fire Ins. Co. v. Fairies*, 13 Tex. Civ. App. 111, 35 S. W. 55.

So, in *Kennefick-Hammond Co. v. Norwich Union Fire Ins. Soc.* (Mo. App.) 80 S. W. 694, it was said that, as the presence of dynamite in the building was material to the risk, the insured could not rely on the fact that the presence of the dynamite did not contribute to the loss, in view of the provisions of Rev. St. 1899, § 7973, declaring that no condition in a policy shall be taken or construed as other than a mere representation, unless it is material to the risk.

(1) Same—Acts of third persons.

The fact that the presence of the prohibited article on the premises is unknown to the insured does not as a rule excuse the breach (*Duncan v. Sun Fire Ins. Co.*, 6 Wend. [N. Y.] 488, 22 Am. Dec. 539), especially where the violation of the condition is by one who occupies the premises with the consent of the assured (*German Fire Ins. Co. v. Board of Com'rs of Shawnee County*, 54 Kan. 732, 39 Pac. 697, 45 Am. St. Rep. 306). Therefore, as it is the business of the lessor to see that his tenants do not violate the conditions of the policy (*Fire Ass'n of Philadelphia v. Williamson*, 26 Pa. 196), it has been held that forfeiture cannot be excused by showing that the breach of the condition was the act of the tenant of the insured.

This rule is asserted in *Liverpool & London & Globe Ins. Co. v. Gunther*, 116 U. S. 113, 6 Sup. Ct. 306, 29 L. Ed. 575, reversing

(C. C.) 85 Fed. 846; *Gunther v. Liverpool & London & Globe Ins. Co.*, 124 U. S. 110, 10 Sup. Ct. 448, 33 L. Ed. 857; *Norwaysz v. Thuringia Ins. Co.*, 68 N. E. 551, 204 Ill. 334, affirming 104 Ill. App. 390; *Badger v. Platts*, 44 Atl. 296, 68 N. H. 222, 73 Am. St. Rep. 572; *Kohlmann v. Selvage*, 54 N. Y. Supp. 230, 34 App. Div. 380.

On the other hand, where the use of friction matches was prohibited, it was held that the casual use of matches by workmen employed in the building, without the knowledge of the insured, would not forfeit the policy (*Farmers' & Mechanics' Ins. Co. v. Simmons*, 30 Pa. 299). It has also been held in Massachusetts (*White v. Mutual Fire Assur. Co.*, 8 Gray, 566) that, where a landlord uses reasonable care in the selection of tenants, his insurance will not be forfeited by their acts. The principle has also been approved in Texas (*East Texas Fire Ins. Co. v. Kempner*, 12 Tex. Civ. App. 533, 34 S. W. 393).

(m) Questions of practice.

A general allegation that insured has performed all the conditions of the policy on his part required to be performed is sufficient, without denying the breach of specific conditions.

Hunt v. Hudson River Fire Ins. Co., 9 N. Y. Super. Ct. 481; *Rau v. Westchester Fire Ins. Co.*, 168 N. Y. 665, 61 N. E. 1134, affirming 64 N. Y. Supp. 290, 50 App. Div. 428.

The breach must be set up in the answer to be available (*Casacia v. Phoenix Ins. Co.*, 28 Cal. 628), and cannot be raised for the first time on appeal (*Wilhelmi v. Des Moines Ins. Co.*, 86 Iowa, 326, 53 N. W. 233). Though it was held, in *Williams v. People's Fire Ins. Co.*, 57 N. Y. 274, that where insured permits, without objection, the admission of evidence showing the keeping of an article in violation of a condition against increase of risk, he cannot insist, on appeal, that the violation of such condition was not properly pleaded by the insurer, the authority cited for such holding (*Williams v. Mechanics' & Traders' Ins. Co.*, 54 N. Y. 577) does not support the decision. An allegation that "there was written and indorsed on the original policy the consent of the defendant that plaintiff might keep certain articles is merely a legal conclusion; but, as the pleading might mean that there was indorsed on the policy in writing the words "consent that insured might keep" such articles in his store house, that meaning must be given to it (*Oriental Ins. Co. v. Drake*, 10 Ky. Law Rep. 445).

Where the answer charges the insured with having kept certain prohibited articles, the jury is authorized to consider only the articles specified (*Phoenix Insurance Company v. Lawrence*, 4 Metc. [Ky.] 9, 81 Am. Dec. 521). It rests within the discretion of the trial court to permit an amendment setting up a breach of a condition against the keeping or use of certain articles as a defense made at the trial, and the court's decision refusing such amendment is not appealable (*Hunt v. Hudson River Fire Ins. Co.*, 9 N. Y. Super. Ct. 481). Where the policy prohibited the storage or use of certain inflammable oils, including kerosene, except that kerosene might be used for lighting, if drawn during the daytime, and the answer alleged that without written permission there were stored and used on the premises inflammable burning fluids prohibited by the policies, it was competent for defendant to prove thereunder that kerosene was drawn in the manner not within the exception (*Liverpool & London & Globe Ins. Co. v. Gunther*, 116 U. S. 113, 6 Sup. Ct. 306, 29 L. Ed. 575). Proof that prohibited articles were kept in an adjacent building, though connected with the building insured, does not meet an allegation that the articles were kept in the insured building (*Sperry v. Insurance Co. of North America* [C. C.] 22 Fed. 516).

While the court will take judicial notice of the fact that the storage of fireworks in the insured building increases the risk (*Betcher v. Capital Fire Ins. Co.*, 78 Minn. 240, 80 N. W. 971), it has no judicial knowledge that certain articles are "such as are usually kept in a country store" (*Yoch v. Home Mut. Ins. Co.*, 111 Cal. 503, 44 Pac. 189, 34 L. R. A. 857). This is a question for the jury (*People's Ins. Co. v. Kuhn*, 12 Heisk. [Tenn.] 515).

Expert testimony is admissible on the question of increase of risk (*Traders' Ins. Co. v. Catlin*, 163 Ill. 256, 45 N. E. 255, 35 L. R. A. 595). This question is one for the jury.

Moore v. Protection Ins. Co., 29 Me. 97, 48 Am. Dec. 514; *Atherton v. British America Assur. Co.*, 91 Me. 289, 39 Atl. 1006; *Smith v. German Ins. Co.*, 107 Mich. 270, 65 N. W. 236, 80 L. R. A. 368; *Williams v. People's Fire Ins. Co.*, 57 N. Y. 274.

What constitutes a "keeping" or "storing" is for the jury (*Fire Association v. Gilmer*, 3 Walk. [Pa.] 234); but it is for the court to say what amounts to a habitual use of an article (*La Force v. Williams City Fire Ins. Co.*, 43 Mo. App. 518).

13. FORFEITURE BY REASON OF CHANGE OF TITLE, INTEREST, OR POSSESSION IN GENERAL.

- (a) Nature and construction of conditions.
- (b) Effect of change in general.
- (c) What constitutes sufficient notice of change.
- (d) Acquiring additional title or interest.
- (e) Change of possession.
- (f) Same—Seizure under judicial decree.

(a) Nature and construction of conditions.

Policies in general contain conditions of some kind against changes in the title, interest, or possession of the property insured, at least without the consent of the insurer. Conditions of this kind may be regarded as wise provisions, necessary to the protection of the insured, as well as the insurer. It is to the mutual interest of the parties that any inducement to incendiarism is reduced to a minimum. Thus, where the title to realty on which buildings insured are located is in the insured at the inception of the contract, it is important that the title shall remain in him. The buildings may be worth thousands of dollars to the owner of the realty, while to others they would be worth but little. Consequently a change in title would often tend to reduce the value of the property to the insured, and thus prove a temptation to destroy it and realize on the policy. A similar reasoning will apply with equal force to other clauses of the same nature. But what has been said is sufficient to indicate that the conditions against change of title or interest are valid and binding, and not against public policy.

Reference may be made to *Findlay v. Union Mut. Fire Ins. Co.*, 74 Vt. 211, 52 Atl. 429, 93 Am. St. Rep. 885; *Richmond v. Phoenix Assur. Co.*, 88 Me. 105, 33 Atl. 786; *Jaskulski v. Citizens' Mut. Fire Ins. Co.*, 92 N. W. 98, 131 Mich. 603; *Cummins v. National Fire Ins. Co.*, 81 Mo. App. 291; *J. B. Ehram Mach. Co. v. Phenix Ins. Co.*, 48 Neb. 554, 61 N. W. 722; *Quinlan v. Providence Washington Ins. Co.*, 133 N. Y. 356, 31 N. E. 31, 28 Am. St. Rep. 645; *Sossaman v. Pamlico Banking & Ins. Co.*, 78 N. C. 145; *Briggs v. North Carolina Home Ins. Co.*, 88 N. C. 141; *Mitchell v. Aetna Ins. Co.*, 6 Ohio Dec. 420, 4 Ohio N. P. 886; *Hartford Fire Ins. Co. v. Clayton*, 17 Tex. Civ. App. 644, 43 S. W. 910; *German Ins. Co. v. Hayden*, 21 Colo. 127, 40 Pac. 453, 52 Am. St. Rep. 206.

This rule applies also to by-laws of mutual companies. A person taking a policy in such a company is bound by a by-law prohibit-

ing a transfer, by mortgage or otherwise, unless ratified by the directors (*Pfister v. Gerwig*, 122 Ind. 567, 23 N. E. 1041).

A condition as to change of title is not in the nature of a forfeiture or penalty, but is an essential stipulation of the contract in determining the extent of liability and the obligations of the insurer.

Card v. Phoenix Ins. Co., 4 Mo. App. 424; *Savage v. Howard Ins. Co.*, 52 N. Y. 502, 11 Am. Rep. 741.

The condition against change of title may be so worded that the insurance will be terminated by a change which is involuntary on the part of insured, as in *Carey v. German-American Ins. Co.*, 84 Wis. 80, 54 N. W. 18, 36 Am. St. Rep. 907, 20 L. R. A. 267, where it was held that, if the condition embraced any change "in the title or possession of the property, * * * whether by sale, transfer, conveyance, legal process, or judicial decree," the cause of forfeiture was not limited to acts of omission or commission of the assured alone. But a clause requiring notice of change of ownership does not embrace a change taking place subsequent to the date of the application, but previous to the delivery of the policy, as the clause merely contemplates notice of changes occurring after the execution of the policy (*Pioneer Sav. & Loan Co. v. Providence Washington Ins. Co.*, 17 Wash. 175, 49 Pac. 231, 38 L. R. A. 397). And a provision that a policy shall be void if a change in title or interest takes place, or if foreclosure proceedings be commenced, does not apply to a change occurring previous to the execution of the policy or foreclosure proceedings pending at that time.

Cowart v. Capital City Ins. Co., 114 Ala. 356, 22 South. 574; *Chamberlain v. Insurance Co. of North America*, 51 Hun (N. Y.) 636, 3 N. Y. Supp. 701; *Steinmeyer v. Steinmeyer*, 64 S. O. 413, 42 S. E. 184, 59 L. R. A. 319, 92 Am. St. Rep. 809; *Cooledge v. Continental Ins. Co.*, 67 Vt. 14, 30 Atl. 798; *Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 24 S. E. 398, 53 Am. St. Rep. 846.

As the object of a condition against a change in title is that the insured shall have no greater motive to destroy the property or less interest in watching and guarding it, it does not embrace a merely nominal change, where the ownership remains in fact the same (*German Ins. Co. v. Gibe*, 59 Ill. App. 614). But it does include anything which terminates a mortgagor's right to redeem, and takes away his possession and control of the mortgaged property (*Little v. Eureka Ins. Co.*, 5 Ohio Dec. 285). A condition against change in interest refers to the proprietary or insurable interest in

the property, and does not embrace a change in the insured's interest in the preservation of the property, such as, for instance, results from a realization that a mortgage on the property will be foreclosed (*Stenzel v. Pennsylvania Fire Ins. Co.*, 110 La. 1019, 35 South. 271, 98 Am. St. Rep. 481). And a condition against the sale of insured property is not violated, unless the sale is such as to pass title to the property (*International Wood Co. v. National Assur. Co.*, 99 Me. 415, 59 Atl. 544).

In Michigan it is held that a provision avoiding a policy, if insured is not the sole and unconditional owner of the property, unless the written consent of the insurer is indorsed on the policy, relates only to changes arising after the execution and acceptance of the policy, and does not apply to an existing state or condition of the property at the time the policy is issued.

Hoose v. Prescott Ins. Co., 84 Mich. 309, 47 N. W. 587, 11 L. R. A. 340; *Hall v. Niagara Fire Ins. Co.*, 93 Mich. 184, 53 N. W. 727, 82 Am. St. Rep. 497, 18 L. R. A. 135.

But, in *Kronk v. Birmingham Fire Ins. Co.*, 91 Pa. 300, it was held that a provision requiring insured's interest to be expressed in the policy, if it is not sole and unconditional ownership, is not applicable to a change in interest taking place after the execution of the policy.

A provision that a policy is not assignable without the consent of the insurer refers only to a transfer of the policy, and does not prohibit a transfer of the property insured.

People v. Beigler, *Lalor's Supp.* (N. Y.) 133; *Hoyt v. Hartford Fire Ins. Co.*, 26 Hun (N. Y.) 416; *Merchants' Ins. Co. v. Scott*, 1 Posey, Unrep. Cas. (Tex.) 534.

A provision which prohibits a sale, transfer, or change in title or possession embraces personal as well as real property (*Girard Fire & Marine Ins. Co. v. Hebard*, 95 Pa. 45); but, where the condition merely prohibits the "sale, conveyance, alienation, transfer, or change of title in the property insured," it relates only to real estate, and not to personal property, covered by the policy (*Commercial Ins. Co. v. Spankneble*, 52 Ill. 53, 4 Am. Rep. 582). Similarly, a condition avoiding a policy in case of "the issuing or levy of an execution, without actual possession, against any kind of property insured," does not apply to real estate (*Shafer v. Phoenix Ins. Co.*, 53 Wis. 361, 10 N. W. 381).

A provision, in a policy issued by a mutual company, that the policy shall be void if the property is transferred without the company's consent, is not limited by a by-law providing for a surrender of the policy and return of the unearned premium in case of an alienation. The by-law does not prevent the policy from becoming void until the unearned premium has been returned. (*Buchanan v. Westchester County Mut. Ins. Co.*, 61 N. Y. 611.) In *Jerdee v. Cottage Grove Fire Ins. Co.*, 75 Wis. 345, 44 N. W. 636, the court construed a by-law of a mutual company, providing that "policies of insurance may be assigned with the consent of the president and secretary, the parties paying fifty cents recording fees, at the same time giving his undertaking to the company, and the company will not hold itself responsible for loss on property so transferred until such assignment so made and undertaking given," as not applying to a transfer under which the insured retained an insurable interest in the property.

(b) Effect of change in general.

If a policy does not contain a condition against change in title or interest, a transfer of the property insured will not work a forfeiture. But the contract of insurance is a personal one, and does not run with the land. Therefore a transfer which divests the insured of all interest in the property prior to loss will prevent a recovery. If the insured has no interest in the property at the time of its destruction, he sustains no loss and cannot claim any indemnity. But, if he retains or has an insurable interest at the time of loss, he can recover therefor.

Macarty v. Commercial Ins. Co., 17 La. 365; *Stetson v. Massachusetts Mut. Fire Ins. Co.*, 4 Mass. 330, 3 Am. Dec. 217.

In other words, an absolute transfer of insured's interest in the property merely suspends the risk, in the absence of a provision to the contrary (*Clinton v. Norfolk Mut. Fire Ins. Co.*, 176 Mass. 486, 57 N. E. 998, 50 L. R. A. 833, 79 Am. St. Rep. 325).

As a general proposition it may be said that a transfer of property insured contrary to the conditions of the policy will forfeit the insurance.

Reference may be made to *Hidden v. Slater Mut. Fire Ins. Co.*, 12 Fed. Cas. 121; *German-American Ins. Co. v. Sanders*, 17 Ind. App. 134, 46 N. E. 535; *Insurance Co. of North America v. Mar-*

tin, 51 N. E. 361, 151 Ind. 209; *Simeral v. Dubuque Mut. Fire Ins. Co.*, 18 Iowa, 819; *Fireman's Fund Ins. Co. v. Gatewood*, 10 Ky. Law Rep. 117; *Green v. Kenton Ins. Co.*, 12 Ky. Law Rep. 750; *Gould v. Patrons' Androscoggin Mut. Fire Ins. Co.*, 76 Me. 298; *Sullivan v. Mass. Mut. Fire Ins. Co.*, 2 Mass. 318; *Smith v. Union Ins. Co.*, 120 Mass. 90; *Kabrich v. State Ins. Co. of Des Moines*, 48 Mo. App. 393; *Watts v. Fire Ass'n of Philadelphia*, 87 Mo. App. 83; *Springfield Fire & Marine Ins. Co. v. Allen*, 43 N. Y. 889, 3 Am. Rep. 711; *Burger v. Farmers' Mut. Ins. Co.*, 2 Lanc. Bar (Pa.) 1, May 6, 1871; *Hazard v. Franklin Mutual Fire Ins. Co.*, 7 R. I. 429; *Bemis v. Harborecreek Mut. Fire Ins. Co.*, 49 Atl. 769, 200 Pa. 340; *Ritchie County Bank v. Firemen's Ins. Co. (W. Va.)* 47 S. E. 84.

But the insurer has the burden of proving that there has been a violation of the nonalienation clause (*Orrell v. Hampden Fire Ins. Co.*, 13 Gray [Mass.] 431). Ordinarily a want of ownership on the part of insured may be shown by the insurer under a general denial, as it is a part of the insured's case to prove ownership (*Germania Fire Ins. Co. v. Stewart*, 13 Ind. App. 627, 42 N. E. 286). But a violation of a nonalienation clause must be specially pleaded (*Illinois Fire Ins. Co. v. Stanton*, 57 Ill. 354). In this case a plea was held bad because it did not allege that the conveyance was made previous to loss and that it had not been consented to. And in *Clay Fire & Marine Ins. Co. v. Wusterhausen*, 75 Ill. 285, a plea alleging that the policy became void by a change in title by voluntary conveyance without the insurer's consent was held to be obnoxious, as presenting an issue involving questions of both fact and law.

Since the conditions against change in title and interest vary in different policies, the effect of a change is largely dependent on the wording of the condition in the particular policy involved. As a result the decisions are conflicting as to the effect of a violation of the nonalienation clause. In *Farmers' Mut. Ins. Ass'n v. Price*, 112 Ga. 264, 37 S. E. 427, it was held that, where a policy stipulated that it should cease to be in force in case of a change of title or ownership of the property, and the by-laws provided that any transfer should operate as a release of all subsequent liabilities, a conveyance of the property insured rendered the policy ipso facto void. But in *Benninghoff v. Agricultural Insurance Co.*, 93 N. Y. 495, it was said that a transfer of the title to property insured under a policy prohibiting such transfer does not ipso facto annul and de-

stroy the policy, but simply confers upon the insurer the right to have it declared void by raising the question at the proper time. Again, it was held, in *Galantschik v. Globe Fire Ins. Co.*, 10 Misc. Rep. 369, 31 N. Y. Supp. 32, that a change of ownership without notice to the insurer renders a policy absolutely void, not voidable, where the policy requires notice of a change. But in *Appleton Iron Co. v. British America Assur. Co.*, 46 Wis. 23, 1 N. W. 9, 50 N. W. 1100, it is said to be well settled in that court that by change of title or possession the policy becomes voidable at the election of the insurer, not void. However, it is not necessary for the insurer to declare a policy void, on notice of a breach, to entitle it to take advantage thereof (*Carey v. German-American Ins. Co.*, 84 Wis. 80, 54 N. W. 18, 36 Am. St. Rep. 907, 20 L. R. A. 267).

In *Cowan v. Iowa State Ins. Co.*, 40 Iowa, 551, 20 Am. Rep. 583, it was said that nothing less than a sale of the entire interest of the insured would defeat a recovery on a policy conditioned to be void on an alienation. And a similar rule prevails in some jurisdictions in regard to a policy providing that it shall be void if the property be sold, conveyed, or transferred.

Scanlon v. Union Fire Ins. Co., 21 Fed. Cas. 645; *Boatmen's Fire & Marine Ins. Co. v. James*, 10 Ky. Law Rep. 816; *Clinton v. Norfolk Mut. Fire Ins. Co.*, 176 Mass. 486, 57 N. E. 998, 50 L. R. A. 838, 79 Am. St. Rep. 825; *Manley v. Insurance Co. of North America*, 1 Lans. (N. Y.) 20; *Blackwell v. Miami Val. Ins. Co.*, 48 Ohio St. 533, 29 N. E. 278, 14 L. R. A. 431, 29 Am. St. Rep. 574, reversing 19 Wkly. Law Bul. 87.

But in Ohio a condition against a sale or transfer is violated by a sale of any part of the property (*Ohio Farmers' Ins. Co. v. Waters*, 61 N. E. 711, 65 Ohio St. 157). And a similar doctrine is asserted in Texas (*Moriarty v. United States Fire Ins. Co.*, 19 Tex. Civ. App. 669, 49 S. W. 132). So in Michigan a sale of a part interest is held to forfeit a policy prohibiting a change in title.

See *Western Mass. Ins. Co. v. Riker*, 10 Mich. 279; *McEwan v. Western Ins. Co.*, 1 Mich. N. P. 118.

In North Dakota, South Dakota, and Montana it is provided by statutes¹ that a change of interest merely suspends the insurance until the interest in the thing and the interest in the insurance are

¹ Rev. Codes N. D. 1899, § 4457; Ann. St. S. D. 1901, § 5299; Civ. Code Mont. 1895, § 8407.

vested in the same person. A rule similar to that stated in the statutes cited has been adopted by the courts in several jurisdictions.

Power v. Ocean Ins. Co., 19 La. 28, 36 Am. Dec. 665; *German Mut. Fire Ins. Co. v. Fox* (Neb.) 96 N. W. 652, 63 L. R. A. 334; *Shearman v. Niagara Fire Ins. Co.*, 2 Sweeny (N. Y.) 470, 40 How. Prac. 393.

In New York it has been held that a transfer of interest will not work a forfeiture under a clause forbidding any change of title if the insured retains an insurable interest in the subject of the insurance (*Shearman v. Niagara Fire Ins. Co.*, 2 Sweeny, 470, 40 How. Prac. 393). So where a condition in a policy prohibited both a change of title and increase of risk, it was held that a change of title would not amount to a breach, unless the risk was increased (*Russell v. Cedar Rapids Ins. Co.*, 78 Iowa, 216, 42 N. W. 654, 4 L. R. A. 538). Likewise it has been held that a policy directing a mortgagee to inform the insurer of a transfer by the mortgagor was not forfeited by a failure to give the required notice, unless the change increased the risk (*Whitney v. American Ins. Co.* [Cal.] 56 Pac. 50). In Maine it was provided by statute ² that a breach of any of the terms of a policy should not affect it, unless materially increasing the risk. This statute, of course, applied to a condition against alienation (*Waterhouse v. Gloucester Fire Ins. Co.*, 69 Me. 409). So it can be said as a matter of law that, if an alienation of one of several parcels insured has not increased the risk as to the other parcels, the insurance is not forfeited, though the policy prohibits alienation without notice (*Baldwin v. Hartford Fire Ins. Co.*, 60 N. H. 422, 49 Am. Rep. 324). And a violation of a condition against litigation merely suspends the risk and does not bar a recovery if the litigation terminates in insured's favor previous to loss (*Sprigg v. American Central Ins. Co.*, 101 Ky. 185, 40 S. W. 575).

It would seem to be elementary that a transfer of property insured, subject to the consent of the insurer, does not forfeit the policy, where consent to the transfer is given on the same day it is made and the policy is assigned to the transferee (*Clifton Coal Co. v. Scottish Union & National Ins. Co.*, 102 Iowa, 300, 71 N. W. 433). Similarly, an alienation will not forfeit a policy which has already been assigned by the insured with the consent of the insurer (*Buckley v. Garrett*, 47 Pa. 204). But a forfeiture of a policy will

² Rev. St. 1871, c. 49, § 19.

not be avoided by an assignment after loss, though such assignment is made within the time limited by the condition against transfer of the property insured (*Dadmun Mfg. Co. v. Worcester Mut. Fire Ins. Co.*, 11 Metc. [Mass.] 429). It is before loss that the insurers are interested in knowing for what persons they stand as insurers. After loss the rights of the parties are changed. The policy is then a mere chose in action, and assignable as such.

In North Dakota, South Dakota, and Montana it is provided by statute that a change of interest after loss will not affect the right of the insured to indemnity.*

If a policy of reinsurance is made subject, not only to the conditions of the original policy, but also to the indorsements thereon, a reinsurer cannot avail itself of a change of title contrary to the conditions of the policy where the insured has obtained the proper indorsement from the original insurer (*Manufacturers' Ins. Co. v. Western Assur. Co.*, 145 Mass. 419, 14 N. E. 632).

A condition against change of title is not violated by a conveyance by a trustee to the cestui que trust (*Rhode Island Underwriters' Ass'n v. Monarch*, 98 Ky. 305, 32 S. W. 959). Nor is a condition against change of interest violated by the filing of a mechanic's lien (*Green v. Homestead Fire Ins. Co.*, 82 N. Y. 517, s. c. 17 Hun, 467). But a charter provision against alienation is violated by a conveyance with a lease back (*Boynton v. Clinton & E. Mut. Ins. Co.*, 16 Barb. [N. Y.] 254). And a stipulation that a policy shall be void if the interest of the insured becomes other than a perfect title is broken by the cancellation of an entry and certificate for a patent to a claim (*German Ins. Co. of Freeport, Ill., v. Hayden*, 21 Colo. 127, 40 Pac. 453, 52 Am. St. Rep. 206).

(c) What constitutes sufficient notice of change.

Under the rule that prior oral negotiations are merged in the written contract when executed, an insured cannot rely on an oral notice of and consent to an intended transfer, which will violate the policy when consummated (*Walton v. Agricultural Ins. Co.*, 116 N. Y. 317, 22 N. E. 443, 5 L. R. A. 667). Similarly an indorsement on a policy making it payable to another is not a sufficient compliance with a requirement that a consent to a transfer be in-

* Rev. Codes N. D. 1899, § 4458; Ann. St. S. D. 1901, § 5300; Civ. Code Mont. 1895, § 3408.

dorsed on the policy, though the grantee is the one to whom the policy is made payable (*Bates v. Equitable Fire & Marine Ins. Co.*, 2 Fed. Cas. 1021). But a consent to an assignment in the form used where property is alienated and with knowledge of an alienation is a sufficient compliance with a stipulation requiring consent to an alienation (*Perry v. Mechanics' Mut. Ins. Co.* [C. C.] 11 Fed. 478). Verbal notice to an insurance agent of the commencement of foreclosure proceedings shortly after the service of process is sufficient to avoid a forfeiture of a policy conditioned to be void on the commencement of foreclosure proceedings with the knowledge of insured (*Bellevue Roller-Mill Co. v. London & L. Fire Ins. Co.*, 4 Idaho, 307, 39 Pac. 196). However, in *Gillon v. Northern Assur. Co.*, 127 Cal. 480, 59 Pac. 901, the court held that a notice to an agent during the life of the insured of a conveyance to insured's brother, to avoid expense of probate, did not entitle insured's heirs to recover for a loss occurring after her death. In *Batchelor v. People's Fire Ins. Co.*, 40 Conn. 56, it was held that a memorandum in the words, "Loss, if any, payable to * * *. Transfer," written in pencil on a policy sent to the secretary of the company, was sufficient notice of a transfer to the one to whom the loss was to be payable; the word "transfer" being regarded as importing an alienation.

(d) Acquiring additional title or interest.

As the object of the insurer in stipulating against an alienation or change in title is to provide that the insured's interest shall not change, so that he shall have a greater temptation or motive to burn the property, or less interest and watchfulness in guarding and preserving it from destruction, a change of title which increases the insured's interest in the property will not constitute a breach of the usual condition against change of title or interest. Thus it was held, in *Wich v. Equitable Fire & Marine Ins. Co.*, 2 Colo. App. 484, 31 Pac. 389, that the conveyance of the legal title to an insured who was the equitable owner of the property was not a change of title or interest prohibited by a policy; and in *Michigan Fire & Marine Ins. Co. v. Wich*, 46 Pac. 687, 8 Colo. App. 409, the court was of the opinion that such a conveyance did not constitute a change of ownership within the meaning of a policy. Likewise it was held, in *Kyte v. Commercial Union Assur. Co.*, 144 Mass. 43, 10 N. E. 518, that a conveyance by the wife of the insured, he joining, to a third person, who simultaneously conveyed to the in-

sured, the purpose being to vest in him a tax title to the premises, which had been purchased by the wife, was not such a "sale" as would terminate a policy. The court said that the seisin of the third person was instantaneous only, and that he was merely a conduit through whom the full title was conveyed to the insured. Therefore it would be placing a too strict construction on the policy to hold the transaction to be a sale. In *Collings v. American Cent. Ins. Co.*, 70 Mo. App. 14, it was held that the mere fact that the heirs of a decedent, in deeding the homestead of the ancestor to the widow, added other land, so that the aggregate exceeded the value of the widow's right of homestead and dower, did not violate a clause against change in title in a policy issued to the widow on the ancestor's dwelling house.

The rule that a change of title which increases the insured's interest does not forfeit the insurance applies particularly to mortgagees. A policy issued to a mortgagee on his interest is not terminated by his acquiring the full title to the property insured.

Balley v. American Century Insurance Co. (O. C.) 13 Fed. 250; *Continental Ins. Co. v. Ward*, 50 Kan. 346, 31 Pac. 1079; *Heaton v. Manhattan Fire Ins. Co.*, 7 R. I. 502; *Esch v. Home Ins. Co.*, 78 Iowa, 334, 48 N. W. 229, 16 Am. St. Rep. 443.

Although a policy payable to a mortgagee under a "union mortgage clause" requires the mortgagee to inform the company of any change of title which comes to his knowledge, still the policy is not forfeited by the mortgagee's failure to notify the company that he has acquired title to the premises through foreclosure or the mortgagor's failure to redeem.

Dodge v. Hamburg-Bremen Fire Ins. Co., 4 Kan. App. 415, 46 Pac. 25; *Pioneer Savings & Loan Co. v. St. Paul Fire & Marine Ins. Co.*, 68 Minn. 170, 70 N. W. 979; *Washburn Mill Co. v. Fire Ass'n*, 60 Minn. 68, 61 N. W. 828, 51 Am. St. Rep. 500.

But in *Continental Ins. Co. v. Anderson*, 107 Ga. 541, 33 S. E. 887, the court took the position that a clause requiring the mortgagee to inform the insurer of any change of title which came to his knowledge was violated by a failure to inform the company of a conveyance by the mortgagor to a third person, though such third person conveyed his title to the mortgagee before loss. And in *Hoxsie v. Providence Mut. Fire Ins. Co.*, 6 R. I. 517, it was said that a provision that an alienation of the property should render the policy void applied to a quitclaim by the insured to his mortgagee,

though the policy had been assigned to the mortgagee as collateral security with the company's consent. The court considered the mortgagor to be the insured, and held that, if the mortgagee desired to avoid responsibility for his acts, he should have secured an insurance upon his own interest.

(c) Change of possession.

Usually the condition providing against change in title and interest also prohibits a change of possession of the property insured. Such a provision is valid and enforceable, and a breach thereof will vitiate the insurance. But the insurer must specially plead the breach; otherwise, it cannot avail itself of incidental proof showing a change of possession (*Phenix Ins. Co. of Brooklyn v. Caldwell*, 58 N. E. 314, 187 Ill. 73, affirming 85 Ill. App. 104).

However, it is often difficult to determine what constitutes a change of possession within the meaning of a policy. In *Rumsey v. Phoenix Ins. Co. (C. C.)* 1 Fed. 396, 2 Fed. 429, it is said that the change of possession contemplated by a provision of this kind is something more than a change of occupation. It is a change effected "by legal process, judicial decree, voluntary transfer, or conveyance"; one which refers to insured's possessory right, and not to his occupancy of the premises. The temporary absence of the insured, leaving the premises in the charge of an agent, who occupies them, is not such a change of possession as will terminate the policy (*Shearman v. Niagara Fire Ins. Co.*, 46 N. Y. 526, 7 Am. Rep. 380; s. c. 2 Sweeny, 470, 40 How. Prac. 393). Nor is it a change of possession to admit another into actual possession under a parol license, for the single purpose of making repairs (*Alkan v. New Hampshire Ins. Co.*, 53 Wis. 136, 10 N. W. 91). On the theory that the change of possession contemplated by a policy is something more than a mere change of occupancy, it was held in *Rumsey v. Phoenix Ins. Co. (C. C.)* 1 Fed. 396, 2 Fed. 429, that a lease of the premises and occupancy by the tenant was not a violation of the policy. A contrary rule is, however, asserted in *Wenzel v. Commercial Ins. Co.*, 67 Cal. 438, 7 Pac. 817, and in *Planters' Mut. Ins. Ass'n v. Dewberry*, 69 Ark. 295, 62 S. W. 1047, 86 Am. St. Rep. 195, it was said that a lease of the premises vitiated the policy. But it is to be noted that the holding in the *Wenzel Case* was overruled by implication in *Smith v. Phoenix Ins. Co.*, 91 Cal. 323, 27 Pac. 738, 13 L. R. A. 475, 25 Am. St. Rep. 191, and that the condi-

tion involved in the Dewberry Case was against change of "occupancy or possession."

A change of possession within the meaning of a policy is effected by admitting another into possession under a conveyance, though a purchase-money lien be retained (*Northern Assur. Co. v. City Savings Bank*, 18 Tex. Civ. App. 721, 45 S. W. 737); by giving a vendee possession under an executory contract for sale (*Cottingham v. Fireman's Fund Ins. Co.*, 10 Ky. Law Rep. 727), or by giving up possession to another under a contract for exchange of property (*Cottingham v. Fireman's Fund Ins. Co.*, 90 Ky. 439, 14 S. W. 417, 9 L. R. A. 627). A condition against change of possession in a policy or a mortgagee's interest does not refer to a change resulting from a foreclosure of the mortgage (*Bailey v. American Century Insurance Company* [C. C.] 13 Fed. 250). So, if a policy is made payable to a mortgagee, the fact that he takes possession on default by the mortgagor does not relieve the company from liability (*Getman v. Guardian Fire Ins. Co.*, 46 Ill. App. 489). But, where the policy expressly provided that it should be void if possession was taken by a mortgagee, it was forfeited by an entry by the mortgagee, though an ineffectual entry had been made prior to the application (*Jacobs v. Eagle Mut. Fire Ins. Co.*, 7 Allen [Mass.] 132). A policy issued to a warehouseman on goods stored, for which receipts have been given, is not forfeited by the fact that a carrier takes up the warehouse receipts and issues bills of lading to the owners of the goods, if the warehouseman retains actual possession of the goods (*California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 10 Sup. Ct. 365, 33 L. Ed. 730).

A policy on partnership property, conditioned to be void on change of possession, is not forfeited by the fact that actual possession of the property is transferred to one of the copartners, so long as he holds it for the benefit of the firm (*Runkle v. Hartford Ins. Co.*, 99 Iowa, 414, 68 N. W. 712). But, if the property is transferred to one of the copartners on a dissolution of the firm, the condition against change of possession is broken (*Jones v. Phoenix Ins. Co.*, 97 Iowa, 275, 66 N. W. 169). In *Allemania Fire Ins. Co. v. Peck*, 133 Ill. 220, 24 N. E. 538, 23 Am. Rep. 610, it was held that a condition against change of possession does not apply to a case where property belonging to three copartners, and insured for their joint benefit, remains in the possession of two of them from the date of the policy to the fire.

(f) Same—Seizure under judicial decree.

A condition in a policy that it shall be void if any change takes place in the possession of the property insured "by legal process" refers to an involuntary as well as a voluntary change of possession. Such a condition is violated by the levy of a writ of attachment under which the officer takes exclusive possession of the property, as possession by a writ of attachment is by "legal process."

Carey v. German Ins. Co., 84 Wis. 80, 54 N. W. 18, 36 Am. St. Rep. 907, 20 L. R. A. 267; *Burr v. German Ins. Co.*, 84 Wis. 76, 54 N. W. 22, 36 Am. St. Rep. 905.

In the cases just cited it was also held that the forfeiture was not excused by the fact that the attachment was dissolved after loss, as it was none the less legal process.

The condition is not violated by an illegal levy, assessment, and seizure and sale of the insured property (*Runkle v. Citizens' Fire Ins. Co.* [C. C.] 6 Fed. 143); nor by a sale on execution until the period of redemption has expired, title not passing till then (*Chamberlain v. Insurance Co. of North America*, 51 Hun, 636, 3 N. Y. Supp. 701); nor by the appointment of a receiver to take charge of property insured by trustees (*Georgia Home Ins. Co. v. Bartlett*, 21 S. E. 476, 91 Va. 305, 50 Am. St. Rep. 832); nor by a levy on execution without actual change of possession (*Springfield Fire & Marine Ins. Co. v. Phillips*, 16 Ky. Law Rep. 352); nor by a formal seizure by a sheriff, if the insured is not dispossessed (*McClelland v. Greenwich Ins. Co.*, 107 La. 124, 31 South. 691).

A provision rendering a policy void if the property shall be levied on or taken into possession or custody in legal proceedings is not violated by a levy, unaccompanied by any change of possession.

Commonwealth Ins. Co. v. Berger, 42 Pa. 285, 82 Am. Dec. 504; *Insurance Co. v. O'Maley*, 82 Pa. 400, 22 Am. Rep. 769; *Smith v. Farmers' & Mechanics' Mut. Fire Ins. Co.*, 89 Pa. 287. A contrary rule is announced in *Dover Glass Works Co. v. American Fire Ins. Co.*, 29 Atl. 1039, 1 Marv. (Del.) 32, 65 Am. St. Rep. 264.

Nor is the condition violated by a levy under an execution against another than the owner, as it refers to rightful levies.

Miami Val. Ins. Co. v. Stanhope, 6 Ohio Dec. 983; *Philadelphia Fire & Life Ins. Co. v. Mills*, 44 Pa. 241, 84 Am. Dec. 437; *Mills v. Insurance Co.*, 5 Phila. (Pa.) 28.

The appointment of a receiver to rent property pending foreclosure proceedings does not violate a condition against change of possession in any proceeding at law or in equity (*Farmers' Fire Ins. Co. v. Baker*, 94 Md. 545, 51 Atl. 184). And a change of possession on the levy of an execution will not work a forfeiture, unless the risk be increased, where the condition against change of possession exempts a change of occupants without increase of hazard (*Walradt v. Phoenix Ins. Co.*, 136 N. Y. 375, 32 N. E. 1063, 32 Am. St. Rep. 752). In such a case it is for the jury to determine whether or not the change increased the risk. A mere change of receivers in a suit does not involve such a change of possession as is contemplated by a policy (*Thompson v. Phenix Ins. Co.*, 136 U. S. 287, 10 Sup. Ct. 1019, 34 L. Ed. 408). And the appointment of a partner of a firm as receiver of the firm property pending an action to dissolve the partnership does not work a change in the possession of the property (*Keeney v. Home Ins. Co.*, 71 N. Y. 396, 27 Am. Rep. 60, reversing 3 *Thomp. & C.* 478). An owner's right to recover insurance on goods is not affected by a mere seizure of the goods under the order of a government officer, without condemnation or forfeiture (*Keith v. Globe Ins. Co.*, 52 Ill. 518, 4 Am. Rep. 634); nor by a seizure by a sheriff, who locks up the goods in the store in which they are kept and retains the key, unless this increases the risk (*Franklin Fire Ins. Co. v. Findlay*, 6 Whart. [Pa.] 483, 37 Am. Dec. 430).

14. FORFEITURE BY REASON OF VOLUNTARY CHANGE OF TITLE OR INTEREST.

- (a) Transfers between owners.
- (b) Partnership transactions in general.
- (c) Conveyance to wife.
- (d) Transfer of part interest.
- (e) Contract for sale.
- (f) Incumbrance of property.
- (g) Defeasible conveyance.
- (h) Invalid conveyances and transfers in fraud of creditors.
- (i) Sale—Retaining lien or taking mortgage for purchase money.
- (j) Lease of property.
- (k) Policy on stock in trade.

(a) Transfers between owners.

The authorities differ as to the effect of a transfer between joint owners or co-tenants. Though in some jurisdictions it is held that

a sale by one joint owner to others constitutes a breach of a condition against alienation, the weight of authority supports the rule that the contract is not terminated by a transfer from one joint owner to another.

This rule is supported by *Lockwood v. Middlesex Mut. Assur. Co.*, 47 Conn. 553; *Hyatt v. Wait*, 37 Barb. (N. Y.) 29; *German Mutual Fire Ins. Co. v. Fox* (Neb.) 96 N. W. 652, 68 L. R. A. 334; *Tillou v. Kingston Mut. Ins. Co.*, 7 Barb. (N. Y.) 570; *Royal Ins. Co. v. Sockman*, 15 Ohio Cir. Ct. R. 106, 8 Ohio Dec. 404. There are also statutes to this effect in North Dakota, South Dakota, and Montana.¹

In the *Lockwood Case* it was said that the object of the provision against alienation—to prevent the policy from becoming a gaming contract and to secure to the insurers contracting parties of their own choosing—was not defeated by a sale by one owner to another. But the Pennsylvania Supreme Court takes a different view of the question. In *Buckley v. Garrett*, 47 Pa. 204, that court held that a transfer by one tenant in common to his co-tenant was within a prohibition against alienation by sale or otherwise.

Analogous to transfers between joint owners are transactions between members of copartnerships. Here, however, the authorities are more conflicting than in the case of sales by one joint owner to another. In most jurisdictions the rule is that a transfer by one partner of all his interest in the property to his copartner is not such a change of interest as will terminate the insurance. This is true, though the policy expressly provides that it shall be void if the property be alienated by sale or otherwise, or the interest of the parties therein be changed.

This rule is supported by *Drennen v. London Assur. Corp.* (O. C.) 20 Fed. 657; *Burnett v. Eufaula Home Ins. Co.*, 46 Ala. 11, 7 Am. Rep. 581; *Sun Fire Office v. Wich*, 6 Colo. App. 103, 39 Pac. 587; *Dermani v. Home Mut. Ins. Co.*, 26 La. Ann. 69, 21 Am. Rep. 544; *Powers v. Guardian Fire & Life Ins. Co.*, 136 Mass. 108, 49 Am. Rep. 20; *New Orleans Ins. Ass'n v. Holberg*, 64 Miss. 51, 8 South. 175; *Phenix Ins. Co. of Brooklyn v. Holcombe*, 57 Neb. 622, 78 N. W. 300, 73 Am. St. Rep. 532; *German Mutual Fire Ins. Co. v. Fox* (Neb.) 96 N. W. 652, 68 L. R. A. 334; *Pierce v. Nashua Fire Ins. Co.*, 50 N. H. 297, 9 Am. Rep. 235; *West v. Citizens' Ins. Co.*, 27 Ohio St. 1, 22 Am. Rep. 294; *Texas Banking & Ins. Co. v. Cohen*, 47 Tex. 406, 26 Am. Rep. 298; *Virginia Fire & Marine Ins. Co. v. Vaughan*, 88 Va. 832, 14 S. E. 754.

¹ Rev. Codes N. D. 1899, § 4462; Ann. St. S. D. 1901, § 5303; Civ. Code Mont. 1895, § 8411.

In New York a contrary rule appears to have been supported in the early cases. In *Howard v. Albany Ins. Co.*, 3 Denio, 301, it was held that a recovery could not be had where one of the partners had disposed of his interest to the other before loss. But this holding was based on the theory that there was a misjoinder of parties to the action, as the original insured had joined in the action. This decision was followed in *Murdock v. Chenango Co. Mutual Ins. Co.*, 2 N. Y. 210, and the latter case was considered as controlling in *Tillou v. Kingston Mut. Ins. Co.*, 5 N. Y. 405. But when the question came squarely before the Court of Appeals in *Hoffman v. Aetna Fire Ins. Co.*, 32 N. Y. 405, 88 Am. Dec. 337, that court held that a transfer between partners does not work a forfeiture of a policy, thus affirming the decision of the superior court reported in 24 N. Y. Super. Ct. 501.

This rule is further supported by *Roby v. American Cent. Ins. Co.*, 11 N. Y. St. Rep. 93; *Wilson v. Genesee Mut. Ins. Co.*, 16 Barb. (N. Y.) 511; *Tallman v. Atlantic Fire & Marine Ins. Co.*, 29 How. Prac. (N. Y.) 71; *Moulton v. Aetna Fire Ins. Co.*, 49 N. Y. Supp. 570, 25 App. Div. 275; *Loeb v. Firemen's Ins. Co.*, 77 N. Y. Supp. 106, 88 Misc. Rep. 107.

In Illinois it has been held that a condition requiring notice of a contract to sell does not apply to an executory contract between partners (*Allemania Fire Ins. Co. v. Peck*, 133 Ill. 220, 24 N. E. 538, 23 Am. St. Rep. 610); and in Georgia it has been held that a similar contract does not violate a provision against change in title (*Georgia Home Ins. Co. v. Hall*, 94 Ga. 630, 21 S. E. 828). But a condition against "any transfer or change of title" was, in *Dix v. Mercantile Ins. Co.*, 22 Ill. 272, said to be violated by a sale between partners.

In a few jurisdictions the courts uniformly hold that a sale by one partner of his interest to a copartner terminates the contract, where the policy provides against alienation or change in title.

▲ transfer between partners terminates the insurance: Where the policy prohibits change in title, *Hartford Fire Ins. Co. v. Ross*, 23 Ind. 179, 85 Am. Dec. 452; *Hathaway v. State Ins. Co.*, 64 Iowa, 229, 20 N. W. 164, 52 Am. Rep. 438; *Oldham v. Anchor Mut. Fire Ins. Co.*, 90 Iowa, 225, 57 N. W. 861; where it simply provides against alienation, *Finley v. Lycoming County Mut. Ins. Co.*, 30 Pa. 311, 72 Am. Dec. 705; *Buckley v. Garrett*, 47 Pa. 204; *Keith v. Royal Ins. Co. of Liverpool*, 117 Wis. 531, 94 N. W. 295; *Keeler v. Niagara Fire Ins. Co.*, 16 Wis. 523, 84 Am. Dec. 714; *Bilson v. Manufacturers' Ins. Co.*, 3 Fed. Cas. 388

In *Powers v. Guardian Fire & Life Ins. Co.*, 136 Mass. 108, 49 Am. Rep. 20, the court held that it could not be said as a matter of law, in the face of a judgment for an insured, that a sale by one partner to another violated a clause which provided that the policy should be void if the "situation or circumstances affecting the risk shall, by or with the advice, agency, or consent of the insured, be so altered as to cause an increase of such risk."

(b) Partnership transactions in general.

If an insured takes in another as a partner, this will violate a provision against a sale or change in interest.

Germania Fire Ins. Co. v. Home Ins. Co., 144 N. Y. 195, 89 N. E. 77, 43 Am. St. Rep. 749, 26 L. R. A. 591, affirming 4 Misc. Rep. 443, 24 N. Y. Supp. 357; *Malley v. Atlantic Fire & Marine Ins. Co.*, 51 Conn. 222.

In the *Malley Case* it was contended that there was no change in title, as the person taken in as a partner had not contributed any capital to carry on the business, though he had agreed to do so; but the majority of the court was of the opinion that a change had taken place, as there were no stipulations in the partnership agreement which made the transfer of an interest in the property dependent on the contribution of capital. However, two of the judges dissented on the ground that the insured was the equitable owner of the property. In *Blackwell v. Miami Val. Ins. Co.*, 19 Wkly. Law Bul. 87, 10 Ohio Dec. 159, it was also held that the taking in of a partner would violate a condition against a sale or transfer of the property insured; but this holding was reversed by the Supreme Court in an opinion reported in 48 Ohio St. 533, 29 N. E. 278, 14 L. R. A. 431, 29 Am. St. Rep. 574. The latter court held that the condition was not avoided so long as insured retained an interest in the property.

Under the doctrine in Iowa that a condition against alienation is not violated unless insured parts with his entire interest, such a condition is not broken by a transfer of individual property of a partner to the firm of which he is a member (*Cowan v. Iowa State Ins. Co.*, 40 Iowa, 551, 20 Am. Rep. 583). But a transfer by an insured of his property to a firm in which he is a silent partner discharges the insurer, under a policy which provides that it shall cease to be in force as to any property insured which shall pass from the insured to any other person, otherwise than by operation

of law (*Royal Ins. Co. v. Martin*, 24 Sup. Ct. 247, 192 U. S. 149, 48 L. Ed. 385).

If a new partner is taken into a firm, and a part interest in the partnership property is transferred to such new partner, this will terminate the insurance.

Forest City Ins. Co. v. Leach, 19 Ill. App. 151; *Card v. Phoenix Ins. Co.*, 4 Mo. App. 424; *Briggs v. North Carolina Home Ins. Co.*, 88 N. C. 141; *Drennen v. London Assur. Corp. (C. C.)* 20 Fed. 657.

But in *Shuggart v. Lycoming Fire Ins. Co.*, 55 Cal. 408, it was said that a transfer by a partner of his interest in the firm property to a third person only terminated the insurance as to the interest transferred.

If the new member of the firm is merely to share in the profits and is not to have an interest in the partnership property, a change in title does not take place.

London Assur. Corporation v. Drennen, 116 U. S. 461, 6 Sup. Ct. 442, 29 L. Ed. 688; *Hanover Fire Ins. Co. v. Lewis*, 28 Fla. 209, 10 South. 297.

A policy containing a clause against change in title or interest is not forfeited on the death of a partner when the partnership property by operation of law passes to the surviving partner for the settlement of the firm's business.

Virginia Fire & Marine Ins. Co. v. Thomas, 90 Va. 658, 19 S. E. 454; *Georgia Home Ins. Co. v. Same*, 90 Va. 658, 19 S. E. 457.

The mere dissolution of a partnership is not a change of the title to the partnership property within the meaning of a policy (*Roby v. American Cent. Ins. Co.*, 120 N. Y. 510, 24 N. E. 808). It does not destroy the general interest of the copartners in the partnership property, or make them tenants in common. The copartnership continues in a limited sense with reference to past transactions and existing assets. While the power previously possessed by each partner to bind the other is determined, that which was partnership property before the dissolution continues to be such afterwards until one of the co-owners sells his interest to the other. However, the rule in New York is even broader. A complete termination of the partnership will not forfeit a policy providing against a change of title, if one of the partners takes over the interest of the other on the dissolution of the firm (*Dresser v. United*

Firemen's Ins. Co., 45 Hun, 298). This rule is evidently based on the doctrine prevailing in New York and several other jurisdictions that a transfer by one partner of his interest to another does not vitiate a policy. But in Iowa, where a contrary doctrine prevails as to the effect of transfers between partners, it is held that a dissolution of a firm, on which one partner transfers his interest to the other, violates a condition against a change in title (*Hathaway v. State Ins. Co.*, 64 Iowa, 229, 20 N. W. 164, 52 Am. Rep. 438).

A dissolution of a partnership and a division of the partnership property will constitute a change in title.

Dreher v. Aetna Ins. Co., 18 Mo. 128; *Runkle v. Hartford Ins. Co.*, 99 Iowa, 414, 68 N. W. 712.

Under the New York rule, the appointment of a member of a partnership as receiver of the partnership property pending a suit to dissolve the partnership will not work a change of title (*Keeney v. Home Ins. Co.*, 71 N. Y. 396, 27 Am. Rep. 60, reversing 3 *Thomp. & C.* 478).

(c) Conveyance to wife.

It may be stated as a general proposition that a conveyance by an insured to his wife, either directly or through a third person, violates a condition against change of title or interest and terminates the contract.

Reference may be made to *Baldwin v. Phoenix Ins. Co.*, 60 N. H. 164; *Melcher v. Insurance Co. of Pennsylvania*, 97 Me. 512, 55 Atl. 411; *Home Fire Ins. Co. of Omaha v. Collins*, 61 Neb. 198, 85 N. W. 54.

This rule prevails, even though there is no change in possession and the conveyance is executed in lieu of a devise of the property to the wife, as there is nevertheless a transfer of the property and a change in the title within the meaning of a policy (*Langdon v. Minnesota Farmers' Mut. Fire Ins. Ass'n*, 22 Minn. 193). And if a policy prohibits "any change" in title, it is immaterial that the conveyance to the wife is only in trust for the husband (*Farmers' & Merchants' Ins. Co. v. Jensen*, 56 Neb. 284, 76 N. W. 577, 44 L. R. A. 861; *Id.*, 78 N. W. 1054, 58 Neb. 522, 44 L. R. A. 861). So, if the policy prohibits a sale of the premises "in whole or in part," it is immaterial that the husband retains an interest in the land as tenant by the curtesy (*Oakes v. Manufacturers' Fire & Marine Ins. Co.*, 131 Mass. 164). Likewise, if the policy requires the insured to

retain an interest in the premises as owner or mortgagee, a conveyance to the wife will prevent a recovery, though the buildings insured are located on the homestead and the insured thus retains an insurable interest therein (*Glaze v. Three Rivers Farmers' Mut. Fire Ins. Co.*, 87 Mich. 349, 49 N. W. 595). But a conveyance of the homestead by the husband to the wife will not constitute a change of title in Illinois, if the wife does not join in the deed, as it is provided by statute that no conveyance of the homestead estate shall be valid, unless signed and acknowledged by the wife (*Kitterlin v. Milwaukee Mechanics' Mut. Ins. Co.*, 134 Ill. 647, 25 N. E. 772, 10 L. R. A. 220, reversing 24 Ill. App. 188). In *Cummins v. National Fire Ins. Co.*, 81 Mo. App. 291, it was said that an antenuptial contract conveying land to the wife, but providing for a reversion should she prove unfaithful or fail to survive the grantor, vests such title in the wife as to come within a prohibition in a policy against a change of title; and the fact that after the loss the husband secured a divorce cannot authorize a recovery on the policy.

The cases cited have all dealt with policies issued to the husband alone. But in *Walton v. Agricultural Ins. Co.*, 116 N. Y. 317, 22 N. E. 443, 5 L. R. A. 677, it was held that a conveyance by the husband to the wife through a third person violated a provision against "any change" of interest, even though the policy was issued to the husband and wife jointly. However, three of the justices dissented on the ground that the policy was intended to cover any interest the wife might acquire in the property, as it was made out to her as well as to the husband. They said that both the insured and his wife were parties to the contract. The title was in them when the policy was made, and was still there at the time of the loss. No new parties were brought in. Therefore the rule that applies to transfers between partners and joint owners ought to be applied in this case.

(d) Transfer of part interest.

A sale of a part interest in property by an insured to a third person will not terminate a contract of insurance in the absence of a condition against alienation (*Stetson v. Mass. Mut. Fire Ins. Co.*, 4 Mass. 330, 3 Am. Dec. 217). The policy does not become a wagering contract by a sale of part of the property; hence, if the insured retains an interest in the property, he is entitled to recover to the extent of his interest, not exceeding the amount of the insurance.

The rule stated also applies where the policy provides that it shall be void if the insured shall sell or transfer the property insured.

Boatman's Fire & Marine Ins. Co. v. James, 10 Ky. Law Rep. 816; *Clinton v. Norfolk Mut. Fire Ins. Co.*, 176 Mass. 486, 57 N. E. 998, 50 L. R. A. 833, 79 Am. St. Rep. 325; *Manley v. Insurance Co.*, 1 Lans. (N. Y.) 20; *Scanlon v. Union Fire Ins. Co.*, 21 Fed. Cas. 645; *Cowan v. Iowa State Ins. Co.*, 40 Iowa, 551, 20 Am. Rep. 583.

But a condition like this, which merely prohibits a sale or transfer in general terms, is to be distinguished from a clause which provides that a policy shall be void on any sale, transfer, or change of title in the property insured. A condition which prohibits a sale and conveyance in general terms is construed to require a transfer of the whole of insured's interest in order to vitiate the policy. On the other hand, a condition against any sale, transfer, or change in title or interest is violated by a transfer of a part interest in the insured premises.

Western Mass. Ins. Co. v. Riker, 10 Mich. 279; *McEwan v. Western Ins. Co.*, 1 Mich. N. P. 118. In *Moriarty v. United States Fire Ins. Co.*, 19 Tex. Civ. App. 669, 49 S. W. 132, it appears to be assumed that a sale of a part interest forfeits a policy; but the condition against alienation is not set out in the opinion.

In *Jerdee v. Cottage Grove Fire Ins. Co.*, 75 Wis. 345, 44 N. W. 636, a by-law of a town mutual insurance company, providing that policies might be assigned with consent of the company's officers and that the company would not hold itself responsible for a loss until an assignment had been made in the manner prescribed, was construed not to apply to a transfer where the insured retained an interest in the property.

(c) Contract for sale.

A contract for the sale of property insured will not terminate a policy in the absence of a condition to that effect, if the insured retains an interest in the premises. Thus it was said, in *Boston & S. Ice Co. v. Royal Ins. Co.*, 12 Allen (Mass.) 381, 90 Am. Dec. 151, that a contract for the sale of the premises would not terminate the insurance, if the property had not passed to the purchaser, though a part of the purchase money had been paid. And in *Stetson v. Massachusetts Mut. Fire Ins. Co.*, 4 Mass. 330, 3 Am. Dec. 217, it was held that a conditional sale, to be consummated on the expiration of a term of years, did not terminate a policy. So, in *Trum-*

bull v. Portage County Mut. Ins. Co., 12 Ohio, 305, the court was of the opinion that a mere agreement to convey the premises on the payment of the purchase money was not such an alienation as to defeat the insurance, though the insurer was a mutual company and entitled to a lien for the premiums. In none of the cases referred to does it appear that there was any condition against alienation or change in title or interest. Where the policy contains such a condition, the effect of a contract for sale depends on the particular condition in the policy involved. The most common conditions are those which provide for a forfeiture if the property be alienated, sold, or transferred, if the title be changed, if the interest of insured become other than sole and unconditional ownership, or if the interest in the property be changed.

A mere executory contract to sell and convey the premises insured is not a violation of a condition against alienation.

Phenix Ins. Co. v. Caldwell, 187 Ill. 73, 58 N. E. 314, affirming 85 Ill. App. 104; *Kempton v. State Ins. Co.*, 62 Iowa, 83, 17 N. W. 194; *Masters v. Madison County Mut. Ins. Co.*, 11 Barb. (N. Y.) 624.

The rule applies, even though a part of the purchase money is paid (*Washington Fire Ins. Co. v. Kelly*, 32 Md. 421, 3 Am. Rep. 149), and the purchaser is given possession of the premises (*Shotwell v. Jefferson Ins. Co.*, 18 N. Y. Super. Ct. 247).

In Iowa (*Davidson v. Hawkeye Ins. Co.*, 71 Iowa, 532, 32 N. W. 514, 60 Am. Rep. 818) it has been held that a contract for the purchase and sale of real estate, under which the purchaser has taken possession, and upon which nothing remained to be done but making the deed, and paying a balance due on the price, constitutes a breach of a condition against selling, conveying, or incumbering, notwithstanding the contract is to become void upon default in making payments at the times agreed. The majority of the court pointed out that the condition prohibited both a sale and a conveyance. In either event the policy was to be void. This case is distinguished from the *Kempton Case* on the ground that there something remained to be done by the vendor in addition to the execution of the deed. But in a dissenting opinion Reed, J., says that the only difference between the two cases lies in the fact that the purchaser in the *Kempton Case* was not entitled to possession of the property until certain payments had been made. In his opinion the purchaser did not acquire the ownership, but the right to be vested therewith when he performed his undertakings in the

contract. Until that was done both title and ownership remained in the insured. The condition provided against a divesting of the insured's title and ownership, and this was not done by the contract.

A condition making a policy void in case of a change of title refers to a legal transfer which divests the insured of title or control of the property, and does not embrace a contract to sell which is not consummated before loss.

Browning v. Home Ins. Co., 71 N. Y. 508, 27 Am. Rep. 86; *Browning v. Home Ins. Co.*, 6 Daly (N. Y.) 522.

Therefore a mere executory contract of sale, without delivery of possession, will not violate the condition (*Pringle v. Des Moines Ins. Co.*, 107 Iowa, 742, 77 N. W. 521); nor will an executory contract by the terms of which the title is not to pass unless the vendee pays the deferred payments (*Home Ins. Co. v. Bethel*, 142 Ill. 537, 32 N. E. 510, affirming 42 Ill. App. 475). The rule laid down in the Bethel Case is also supported by *Georgia Home Ins. Co. v. Hall*, 94 Ga. 630, 21 S. E. 828, though the question at issue was as to the effect of an executory contract by one partner to another.

Whether title was passed by a verbal sale of goods, under which a portion of the purchase price was paid and the whole price agreed upon, where there was an understanding that a settlement was to be made on the completion of an inventory which was being taken, and that the seller was to take a mortgage for the remainder, was, in *Richardson v. Insurance Co. of North America*, 136 N. C. 314, 48 S. E. 733, held to be a question for the jury.

In Kentucky the rule is that a contract of sale, which passes the equitable title, is a violation of a clause against change of title.

Cottingham v. Fireman's Fund Ins. Co., 90 Ky. 439, 14 S. W. 417, 9 L. R. A. 627, 12 Ky. Law Rep. 409, reversing 10 Ky. Law Rep. 727; *Robinson's Executors v. North British & Mercantile Ins. Co.*, 21 Ky. Law Rep. 982, 53 S. W. 660. In the Cottingham Case the court directs attention to the fact that in Kentucky a loss on the property would fall on the purchaser. Therefore the old rule that a contract of sale would not terminate the insurance was not applicable, as that was based on the proposition that the vendor, as the owner of the legal title, retained the risk of the property, so that any loss which occurred would fall on him.

Where a policy provides for an indorsement in case of a change in title, an indorsement that the title has been changed, when in

fact only a contract to sell has been made, will not forfeit the insurance (*Ladd v. Aetna Ins. Co.*, 70 Hun, 490, 24 N. Y. Supp. 384).

If a change in interest, as well as a change in title, is included as a ground of forfeiture, it is in many jurisdictions held that a contract to sell the property insured will vitiate the policy.

Such is the rule in *Skinner & Sons Ship Building & Dry Docks Co. v. Houghton*, 92 Md. 68, 48 Atl. 85, 84 Am. St. Rep. 485; *Excelsior Foundry Co. v. Western Assur. Co.* (Mich.) 98 N. W. 9; *Gibb v. Fire Ins. Co.*, 59 Minn. 267, 61 N. W. 187, 50 Am. St. Rep. 405; *Germond v. Home Ins. Co.*, 2 Hun (N. Y.) 540, 5 Thomp. & C. (N. Y.) 120; *Southern Cotton Oil Co. v. Prudential Fire Ass'n of New York*, 78 Hun, 873, 29 N. Y. Supp. 123.

The rule in these jurisdictions is based on the distinction between the terms "title" and "interest." The latter term is held to be broader than the former, and to include equitable as well as legal rights. The rule stated does not prevail in all states. Thus it is held in Iowa (*Erb v. German American Ins. Co.*, 98 Iowa, 606, 67 N. W. 583, 40 L. R. A. 845) and Texas (*Home Mut. Ins. Co. v. Tompkins*, 30 Tex. Civ. App. 404, 71 S. W. 812) that a mere executory contract to exchange or sell property, without delivery of possession, does not constitute a change in interest within the meaning of a policy. And in Nebraska (*Grable v. German Ins. Co.*, 32 Neb. 645, 49 N. W. 713) the court has gone still further, and held that a clause prohibiting a change of interest is not violated by a contract for sale under which the purchaser has taken possession and paid part of the purchase money, so long as the insured retains an interest in the property equal to the amount of the policy. But it is to be noted that the decision is based on the cases holding that such a contract does not violate a nonalienation clause, and that the effect of the provision against change of interest is not discussed.

A contract by a guardian to sell property insured, subject to approval by the court, does not constitute a change of interest (*Tiemann v. Citizens' Ins. Co.*, 78 N. Y. Supp. 620, 76 App. Div. 5); nor does a contract by an assignee to sell subject to the consent of the assignor's creditors (*Jones v. Capital City Ins. Co.*, 122 Ala. 421, 25 South. 790); nor a contract which is within the statute of frauds (*Moseley v. Northwestern Nat. Ins. Co.* [Mo. App.] 84 S. W. 1000).

A provision that a policy shall be void if the interest of the insured become other than the entire, unconditional, and sole owner-

ship is not violated by an agreement to convey without delivery of possession (*Arkansas Fire Ins. Co. v. Wilson*, 55 S. W. 933, 67 Ark. 553, 48 L. R. A. 510, 77 Am. St. Rep. 129). Similarly a provision that a policy shall be void if the interest of insured be other than sole and unconditional ownership is not violated by a contract to sell corn in a crib, where the corn is to be shelled and weighed before delivery (*Orient Ins. Co. v. McKnight*, 96 Ill. App. 525). And a condition providing that a policy shall be of no force and effect when the property has been sold and delivered or otherwise disposed of, so that all interest or liability on the part of the insured has ceased, is not violated by an executory contract to sell without delivery of possession (*Carey v. Home Ins. Co.*, 97 Iowa, 619, 66 N. W. 920). But a policy on live stock, which requires the insured to notify the insurer of a sale of any animal covered by the policy, is terminated by a failure to notify the insurer of a conditional sale, under which the purchaser has taken possession and paid the purchase price (*Olyphant Lumber Co. v. People's Mut. Live Stock Ins. Co.*, 4 Pa. Super. Ct. 100). Where the policy merely contains a condition against increase of risk, an oral contract to sell the property insured, which is within the statute of frauds, does not work a forfeiture (*Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6).

(f) Incumbrance of property.

It is a well-settled rule that the execution of a mortgage on property insured does not constitute an alienation within the meaning of a policy.

Reference may be made to *Friezen v. Allemania Fire Ins. Co.* (O. C.) 30 Fed. 352; *Virginia Fire & Marine Ins. Co. v. Feagin*, 62 Ga. 515; *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53, 4 Am. Rep. 582; *Smith v. Monmouth Fire Ins. Co.*, 50 Me. 96; *Jackson v. Massachusetts Mut. Fire Ins. Co.*, 23 Pick. (Mass.) 418, 34 Am. Dec. 69; *Rice v. Tower*, 1 Gray (Mass.) 426; *Judge v. Connecticut Fire Ins. Co.*, 132 Mass. 521; *Strong v. North American Fire Ins. Co.*, 1 Alb. Law J. (N. Y.) 162.

This rule applies, not only to policies issued by the ordinary fire companies, but also to those executed by mutual companies whose charters or by-laws provide for forfeitures in case of alienation of the property insured.

Such is the principle asserted in *Pollard v. Somerset Mutual Fire Ins. Co.*, 42 Me. 221; *Shepherd v. Union Mut. Fire Ins. Co.*, 38 N. H.

232; *Folsom v. Belknap County Mut. Fire Ins. Co.*, 30 N. H. 231; *Rollins v. Columbian Mut. Fire Ins. Co.*, 25 N. H. 200; *Conover v. Mutual Ins. Co.*, 1 N. Y. 290, affirming 3 Denio, 254.

A contrary view is taken in *McCulloch v. Indiana Mut. Fire Ins. Co.*, 8 Blackf. (Ind.) 50, on the ground that an insured might otherwise mortgage the premises to their full value and thus destroy the company's lien for the payment of premiums. And where a by-law of a mutual company provides that "alienations and alterations in the ownership" of the property without consent shall render it void, the execution of a mortgage will terminate the insurance, as the term "alteration in the ownership" is a broader term than "alienation," and embraces a change from legal to equitable ownership (*Edmands v. Mutual Safety Fire Ins. Co.*, 1 Allen [Mass.] 311, 79 Am. Dec. 746).

The general rule applicable to a clause against alienation is controlling, where a policy provides that it shall become void by a sale or transfer of the property. Such a provision is not violated by the giving of a mortgage.

Reference may be made to *Friezen v. Allemanla Fire Ins. Co.* (C. O.) 80 Fed. 852; *Hanover Fire Ins. Co. v. Connor*, 20 Ill. App. 297; *Bryan v. Traders' Ins. Co.*, 145 Mass. 389, 14 N. E. 454; *Byers v. Farmers' Ins. Co.*, 35 Ohio St. 606, 35 Am. Rep. 623; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507, 27 Am. Rep. 582; *Nease v. Aetna Ins. Co.*, 32 W. Va. 283, 9 S. E. 233.

It may further be laid down as a general rule that the execution of a mortgage is neither a change of title nor a change of interest, within the common condition against change of title or interest in the property insured. There are a few exceptions, especially as to the effect of a mortgage on a policy providing against a change of interest; but the majority of the cases hold that even a clause against change of interest is not violated by a mortgage, much less a condition against change of title.

A mortgage does not constitute a change of title: *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53, 4 Am. Rep. 582; *Hartford Fire Ins. Co. v. Walsh*, 54 Ill. 164, 5 Am. Rep. 115; *Aurora Fire Ins. Co. v. Eddy*, 55 Ill. 213; *Hanover Fire Ins. Co. v. Connor*, 20 Ill. App. 297; *Forehand v. Niagara Ins. Co.*, 58 Ill. App. 161; *Taylor v. Merchants' & Bankers' Ins. Co.*, 83 Iowa, 402, 49 N. W. 904; *Ayers v. Hartford Fire Ins. Co.*, 21 Iowa, 193; *Dolliver v. St. Joseph Fire & Marine Ins. Co.*, 128 Mass. 315, 35 Am. Rep. 378; *Judge v. Connecticut Fire Ins. Co.*, 132 Mass. 521; *Union Ins. Co. v. Barwick*, 36 Neb. 223, 54 N. W. 519; *Van Deusen v. Charter*

Oak Fire & Marine Ins. Co., 24 N. Y. Super. Ct. 55; Byers v. Farmers' Ins. Co., 35 Ohio St. 606, 35 Am. Rep. 623; Hartford Steam Boiler Inspection & Ins. Co. v. Lasher Stocking Co., 66 Vt. 439, 29 Atl. 629, 44 Am. St. Rep. 859; Nease v. Aetna Ins. Co., 32 W. Va. 283, 9 S. E. 233; Quarrier v. Peabody Ins. Co., 10 W. Va. 507, 27 Am. Rep. 582.

A mortgage is not a change in interest: Germania Fire Ins. Co. v. Stewart, 13 Ind. App. 627, 42 N. E. 286; Moulton v. Aetna Fire Ins. Co., 25 App. Div. 275, 49 N. Y. Supp. 570; Sun Fire Office v. Clark, 53 Ohio St. 414, 42 N. E. 248, 38 L. R. A. 562; Koshland v. Hartford Fire Ins. Co., 49 Pac. 868, 31 Or. 402; Lampasas Hotel & Park Co. v. Phoenix Ins. Co. (Tex. Civ. App.) 38 S. W. 361; Peck v. Girard Fire & Marine Ins. Co., 51 Pac. 255, 16 Utah, 121, 67 Am. St. Rep. 600; Wolf v. Theresa Village Mut. Fire Ins. Co., 115 Wis. 402, 91 N. W. 1014.

In *East Texas Fire Ins. Co. v. Clarke*, 79 Tex. 23, 15 S. W. 166, 11 L. R. A. 293, the Supreme Court of Texas held that a mortgage violated a condition against change in "interest" by sale, transfer or "conveyance." But in the *Lampasas Hotel & Park Co. Case* the Court of Civil Appeals says that the holding of the Supreme Court is in conflict with the construction placed by a number of the ablest courts in America on a similar condition.

A contrary rule prevails in Colorado, Michigan, and North Carolina. In these states a mortgage is held to be within a clause against change in interest.

Fireman's Fund Ins. Co. v. Barker, 6 Colo. App. 535, 41 Pac. 513; *Olney v. German Ins. Co.*, 88 Mich. 94, 50 N. W. 100, 13 L. R. A. 684, 28 Am. St. Rep. 281; *Sossaman v. Pamlico Banking & Ins. Co.*, 78 N. C. 145.

But the execution of a mortgage by the holder of the legal title to property insured by the equitable owner will not violate a condition against change in title in the policy, unless the equitable owner agrees to pay the mortgage (*Hoose v. Prescott Ins. Co.*, 84 Mich. 309, 47 N. W. 587, 11 L. R. A. 340). In the early case of *Schumitsch v. American Ins. Co.*, 48 Wis. 26, 3 N. W. 595, the Wisconsin Supreme Court appears to take the position that a chattel mortgage is a change in title; but in the recent case of *Wolf v. Theresa Village Mut. Fire Ins. Co.*, 115 Wis. 402, 91 N. W. 1014, the court squarely lays down the rule that the giving of a mortgage does not operate to change the title or interest in property insured. A condition against change in interest is not violated by the giving of a mortgage prior to the issuing of the policy (*Cowart v. Capital City Ins. Co.*, 114 Ala. 356, 22 South. 574). And a provision that

a policy should become void, if an incumbrance should fall or be executed on the property sufficient to reduce the real interest of insured to or below the amount of the insurance, was not broken by a mortgage to the assignees of a policy to secure them for an indorsement, as the insured's interest in the property would remain undiminished until the property should be disposed of under the mortgage (*Allen v. Hudson River Mut. Ins. Co.*, 19 Barb. [N. Y.] 442).

(g) Defeasible conveyance.

There is some difference of opinion, especially in the earlier cases, as to whether or not the execution of a deed absolute on its face, but in fact a mortgage, constitutes an alienation, or change in title or interest. In *Tatham v. Commerce Ins. Co.*, 4 Hun (N. Y.) 136, it was held that the execution and delivery of a deed constituted a change of title, though an instrument of defeasance was taken back by the grantor. This ruling was followed in *Barry v. Hamburg-Bremen Fire Ins. Co.*, 53 N. Y. Super. Ct. 249; but the Court of Appeals reversed this case (110 N. Y. 1, 17 N. E. 405), and held that a deed given to secure a debt, though absolute on its face, did not constitute a change in title.

In *Adams v. Rockingham Mut. Fire Ins. Co.*, 29 Me. 292, it was said that a nonalienation clause was violated by the giving of a deed absolute, though an instrument of defeasance was taken back, as it could not be assumed that at the time of the fire the title under the deed was defeasible. In a subsequent case (*Tomlinson v. Monmouth Mut. Fire Ins. Co.*, 47 Me. 232) the court comes to the same conclusion, but on the ground that the defeasance was not recorded. It was by statute provided that a deed which was intended to be defeasible should not be defeated by means of any instrument against any other than the maker of such defeasance, his heirs or devisees, unless the instrument of defeasance should have been duly recorded. Under this statute the insurer was not bound by an unrecorded defeasance. But in *Smith v. Monmouth Mut. Fire Ins. Co.*, 50 Me. 96, the court said that it was sufficient if the instrument of defeasance was recorded before introduced in evidence at the trial and before rights of third parties had attached.

In *Foote v. Hartford Fire Ins. Co.*, 119 Mass. 259, the Massachusetts court approved the principle announced in the *Tomlinson Case*, and held that a condition against a change in title was violated by a deed absolute on its face, where the instrument of

defeasance was not recorded. But in the subsequent case of *Bryan v. Traders' Ins. Co.*, 145 Mass. 389, 14 N. E. 454, the court took the position that a stipulation against a sale of the premises was not violated under similar circumstances. In this case the court directs attention to the fact that in the *Foote Case* the condition was against change in title, while here it was simply against a sale of the premises. But it does not stop with this. It says that a decision on the effect of a failure to record a defeasance was not necessary to the determination of the *Foote Case*, thus indicating that the decision therein is to be regarded as a mere dictum. To clinch its argument the court says that the purpose of the statute requiring an instrument of defeasance to be recorded is to give notice to purchasers, attaching creditors, and others who might become interested in the estate and rely on the apparently absolute deed, and thus be misled by the record of it, if the defeasance is not recorded. The statute does not apply to an action on a policy, where the defendant makes no claim to the property and cannot in any way have been misled by a failure to record the defeasance.

In *Michigan* (*Western Insurance Company v. Riker*, 10 Mich. 279) and *Georgia* (*Phoenix Ins. Co. of Hartford v. Asberry*, 95 Ga. 792, 22 S. E. 717) the rule prevails that the giving of a deed absolute on its face, but in fact defeasible, constitutes a change in title. The rule in *Georgia* is based on a statutory provision² to the effect that a deed absolute on its face, though in fact defeasible, shall operate as an absolute conveyance, and shall be so held by the courts, and that it shall not be held to be a mortgage.

Except as already noted, the rule is that a defeasible conveyance, though absolute on its face, is not an alienation, change of title, etc., within the meaning of a policy.

No change in title: *Nussbaum v. Northern Ins. Co.* (C. C.) 87 Fed. 524, 1 L. R. A. 704; *Ætna Ins. Co. v. Jacobson*, 105 Ill. App. 283; *German Ins. Co. v. Gibe*, 162 Ill. 251, 44 N. E. 490, affirming 59 Ill. App. 614; *Bank of Glasco v. Springfield Fire & Marine Ins. Co.*, 5 Kan. App. 388, 49 Pac. 329; *Henton v. Farmers' & Merchants' Ins. Co.*, 95 N. W. 670, 1 Neb. Unof. 425; *New Orleans Ins. Co. v. Gordon*, 68 Tex. 144, 3 S. W. 718. No change in title or interest: *Bemis v. Harborcreek Mut. Fire Ins. Co.*, 14 Pa. Super. Ct. 528; *Wolf v. Theresa Village Mut. Fire Ins. Co.*, 115 Wis. 402, 91 N. W. 1014. No termination of interest: *Holbrook v. American Ins. Co.*, 12 Fed. Cas. 319. No transfer: *Burkhart v. Farmers' Union Ass'n & Fire Ins. Co.*, 11 Pa. Super. Ct. 280.

² Code 1882, § 1969.

In an action on a policy, parol evidence is admissible to show that a deed absolute on its face is in fact only a mortgage.

Reference may be made to *German Ins. Co. v. Gibe*, 162 Ill. 251, 44 N. E. 490; *Northern Assur. Co. v. Chicago Mut. Bldg. & Loan Ass'n*, 98 Ill. App. 152; *Northern Assur. Co. v. Chicago Mut. Bldg. Ass'n*, 198 Ill. 474, 64 N. E. 979; *Ayers v. Home Ins. Co.*, 21 Iowa. 185; *Burkhart v. Farmers' Union Ass'n & Fire Ins. Co.*, 11 Pa. Super. Ct. 280.

In a recent case (*Bemis v. Harbor Creek Mut. Fire Ins. Co.*, 200 Pa. 340, 49 Atl. 769) the Pennsylvania Supreme Court appears to have overruled the decisions of the superior court. In this case it was held that a stipulation against change in title was violated by the giving of a deed which was absolute on its face and contained no intimation that it was not of such nature. In *Dailey v. Westchester Fire Ins. Co.*, 131 Mass. 173, it was said that a conveyance absolute on its face to a mortgagee, coupled with an oral agreement to sell the property and account for any surplus, violated a stipulation against the sale of the premises, as the agreement did not show an intention to charge the estate with a trust, or operate to prevent the whole title from vesting in the mortgagee. Where an assignment of a lease was absolute on its face, but there was evidence tending to show that it was made merely to enable the assignee to raise money for his business, it was for the jury to determine whether or not the assignment was defeasible (*Peet v. Dakota Fire & Marine Ins. Co.*, 47 N. W. 532, 1 S. D. 462).

(h) Invalid conveyances and transfers in fraud of creditors.

The execution of a deed to the homestead, which is signed by the husband alone, and therefore void, will not work a forfeiture of any rights under a fire insurance policy (*German Ins. Co. v. York*, 48 Kan. 488, 29 Pac. 586, 30 Am. St. Rep. 313). Likewise a sale of insured property by the husband of the insured without her procurement or consent will not violate a stipulation against "any sale, alienation, transfer, conveyance, or change of title in the property insured" (*Commercial Ins. Co. v. Spankneble*, 52 Ill. 53, 4 Am. Rep. 582). So a conveyance by an insured which is void for usury does not pass the title out of him, so as to defeat recovery under a condition making the policy void if the title to the property is transferred (*Phoenix Ins. Co. v. Asbury*, 102 Ga. 565, 27 S. E. 667). Similarly a deed executed by an insured who is mentally incapable of conveying does not effect a change of title within the meaning of a

policy (*Gerling v. Agricultural Ins. Co.*, 39 W. Va. 689, 20 S. E. 691). Likewise the mere execution of a deed, unaccompanied by delivery, will not work a forfeiture.

Whitney v. American Ins. Co., 127 Cal. 464, 59 Pac. 897; *Schaeffer v. Anchor Mut. Fire Ins. Co.*, 85 N. W. 985, 113 Iowa, 652; *Hogadone v. Grange Mut. Fire Ins. Co. of Kent and Ottawa Counties*, 94 N. W. 1045, 133 Mich. 339; *Humphry v. Hartford Fire Ins. Co.*, 12 Fed. Cas. 883.

Though the recording of a deed raises a presumption of delivery, such presumption is not conclusive (*Fireman's Fund Insurance Co. v. Dunn*, 22 Ind. App. 332, 53 N. E. 251). The delivery, procured by fraud, of a deed duly executed, does not serve to create a forfeiture of a policy, which is to become void if the title to the insured property shall become other than the entire ownership (*Hartford Fire Ins. Co. v. Warbritton*, 66 Kan. 93, 71 Pac. 278). And the voluntary execution of a bill of sale, without consideration, and without the knowledge of or delivery to the vendee, or any change in possession, is not within a provision against any change "in title, possession, or interest" (*Omaha Fire Ins. Co. v. Thompson*, 50 Neb. 580, 70 N. W. 30). A deed which is void for a failure to designate the grantee will not terminate the insurance (*Westchester Fire Ins. Co. v. Jennings*, 70 Ill. App. 539). The execution of a deed to a mortgagee, under which title is not to pass until certain conditions have been complied with, will not work a forfeiture, where the conditions of the deed are unfulfilled at the time of the loss (*Pioneer Sav. & Loan Co. v. Providence-Washington Ins. Co.*, 17 Wash. 175, 49 Pac. 231, 38 L. R. A. 397). But where a conveyance is prima facie valid, the burden is on the insured to prove its invalidity, in order to avoid a forfeiture (*Cottom v. National Fire Ins. Co.*, 65 Kan. 511, 70 Pac. 357).

From the cases cited the rule may be deduced that a void deed will not work a forfeiture. But the mere fact that a deed duly executed and delivered is without consideration will not prevent a forfeiture, as such a deed passes the legal title.

Dean v. Equitable Fire Ins. Co., 7 Fed. Cas. 301; *Brown v. Cotton & Woolen Manufacturers' Ins. Co. of New England*, 156 Mass. 587, 31 N. E. 691; *Baldwin v. Phoenix Ins. Co.*, 60 N. H. 164; *Brown v. Cotton & Woolen Mfrs.' Mut. Ins. Co. of New England*, 156 Mass. 587, 31 N. E. 691; *Home Fire Ins. Co. of Omaha v. Collins*, 61 Neb. 198, 85 N. W. 54.

A conveyance which is valid between the parties, though it is in fraud of creditors, will terminate a policy which provides against alienation.

Rosenstein v. Traders' Ins. Co., 79 N. Y. Supp. 736, 79 App. Div. 481;
Baldwin v. Phoenix Ins. Co., 60 N. H. 164; *Mulville v. Adams* (C. C.) 19 Fed. 887; *Dadmun Mfg. Co. v. Worcester Mut. Fire Ins. Co.*, 11 Metc. (Mass.) 429.

But a mere agreement between the owner of property insured and another person to represent to the creditors of the owner, in order to prevent attachments, that it has been sold to such other person, does not invalidate the policy, though it provides that the insurance shall be void "in case of any sale, transfer, or change of title" (*Orrell v. Hampden Fire Ins. Co.*, 13 Gray [Mass.] 431).

(1) Sale—Retaining lien or taking mortgage for purchase money.

In the early case of *Kitts v. Massasoit Ins. Co.*, 56 Barb. (N. Y.) 177, it was held that a sale of property with mortgage back to secure the purchase money was not a change of title; and this ruling was followed in *Savage v. Howard Ins. Co.*, 43 How. Prac. (N. Y.) 462, affirmed in 44 How. Prac. (N. Y.) 40. But the *Savage Case* was reversed by the Court of Appeals (52 N. Y. 502, 11 Am. Rep. 741), on the ground that the policy also provided against a sale or transfer of the property. The court points out that the term "property" was used for the corpus of the thing insured, as distinguished from the interest of the insured in it. Therefore a conveyance with mortgage back would violate a condition against the transfer of the property, though it might not violate a clause against transfer of interest. The rule thus laid down by the court of last resort was subsequently followed in *Miner v. Judson*, 2 Hun (N. Y.) 441, 5 Thomp. & C. (N. Y.) 46. In *Tittmore v. Vermont Mut. Fire Ins. Co.*, 20 Vt. 546, a conveyance with mortgage back was held to violate a provision against alienation by sale or otherwise. In *Meiswinkel v. St. Paul Fire & Marine Ins. Co.*, 75 Wis. 147, 43 N. W. 669, 6 L. R. A. 200, it was held to violate a clause against change in title; and in *Abbott v. Hampden Mut. Fire Ins. Co.*, 30 Me. 414, to violate a stipulation against a sale or alienation of the property, in whole or in part. Where, however, the insurer is notified of the sale, and its consent thereto is obtained and indorsed on the policy, there is no forfeiture (*Sanders v. Hillsborough Ins. Co.*, 44 N. H. 238).

The mere retention of a lien for unpaid purchase money on the sale of property will not prevent a forfeiture, where the policy provides against a sale or disposition of the property (*California State Bank v. Hamburg-Bremen Ins. Co.*, 71 Cal. 11, 11 Pac. 798), where it prohibits a change in interest (*Northern Assur. Co. v. City Savings Bank*, 18 Tex. Civ. App. 721, 45 S. W. 737), and where it contains a stipulation against a transfer or change of interest (*Bates v. Commercial Ins. Co.*, 2 Cin. R. 195, 13 Ohio Dec. 851, reversing 1 Cin. R. 523, 13 Ohio Dec. 698). In *Farmers' Ins. Co. v. Archer*, 36 Ohio St. 608, it was said that a stipulation against any sale, transfer, or change of title was violated by the giving of a general warranty deed, though the grantor took from the vendee, as a part consideration, a bond wherein the vendee covenanted to permit the vendor to use and occupy the dwelling house as his own during his natural life. A rule contrary to the one stated appears to find support in *Merchants' Ins. Co. v. Scott*, 1 Posey, Unrep. Cas. (Tex.) 534. But it is to be noted that the court construes the condition involved in that case as applying to a sale or transfer of the policy, and not a transfer of the property.

(j) Lease of property.

A lease of premises insured does not violate a stipulation against alienation or change in title.

Rumsey v. Phoenix Ins. Co. (C. C.) 1 Fed. 396; *Lane v. Maine Mut. Fire Ins. Co.*, 12 Me. 44, 28 Am. Dec. 150; *West Branch Ins. Co. v. Helfenstein*, 40 Pa. 289, 80 Am. Dec. 573; *Peet v. Dakota Fire & Marine Ins. Co.*, 47 N. W. 532, 1 S. D. 462.

But a lease under which the lessee is given an option to purchase the premises is in some jurisdictions regarded as coming within a nonalienation clause.

Such is the rule in *Fire Ass'n of Philadelphia v. Flournoy*, 84 Tex. 632, 19 S. W. 793, 31 Am. St. Rep. 89; *Northern Assur. Co. of London v. Same* (Tex. Sup.) 19 S. W. 795; *Smith v. Phenix Ins. Co.* (Cal.) 23 Pac. 388; *Same v. American Fire Ins. Co.*, Id. 385.

However, it is to be noted that on a rehearing of the *Smith Cases* (91 Cal. 323, 27 Pac. 738, 13 L. R. A. 475, 25 Am. St. Rep. 191) the court came to a different conclusion, on the ground that, as the lessee could not be compelled to purchase the property, there was no change of title. And in *Planters' Mut. Ins. Co. v. Rowland*, 66 Md. 236, 7 Atl. 257, it was held that an insured, who leased his

premises, giving the lessee an option to buy, did not part with his interest, where the lessee did not take up the option. According to *Rumsey v. Phoenix Ins. Co.* (C. C.) 1 Fed. 396, a lease of insured premises does not constitute a change of possession. A contrary rule is asserted in *Wenzel v. Commercial Ins. Co.*, 67 Cal. 438, 7 Pac. 817. But it is to be noted the holding in this case was by implication overruled in *Smith v. Phoenix Ins. Co.*, 91 Cal. 323, 27 Pac. 738, 13 L. R. A. 475, 25 Am. St. Rep. 191.

(k) Policy on stock in trade.

An insurance on a stock of goods, which, in the nature of business, will be continually changed, is an insurance on the stock, and not on the specific goods in stock at the time the policy issued, so that sale from the stock and removal thereof will not forfeit the policy, though it contains a nonalienation clause.

Such is the principle announced in *Bates v. Equitable Fire & Marine Ins. Co.*, 2 Fed. Cas. 1021; *Lane v. Maine Mut. Fire Ins. Co.*, 12 Me. 44, 28 Am. Dec. 150; *Wolfe v. Security Fire Ins. Co.*, 39 N. Y. 49; *Briggs v. North Carolina Home Ins. Co.*, 88 N. C. 141; *West Branch Ins. Co. v. Helfenstein*, 40 Pa. 289, 80 Am. Dec. 573.

If the insured, however, disposes of his entire stock, he will, of course, thereby forfeit his insurance (*Bates v. Equitable Fire & Marine Ins. Co.*, 2 Fed. Cas. 1021). But a sale of the entire output of a manufacturing plant will not constitute a change of title, within the meaning of a policy on the product of the plant, especially where the sale is conditional and the seller remains liable for all losses, except by fire, and agrees to pay premiums for insurance on the product (*Burke v. Continental Ins. Co.*, 91 N. Y. Supp. 402, 100 App. Div. 108). In those jurisdictions in which the taking in of a new member in a firm is held to be an alienation, the sale of a part interest in a stock in trade to a third person will forfeit the insurance.

See *Briggs v. North Carolina Home Ins. Co.*, 88 N. C. 141; *Insurance Co. of North America v. Lewis*, 1 Ohio Cir. Ct. R. 79, 1 O. C. D. 47.

However, it is to be noted that a sale of the entire stock, or a part interest therein, is generally considered merely to suspend the risk. Hence a recovery can be had if the insured, before loss, repurchases the stock or interest disposed of (*Insurance Co. of North*

America v. Lewis, 1 Ohio Cir. Ct. R. 79, 1 O. C. D. 47), or puts in a new stock (*Wolfe v. Security Fire Ins. Co.*, 39 N. Y. 49).

In this connection it may be said that the rules applicable to insurance on stock in trade apply equally to insurance on farming implements and stock. An insured may sell or mortgage any portion of such stock and implements without affecting the validity of the policy as to the residue (*Dwelling House Ins. Co. v. Butterly*, 133 Ill. 534, 24 N. E. 873, affirming 33 Ill. App. 626).

15. FORFEITURE BY REASON OF INVOLUNTARY CHANGE IN TITLE OR INTEREST.

- (a) Assignment for creditors and proceedings in insolvency or bankruptcy.
- (b) Devolution of property by death of insured.
- (c) Levy of execution, attachment, or other process.
- (d) Effect of judgment and judicial sale.
- (e) Partition.
- (f) Foreclosure of mortgage or sale under power therein.
- (g) "Commencement of foreclosure proceedings" and "notice of sale."
- (h) Premises becoming involved in litigation.

(a) Assignment for creditors and proceedings in insolvency or bankruptcy.

It appears to be a generally accepted rule that an assignment for the benefit of creditors is an alienation, transfer, or change of title, within the meaning of a policy.

It is an alienation: *Dadmun Mfg. Co. v. Worcester Mut. Fire Ins. Co.*, 11 Metc. (Mass.) 429; *Young v. Eagle Fire Ins. Co.*, 14 Gray (Mass.) 150, 74 Am. Dec. 673; *Hazard v. Franklin Mut. Fire Ins. Co.*, 7 R. I. 429; a transfer: *Orr v. Hanover Fire Ins. Co.*, 158 Ill. 149, 41 N. E. 854, 49 Am. St. Rep. 146, affirming *Hanover Fire Ins. Co. v. Orr*, 56 Ill. App. 621; *Orr v. National Fire Ins. Co.*, 158 Ill. 431, 41 N. E. 1009; *Little v. Eureka Ins. Co.*, 5 Ohio Dec. 285, 4 Am. Law Rec. 228; *Ohio Farmers' Ins. Co. v. Waters*, 61 N. E. 711, 65 Ohio St. 157; *Campbell v. German Ins. Co. (Tex. Civ. App.)* 81 S. W. 810. A change of title or interest: *Guenzburger v. Home Ins. Co. of New York*, 4 Ohio Dec. 220, 3 Ohio N. P. 140; *Milwaukee Trust Co. v. Lancashire Ins. Co.*, 95 Wis. 192, 70 N. W. 81.

A transfer to a trustee in bankruptcy proceedings, whether voluntary or involuntary, is such a transfer as will forfeit the insurance.

In *re Hamilton* (D. C.) 102 Fed. 683; *Starkweather v. Cleveland Ins. Co.*, 22 Fed. Cas. 1093, reversing 22 Fed. Cas. 1091; *Dean v. Eq-*

uitable Fire Ins. Co., 7 Fed. Cas. 301; *Adams v. Rockingham Mut. Fire Ins. Co.*, 29 Me. 292; *Perry v. Lorillard Fire Ins. Co.*, 61 N. Y. 214, 19 Am. Rep. 272, affirming 6 Lans. 201.

A rule contrary to the one stated is announced in the early case of *Phoenix Insurance Company v. Lawrence*, 4 Metc. (Ky.) 9, 81 Am. Dec. 521. In that case it was said that a conveyance to an assignee in trust for creditors did not violate a clause prohibiting "any transfer of the interest of the insured by sale or otherwise" without the consent of the insurer. And in *Small v. Westchester Fire Ins. Co.* (C. C.) 51 Fed. 789, it was held that a decree appointing a receiver after loss did not relate back to the commencement of the proceedings, before loss, so as to work a forfeiture. Likewise it was said, in *Fuller v. Jameson*, 98 App. Div. 53, 90 N. Y. Supp. 456, that the appointment of a receiver after loss in bankruptcy proceedings commenced prior to loss did not impair the bankrupt's title, so as to forfeit his policy. So, in *Appleton Iron Co. v. British-America Assur. Co.*, 46 Wis. 23, 1 N. W. 9, 50 N. W. 1100, the court was of the opinion that an assignment in bankruptcy by a mortgagor of personal property would not invalidate a policy made payable to the mortgagee. This holding was based on the fact that the legal title to the property had passed to the mortgagee by the execution of the mortgage, and therefore the mortgagor had no title to transfer by the assignment. But a contrary rule prevails in other jurisdictions.

Reference may be made to *Young v. Eagle Fire Ins. Co.*, 14 Gray (Mass.) 150, 74 Am. Dec. 673; *Perry v. Lorillard Fire Ins. Co.*, 61 N. Y. 214, 19 Am. Rep. 272; *Hazard v. Franklin Mut. Fire Ins. Co.*, 7 R. I. 429.

An assignment for the benefit of creditors will not vitiate a policy which contains no condition against alienation, though it prohibits an assignment of the policy itself (*People v. Beigler, Lalor, Supp.* 133). Likewise a mere change of receivers or trustees by the court will not constitute a change in title.

Thompson v. Phoenix Ins. Co., 186 U. S. 287, 10 Sup. Ct. 1019, 34 L. Ed. 408; *Georgia Home Ins. Co. v. Bartlett*, 91 Va. 305, 21 S. E. 476, 50 Am. St. Rep. 832.

Where the title to property insured by a married woman is held by her as security for a debt due from her husband, a conveyance

of the property by her to her husband's assignee in insolvency is a breach of a condition in the policy against alienation (*Brown v. Cotton & Woolen Mfrs.' Mut. Ins. Co. of New England*, 156 Mass. 587, 31 N. E. 691).

(b) Devolution of property by death of insured.

A policy conditioned to be void on the alienation or transfer of the property is not terminated by the death of the insured and the descent of the property to the heirs.

Burbank v. Rockingham Ins. Co., 24 N. H. 550, 57 Am. Dec. 300;
Columbia Ins. Co. v. Mullin's Adm'rs, 4 Leg. Op. (Pa.) 572; *Pfister v. Gerwig*, 122 Ind. 567, 23 N. E. 1041.

A similar rule also prevails in some jurisdictions with respect to a clause prohibiting change in title.

Planters' Mut. Ins. Ass'n v. Dewberry, 69 Ark. 295, 62 S. W. 1047, 86 Am. St. Rep. 195; *Georgia Home Ins. Co. v. Kinnier's Adm'x*, 28 Grat. (Va.) 88; and *Virginia Fire & Marine Ins. Co. v. Thomas*, 90 Va. 658, 19 S. E. 454.

In several states there are statutory provisions to the effect that a change of interest by will or succession on the death of the insured will not forfeit a policy.¹

In the *Kinnier Case* the court says, in defense of its position that by the change of title provided against must have been intended a voluntary disposition of the property, that it could not have been intended to embrace all transfers, as a change by foreclosure or execution was provided against in another clause, and, moreover, that it is to the last degree unreasonable to suppose that any sane man would ever accept a policy of insurance against loss by fire, if he understood it, which contained a provision for immediate forfeiture by reason of his death and consequent descent of title to his heirs.

The principle that devolution of the property on the death of the insured does not terminate the insurance cannot be said to prevail generally. In many instances where it has been apparently approved the decision rests on particular facts or forms of condition. Thus, where the policy expressly provides that any loss occurring shall be made good not only to the insured, but also to his execu-

¹ Rev. Codes N. D. 1899, § 4461; Ann. St. S. D. 1901, § 5302, Civ. Code Mont. 1895, § 3410.

tors, administrators, and assigns, it has been held that the insurance is not terminated by the death of the insured.

Such is the principle stated in *Forest City Ins. Co. v. Hardesty*, 55 N. E. 189, 182 Ill. 39, 74 Am. St. Rep. 161, affirming *Hardesty v. Forest City Ins. Co.*, 77 Ill. App. 413; *Forest City Ins. Co. v. Eaton*, 86 Ill. App. 463; *Richardson's Adm'r v. German Ins. Co. of Freeport*, 89 Ky. 571, 13 S. W. 1, 12 Ky. Law Rep. 37, 8 L. R. A. 800; *German Ins. Co. v. Read's Ex'r* (Ky.) 13 S. W. 1080.

On the other hand, it has been held in New York that a policy conditioned against change of title or interest is forfeited by the devolution of the property on the death of the insured, notwithstanding that the loss is, by the express terms of the policy, made payable to the administrators and executors of the insured, as well as to him.

Hine v. Woolworth, 93 N. Y. 75, 45 Am. Rep. 176, affirming 29 Hun, 84; *Lappin v. Charter Oak Fire & Marine Ins. Co.*, 58 Barb. (N. Y.) 325.

The condition making a loss payable to the personal representatives of the insured was in these cases regarded as applying only to the collection of a loss which had occurred prior to the death of the insured. In *Sherwood v. Agricultural Ins. Co.*, 73 N. Y. 447, 29 Am. Rep. 180, affirming 10 Hun, 593, it was held that a clause prohibiting a change of interest, whether by act of the parties or by operation of law, was violated by a devise of the premises.

Reference may also be made to *German Ins. Co. v. Reed's Ex'r*, 10 Ky. Law Rep. 1061; *Miller v. German Ins. Co.*, 54 Ill. App. 53, and *Trabue v. Dwelling House Ins. Co.*, 49 Mo. App. 331.

A policy issued by a mutual company was, in *Cook v. Kentucky Growers Ins. Co.* (Ky.) 72 S. W. 764, held to be terminated on the death of a member and devise of the property to his son, on the ground that, as the insured was required to be a member of the company, the indemnity existed only so long as he should remain a member. And a similar rule was asserted in *Pinckneyville Mut. Fire Ins. Co. v. Kimmel*, 59 Ill. App. 532. But this case was reversed by the Supreme Court in *Kimmel v. Pinckneyville Mut. Fire Ins. Co.*, 161 Ill. 43, 43 N. E. 615. And it is to be noted that other cases involving policies issued by mutual companies make no distinction between such policies and those issued by the ordinary companies, when determining the effect of insured's death on the

contract. If the condition against change in title expressly excepts a "succession by reason of the death of the insured," the policy will not become void by reason of the death of the insured (*Quarles v. Clayton*, 87 Tenn. 308, 10 S. W. 505, 3 L. R. A. 170). And a policy issued to a decedent's estate is not extinguished by a settlement of the estate by the executor, and delivery of the insured property to legatees as absolute owners, since they are regarded as the parties for whose benefit the insurance was effected (*Stone v. Granite State Fire Ins. Co.*, 69 N. H. 438, 45 Atl. 235).

(c) Levy of execution, attachment, or other process.

The issuing of an execution or attachment on real estate, followed by an advertisement of sale, does not effect an alienation or change of title, until perfected by a sale of the property, as up to that time the insured is not divested of his title.

Caraher v. American Cent. Ins. Co., 63 Hun, 82, 17 N. Y. Supp. 858; *Insurance Co. v. O'Maley*, 82 Pa. 400, 22 Am. Rep. 769; *Tefft v. Providence-Washington Ins. Co.*, 19 R. I. 185, 32 Atl. 914, 61 Am. St. Rep. 761.

Likewise a levy of an execution on real property is not an alienation, within the meaning of a policy, so long as a right of redemption remains in the execution defendant (*Clark v. New England Mut. Fire Ins. Co.*, 6 Cush. [Mass.] 342, 53 Am. Dec. 44). The rule stated also applies to levies of executions on personal property. The constructive possession of the sheriff by virtue of levy of an execution on goods insured, where the insured retains the actual possession, does not vitiate a policy providing that it shall be void in case of alienation, change of title, or termination of the interest of insured.

Phoenix Ins. Co. v. Lawrence, 4 Metc. (Ky.) 9, 81 Am. Dec. 521; *Rice v. Tower*, 1 Gray (Mass.) 426; *Walradt v. Phoenix Ins. Co.*, 136 N. Y. 375, 32 N. E. 1063, 32 Am. St. Rep. 752, affirming 64 Hun, 129, 19 N. Y. Supp. 293; *Herman v. Katz*, 47 S. W. 86, 101 Tenn. 118, 41 L. R. A. 700.

The cases cited involved only nonalienation clauses. But, where a policy provides that it shall be void if the property covered shall be "levied on or taken into possession," it becomes more difficult to determine the effect of a levy. Such a condition is valid and enforceable (*Dover Glass Works Co. v. American Fire Ins. Co.*, 1 Marv. [Del.] 32, 29 Atl. 1039, 65 Am. St. Rep. 264). But the words

"levied on or taken into possession" are construed together, and are held to have a special, if not exclusive, reference to personal property. As such property is usually seized when levied on, the condition against a levy has been held as designed to guard against any supposed increase of risk resulting from a change of possession. Therefore it has no application to a technical levy of execution on real estate, which is unattended by any change in the possession of the property, but consists merely of a mental determination of the officer to make a sale of the property, followed by a notification of the sale, and sale as prescribed by statute.

This is asserted in *Colt v. Phoenix Fire Ins. Co.*, 54 N. Y. 595; *Caraher v. Springfield Ins. Co.*, 63 Hun, 82, 17 N. Y. Supp. 858; *Insurance Co. v. O'Maley*, 82 Pa. 400, 22 Am. Rep. 769; *Pennebaker v. Tomlinson*, 1 Tenn. Ch. 598; *Hammel v. Queen's Ins. Co. of Liverpool and London*, 54 Wis. 72, 11 N. W. 349, 41 Am. Rep. 1; *Shafer v. Phoenix Ins. Co.*, 53 Wis. 361, 10 N. W. 381.

Even though a condition prohibiting a levy also provides against an attachment of the property, it refers only to personal property, as the attachment of the real property merely creates a lien upon the land, which can be perfected by sale of the property on execution (*Tefft v. Providence Washington Ins. Co.*, 19 R. I. 185, 32 Atl. 914, 61 Am. St. Rep. 761).

A clause prohibiting levies is strictly construed against the insurer. It is not violated by a technical seizure, which is unaccompanied by any change in possession.

Commonwealth Ins. Co. v. Berger, 42 Pa. 235, 82 Am. Dec. 504; *Smith v. Farmers' & Mechanics' Mut. Fire Ins. Co.*, 89 Pa. 287; *Springfield Fire & Marine Ins. Co. v. Phillips*, 16 Ky. Law Rep. 352. But a contrary rule is asserted in *Dover Glass Works Co. v. American Fire Ins. Co.*, 1 Marv. (Del.) 82, 29 Atl. 1099, 65 Am. St. Rep. 264.

Nor is such a clause violated by a levy under an execution against one who is not the owner of the property.

Miami Valley Ins. Co. v. Stanhope, 6 Ohio Dec. 983; *Philadelphia Fire & Life Ins. Co. v. Mills*, 44 Pa. 241, 84 Am. Dec. 437; *Mills v. Insurance Co.*, 5 Phila. (Pa.) 28.

A condition in a fire policy that it "shall cease from the time the property insured shall be levied on or taken into possession or control under any proceeding in law or equity, whether there be any change in possession or not," is not violated by the appoint-

ment of a receiver, who is merely to see to the rental of the property pending foreclosure proceedings (*Farmers' Fire Ins. Co. v. Baker*, 94 Md. 545, 51 Atl. 184). If a policy not only prohibits the levy of an execution, but also requires notice of incumbrances, it will be forfeited by the levying of an execution of which no notice is given to the insurer (*Pennsylvania Ins. Co. v. Gottsman's Adm'rs*, 48 Pa. 151). But, if an insurance company has been notified of the entry of a judgment against the insured and the issuance of execution thereon, it is not necessary for the insured to notify the company of the advertisement for sale of the insured property by the sheriff (*Ulysses Elgin Butter Co. v. Home Ins. Co.*, 20 Pa. Super. Ct. 320). A mere seizure of goods under an order of a government officer, without condemnation or forfeiture, will not affect the owner's right to recover his insurance thereon (*Keith v. Globe Ins. Co.*, 52 Ill. 518, 4 Am. Rep. 634). Nor will a seizure of goods by a sheriff, who locks up the store in which the goods are kept and retains the key, prevent a recovery on the policy, where the seizure does not increase the risk (*Franklin Fire Ins. Co. v. Findlay*, 6 Whart. [Pa.] 483, 37 Am. Dec. 430). But it is to be noted that in the two cases just cited it did not appear that the policies involved contained any conditions against change of title or possession. Where the policy merely provides for a forfeiture in case of an increase of risk, a judgment and execution sale under a mechanic's lien, filed at the time the policy was issued, will not bar a recovery, unless an increase of risk be shown (*Greenlee v. North British & Mercantile Ins. Co.*, 102 Iowa, 427, 71 N. W. 534, 63 Am. St. Rep. 455).

(d) Effect of judgment and judicial sale.

A judicial sale of property insured, which is perfected by confirmation or by lapse of time, constitutes an alienation within the meaning of a policy (*Campbell v. Hamilton Mut. Ins. Co.*, 51 Me. 69).

If a loss occurs before the sale is confirmed, a recovery is not barred, though the policy prohibits an alienation or a change in title or interest.

Farmers' Mut. Ins. Co. v. Graybill, 74 Pa. 17; *Manhattan Ins. Co. v. Stein*, 5 Bush (Ky.) 652.

This is on the theory that a judicial sale does not effectually change the insured's interest until it is confirmed. A similar rule

prevails if a fire occurs before the expiration of the period of redemption.

Greenlee v. North British & Mercantile Ins. Co., 102 Iowa, 427, 71 N. W. 534, 63 Am. St. Rep. 455; *Strong v. Manufacturers' Ins. Co.*, 10 Pick (Mass.) 40, 20 Am. Dec. 507; *Wood v. American Fire Ins. Co.*, 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep. 733, affirming 29 N. Y. Supp. 250, 78 Hun, 109; *Hammel v. Queen's Ins. Co. of Liverpool and London*, 54 Wis. 72, 11 N. W. 349, 41 Am. Rep. 1.

The holding in the *Wood Case* is expressly based on a Code provision to the effect that a judgment debtor is not divested of title to real estate by a sale on execution until the expiration of the period of redemption. The court thus distinguishes this case, which involved real estate, from *Walradt v. Insurance Co.*, 136 N. Y. 375, 32 N. E. 1063, wherein it was intimated that a sale of personal property on execution would constitute a change of title. In analogy with the principle stated, it was held in *Collins v. London Assur. Corp.*, 165 Pa. 298, 30 Atl. 924, that a sale by a sheriff does not pass title, within the meaning of a condition prohibiting change of title, until after he acknowledges and delivers the deed. And a sale by a receiver under order of court does not terminate the insurance until delivery of the deed (*Porter v. Orient Ins. Co.*, 72 Conn. 519, 45 Atl. 7), or an instrument of conveyance in case of the sale of personal property (*International Wood Co. v. National Assur. Co.*, 99 Me. 415, 59 Atl. 544). Even though the sheriff executes a deed, yet if the execution sale was invalid, a clause against change of title by legal process is not violated, nor a clause prohibiting a sale "under a levy under execution" (*Pearman v. Gould*, 42 N. J. Eq. 4, 5 Atl. 811). A sale which becomes abortive through the purchaser's failure to execute a bond will not invalidate a policy providing against a change in title or possession (*Springfield Fire & Marine Ins. Co. v. Phillips*, 16 Ky. Law Rep. 352). In *Lodge v. Capital Ins. Co.*, 91 Iowa, 103, 58 N. W. 1089, it was said that there was no violation of a clause providing against a change of title, where the husband of the insured paid the redemption money before the expiration of the redemption period and the insured remained in possession, though the husband made the payment under an agreement for a conveyance with the purchaser at the execution sale, and a deed was executed to the purchaser before loss. The court considered the payment by the husband of the full amount due to operate as a redemption.

A decree for the sale of property, obtained in invitum, will not bar a recovery for a loss occurring before a sale is made under the decree (*Cleavenger v. Franklin Fire Ins. Co. of Wheeling*, 47 W. Va. 595, 35 S. E. 998). And a judgment in unlawful detainer against an insured will not work a change in interest until the statutory period within which no execution may be issued has expired (*Browne Nat. Bank v. Southern Ins. Co.*, 22 Wash. 379, 60 Pac. 1123). In *Collins v. London Insurance Corporation*, 165 Pa. 298, 30 Atl. 924, it is said that a condition against an increase of risk is intended to protect the property from risks by change in structure, methods of heat, additions, etc., and does not relate to sales on execution, at least not to a sale on execution under a judgment existing at the time the policy was issued.

(e) Partition.

Some doubt is expressed in *Barnes v. Union Mut. Fire Ins. Co.*, 51 Me. 110, 81 Am. Dec. 562, as to whether or not a partition of premises insured will constitute an alienation. But, while there may be doubt as to the effect of partition on a condition against alienation, the authorities uniformly hold that a sale or division of property insured in partition proceedings violates a clause prohibiting a change in title or interest.

This is asserted in *Barnes v. Union Mut. Fire Ins. Co.*, 51 Me. 110, 81 Am. Dec. 562; *Trabue v. Dwelling House Ins. Co.*, 121 Mo. 75, 25 S. W. 848, 23 L. R. A. 719, 42 Am. St. Rep. 523, affirming 49 Mo. App. 331; *Hollaway v. Same*, 121 Mo. 87, 25 S. W. 850; *Hartford Fire Ins. Co. v. Ransom* (Tex. Civ. App.) 61 S. W. 144; *Dornblaser v. Sugar Valley Mut. Fire Ins. Co.*, 20 Pa. Super. Ct. 586.

It is, however, to be noted that, as in foreclosure proceedings, a mere sale under a decree for partition, which is not confirmed, does not constitute a change of interest. If a fire occurs before confirmation, the insured may recover for the loss sustained (*Terpenning v. Agricultural Ins. Co.*, 14 Hun [N. Y.] 299).

(f) Foreclosure of mortgage or sale under power therein.

Though a policy provides that it shall be void if the property insured shall be sold or transferred, or any change shall take place in the title or possession, whether by legal process, judicial sale, or voluntary conveyance, a foreclosure of a mortgage on the premises will not defeat a recovery for a loss occurring before the expiration

of the period of redemption (*Loy v. Home Ins. Co.*, 24 Minn. 315, 31 Am. Rep. 346). Even if a clause against a sale or conveyance is modified by a provision that a judgment in foreclosure shall be deemed an alienation, it will not be violated by a decree in an ordinary foreclosure suit without further proceedings (*Kane v. Hibernia Mut. Fire Ins. Co.*, 38 N. J. Law, 441, 20 Am. Rep. 409). And this rule applies, though a policy contains a stipulation making it void immediately on the passing or entry of a decree of foreclosure (*Pearman v. Gould*, 42 N. J. Eq. 4, 5 Atl. 811). The non-alienation clause is not violated, except by strict foreclosure, until the period of redemption has expired and the mortgagor has been entirely divested of his interest in the property. But, if the insured fails to redeem within the specified time, the insurance will be terminated, especially if the policy prohibits a sale of the premises without the insurer's consent.

Essex Sav. Bank v. Meriden Fire Ins. Co., 57 Conn. 335, 17 Atl. 980, 18 Atl. 324, 4 L. R. A. 759; *McKissick v. Mill Owners' Mut. Fire Ins. Co.*, 50 Iowa, 118.

The policy is not revived by a verbal promise by the mortgagee to extend the time within which the property may be redeemed, made after expiration of the specified period of redemption and without consideration of any kind (*Essex Sav. Bank v. Meriden Fire Ins. Co.*, 57 Conn. 335, 17 Atl. 930, 18 Atl. 324, 4 L. R. A. 759). In analogy with the rule first stated, it is held that a sale which requires confirmation, as, for instance, a sale by a master on foreclosure or by a trustee under a power in the mortgage, will not violate a nonalienation clause, unless the sale is confirmed. The insurer will be liable for a loss happening before confirmation.

Such is the rule in *Hanover Fire Ins. Co. v. Brown*, 77 Md. 64, 25 Atl. 989, 27 Atl. 814, 39 Am. St. Rep. 386; *McLaren v. Hartford Ins. Co.*, 1 Edm. Sel. Cas. (N. Y.) 210; *Haight v. Continental Ins. Co.*, 92 N. Y. 51, affirming 27 Hun, 617.

It is true that a contrary view was taken in the early case of *McLaren v. Hartford Fire Ins. Co.*, 5 N. Y. 151, wherein the court held that a clause against change of title was violated by a foreclosure sale, though the loss occurred prior to confirmation. But this holding has been overruled by the later case of *Haight v. Continental Ins. Co.*, 92 N. Y. 51, affirming 27 Hun, 617, in which the court announced the principle that a sale on foreclosure without the giving of a deed or the presentation of a report does not consti-

tute a change of title. This rule is also supported by *Marts v. Cumberland Mut. Fire Ins. Co.*, 44 N. J. Law, 478.

If no confirmation is necessary to complete the sale, or it is otherwise completed before loss, there can be no recovery.

Mt. Vernon Mfg. Co. v. Summit County Mut. Fire Ins. Co., 10 Ohio St. 347; *Commercial Union Assur. Co. v. Scammon*, 102 Ill. 46; *Tallman v. Atlantic Fire & Marine Ins. Co.*, 29 How. Prac. (N. Y.) 71.

If a foreclosure sale is vacated for irregularity and the order of confirmation is set aside before loss, the insurable interest of the mortgagor remains and continues precisely as though no sale had been attempted (*Richland County Mut. Ins. Co. v. Sampson*, 38 Ohio St. 672). Likewise a stipulation in a policy that a foreclosure will be deemed such an alienation as will vitiate the policy does not embrace a sale on a creditors' bill which is set aside before loss (*Georgia Home Ins. Co. v. Kinnier's Adm'x*, 28 Grat. [Va.] 88). A similar rule will also apply if a mortgage sale is set aside by consent of the parties before a loss occurs (*Mt. Vernon Mfg. Co. v. Summit County Mut. Fire Ins. Co.*, 10 Ohio St. 347). A forfeiture will likewise be prevented if the mortgagor, before a loss has happened, notifies the mortgagee that he will proceed to have the sale set aside and procures a decree to that effect, even though the decree is not obtained till after loss, as it will at least relate back to the time of the notice.

Niagara Fire Ins. Co. v. Scammon, 144 Ill. 502, 32 N. E. 914, 19 L. R. A. 118, reaffirming on rehearing 144 Ill. 490, 28 N. E. 919, 19 L. R. A. 114, affirming 35 Ill. App. 582; *Commercial Union Assur. Co. v. Same*, 144 Ill. 506, 32 N. E. 916.

On prior appeals of the *Commercial Assur. Co.* Case the courts came to the same conclusion, that the mortgagor's insurance was not terminated, but based their holding on the fact that a clause providing that the policy should be void if the property be sold or transferred, or any change take place in the title thereto, was modified by a second clause providing that the insurance should be terminated if the property be sold and delivered, so that all interest on the part of the insured ceased. As thus modified, the policy provided only against such a disposition of the property as caused all interest of the insured in or control over it to cease.

Scammon v. Commercial Union Ins. Co., 20 Ill. App. 500; *Commercial Union Assur. Co. v. Scammon* (Ill.) 12 N. E. 324; *Scammon v. Commercial Union Assurance Co.*, 6 Ill. App. 551.

But the mere fact that a sale is set aside after loss will not prevent a forfeiture (*Mt. Vernon Mfg. Co. v. Summit County Mut. Fire Ins. Co.*, 10 Ohio St. 347). Especially is this true if the insurer is not made a party to the proceedings in which the judgment setting aside the foreclosure is procured (*Tierney v. Phoenix Ins. Co. of Brooklyn*, 4 N. D. 565, 62 N. W. 642, 36 L. R. A. 760). And such a judgment is not admissible in an action on the policy. If the purchaser at a foreclosure sale insures the property, he is not affected by an order to open the judgment made without his knowledge after the expiration of the period of redemption (*Porter v. Orient Ins. Co.*, 72 Conn. 519, 45 Atl. 7).

In *Bragg v. New England Mut. Fire Ins. Co.*, 25 N. H. 289, it was said that a policy made payable to a mortgagee was not vitiated by a foreclosure without any act of the mortgagor to whom the policy was issued. But in other cases it has been held that, though a policy issued to a mortgagor is made payable to the mortgagee, a foreclosure by the latter violates a stipulation against change of title by legal process or judicial decree.

Brunswick Sav. Inst. v. Commercial Union Ins. Co., 68 Me. 313, 28 Am. Rep. 56; *Hagaman v. Allemania Fire Ins. Co.*, 38 Leg. Int. (Pa.) 375; *McKinney v. Western Assur. Co.*, 97 Ky. 474, 30 S. W. 1004.

If a mortgagee's interest is insured, a foreclosure by him under which he obtains full title to the premises does not defeat the insurance.

Bailey v. American Cent. Ins. Co. (O. O.) 18 Fed. 250; *Esch v. Home Ins. Co.*, 78 Iowa, 334, 43 N. W. 229, 16 Am. St. Rep. 443.

Likewise, if a policy is made payable to a mortgagee under a union mortgage clause, a foreclosure by the mortgagee, which increases his interest, will not release the insurer from liability.

Dodge v. Hamburg-Bremen Fire Ins. Co., 46 Pac. 25, 4 Kan. App. 415; *Pioneer Savings & Loan Co. v. St. Paul Fire & Marine Ins. Co.*, 68 Minn. 170, 70 N. W. 979.

In *German Ins. Co. of Freeport v. Churchill*, 26 Ill. App. 206, the court took the position that, where mortgaged property is insured, while involved in litigation and after the commencement of foreclosure proceedings, for the benefit of the mortgagee and his assigns, and a loss occurs after the foreclosure sale, the insurer can-

not defend on the ground of change of interest or ownership of the property. The court's holding is largely based on the fact that the insurer was estopped from asserting the forfeiture, as its agent had knowledge of the foreclosure proceedings when the policy was issued. This doctrine, no doubt, prevails in most jurisdictions.² Thus it was said, in *Billings v. German Ins. Co. of Freeport*, 34 Neb. 502, 52 N. W. 397, that where a policy on mortgaged premises is, with the insurer's consent, assigned to the mortgagee as additional security, the policy will not be forfeited by a foreclosure of the mortgage, though there may be such a condition printed on the policy. In *Phenix Ins. Co. v. Union Mut. Life Ins. Co.*, 101 Ind. 392, it was held that the mere commencement of foreclosure proceedings was not in itself a "change of ownership or increase of hazard," which would terminate a policy for the benefit of a mortgagee.

A mortgagor's failure to redeem premises foreclosed before the execution of a policy for the benefit of the mortgagee does not work an alienation, so as to defeat the policy, though it requires the mortgagee to notify the insurer of any change of ownership (*Washburn Mill Co. v. Fire Ass'n of Philadelphia*, 60 Minn. 68, 61 N. W. 828, 51 Am. St. Rep. 500). And a mere failure to pay at maturity a mortgage existing on property at the time it was insured does not vitiate a policy providing that a change in interest, title, or possession renders it void (*Ethington v. Dwelling House Ins. Co.*, 55 Mo. App. 129). Likewise a surrender of possession of goods mortgaged prior to the issuing of a policy will not constitute such a sale as will invalidate the insurance (*Washington Ins. Co. v. Hayes*, 17 Ohio St. 432, 93 Am. Dec. 628).

Where property insured by trustees under a second mortgage is foreclosed and sold under the first mortgage, and the sale is allowed to become absolute by a failure to redeem, there is such change in title as will terminate the policy issued to the trustees, and the insurance is not saved by the fact that the decree of foreclosure gave the trustees under the second mortgage a lien for certain advances (*Bishop v. Clay Fire & Marine Ins. Co.*, 45 Conn. 430). In *Macomber v. Cambridge Mut. Fire Ins. Co.*, 8 Cush. (Mass.) 133, it appeared that an owner of mortgaged real estate obtained insurance thereon, payable to the mortgagee in case of loss, from a mutual company, whose by-laws provided that no mortgaged estate should be deemed to be alienated, so as to forfeit the policy, until the mort-

² Estoppel by knowledge of agent, see post, vol. 3, p. 2516.

gage should be foreclosed, and that a third person afterwards purchased the equity of redemption, and also obtained an assignment of the mortgage and of the policy. It was held that the mortgage was thereby merged in the fee, that this operated as a foreclosure, and that no action could be maintained on the policy for a subsequent loss.

(g) "Commencement of foreclosure proceedings" and "notice of sale."

Oftentimes it is stipulated in a policy that the commencement of foreclosure proceedings shall terminate the insurance, or that the commencement of such proceedings shall be deemed an alienation. Such stipulations are material and valid (*Findlay v. Union Mut. Fire Ins. Co.*, 74 Vt. 211, 52 Atl. 429, 93 Am. St. Rep. 885), and a breach thereof will terminate the insurance.

Medley v. German Alliance Ins. Co. (W. Va.) 47 S. E. 101; *Woodside Brewing Co. v. Pacific Fire Ins. Co.*, 11 App. Div. 68, 42 N. Y. Supp. 620; *Hartford Fire Ins. Co. v. Clayton*, 17 Tex. Civ. App. 644, 43 S. W. 910, *Meadows v. Hawkeye Ins. Co.*, 62 Iowa, 387, 17 N. W. 600.

Thus it was said, in *Schroeder v. Imperial Ins. Co.*, 132 Cal. 18, 63 Pac. 1074, 84 Am. St. Rep. 17, that where a policy provided that it should become void if, with the knowledge of the insured, foreclosure proceedings should be commenced, the policy became void on the service of process in foreclosure, notwithstanding insured had no knowledge of the proceedings commenced until such service of process. And in *McIntire v. Norwich Ins. Co.*, 102 Mass. 230, 3 Am. Rep. 458, it was held that a clause in a policy on a chattel, providing that "the entry of a foreclosure of a mortgage shall be deemed an alienation of the property," imported something short of a consummated foreclosure, and hence was violated by notice of intention to foreclose. Such stipulations apply to proceedings to foreclose mortgages made after the issuing of a policy, as well as those in existence at that time (*Jackson v. Massachusetts Mut. Fire Ins. Co.*, 23 Pick. [Mass.] 418, 34 Am. Dec. 69), and are not confined to foreclosure proceedings of which the insured has notice at the time they are commenced, but cover all proceedings of which he obtains knowledge at any time before loss (*Delaware Ins. Co. v. Greer*, 120 Fed. 916, 57 C. C. A. 188, 61 L. R. A. 137). However, it must appear that the insured had knowledge of the commencement of foreclosure proceedings, in order to defeat a recovery on a policy condi-

tioned to be void if such proceedings be commenced with the insured's knowledge.

North British & Mercantile Ins. Co. v. Freeman (Tex. Civ. App.) 33 S. W. 1091; Bellevue Roller Mill Co. v. London & L. Fire Ins. Co., 4 Idaho, 307, 39 Pac. 196; Sharp v. Scottish Union & Nat. Ins. Co., 136 Cal. 542, 69 Pac. 253; London & L. Fire Ins. Co. v. Davis (Tex. Civ. App.) 84 S. W. 280.

Like all other conditions imposed on the insured, the stipulation against the commencement of foreclosure proceedings is construed strictly against the insurer. The condition does not apply to proceedings pending when a policy is issued, but refers only to those commenced in the future (*Orient Insurance Co. v. Burrus*, 23 Ky. Law Rep. 656, 63 S. W. 453). It relates only to judicial proceedings for the enforcement of a mortgage, and does not embrace waivers of legal delays and other waivers of a nature to expedite the judicial proceedings (*Stenzel v. Pennsylvania Fire Ins. Co.*, 110 La. 1019, 35 South. 271, 98 Am. St. Rep. 481).

The stipulation is not violated by: An execution sale of property on a judgment entered on a personal judgment note, though given for a balance due on a mortgage, *Collins v. London Assur. Corp.*, 165 Pa. 298, 30 Atl. 924; an entry of a judgment on a bond accompanying a mortgage, not followed by a sale before loss, *Stainer v. Royal Ins. Co.*, 6 North. Co. R. 362, s. c. 13 Pa. Super. Ct. 25; the issuance of a scire facias on the property of insured by a mortgagee, *Weiss v. American Fire Ins. Co.*, 148 Pa. 349, 23 Atl. 991; proceedings to foreclose a mechanic's lien, *Colt v. Phoenix Fire Ins. Co.*, 54 N. Y. 595, *Speagle v. Dwelling House Ins. Co.*, 97 Ky. 646, 31 S. W. 282; proceedings to foreclose a vendor's lien, *Southern Ins. Co. v. Estes*, 106 Tenn. 472, 62 S. W. 149, 52 L. R. A. 915, 82 Am. St. Rep. 892.

In the *Estes Case* the court appears to be of the opinion that the stipulation would not even be violated by the commencement of proceedings to foreclose a mortgage. The court reasons that, if the existence of an undisclosed mortgage on property will not vitiate a policy which contains an ownership clause, it is hard to perceive how notice of foreclosure of the mortgage can have that effect, notwithstanding the policy stipulates that it shall be forfeited by the commencement of foreclosure proceedings without notice to the insurer.

If an insurance company gives its consent to an existing mortgage, a judgment of foreclosure does not forfeit the policy, though

it provides against the instituting of a suit for foreclosure (*Fitzgibbons v. Merchants' & Bankers' Mut. Fire Ins. Co.* [Iowa] 101 N. W. 454). And where a company has knowledge at the time a policy is issued that a mortgage is overdue, the mere commencement of foreclosure proceedings will not terminate the insurance, though the policy stipulates that it shall be void if proceedings to foreclose any lien shall be commenced.

Butz v. Ohio Farmers' Mut. Ins. Co., 76 Mich. 268, 42 N. W. 1119, 15 Am. St. Rep. 316; *Michigan State Ins. Co. v. Lewis*, 80 Mich. 41.

In regard to what constitutes a "commencement of foreclosure proceedings," it may be said that the proceedings are begun by the service of a petition to foreclose (*Findlay v. Union Mut. Fire Ins. Co.*, 74 Vt. 211, 52 Atl. 429, 93 Am. St. Rep. 885), or by the service of process (*Norris v. Hartford Fire Ins. Co.*, 55 S. C. 450, 33 S. E. 566, 74 Am. St. Rep. 765).

In some instances the clause prohibits a notice of sale under a mortgage or deed of trust, as well as the commencement of foreclosure proceedings, generally providing that the policy shall be void if, with the knowledge of the insured, foreclosure proceedings be commenced, or notice given of sale of any property covered by the policy, by virtue of any mortgage or deed of trust. Such a condition is violated by advertising the property for sale under a mortgage (*Hayes v. United States Fire Ins. Co.*, 132 N. C. 702, 44 S. E. 404), even though the sale never occurs (*Springfield Steam Laundry Co. v. Traders' Ins. Co.*, 151 Mo. 90, 52 S. W. 238, 74 Am. St. Rep. 521, affirming 66 Mo. App. 199, on this point); by proceedings for a sale under a power in a mortgage (*Merchants' Ins. Co. v. Brown*, 77 Md. 79, 25 Atl. 992); and by a notice of a sale under a deed of trust (*Medley v. German Alliance Ins. Co.* [W. Va.] 47 S. E. 101). In *Pearson v. German Ins. Co.*, 73 Mo. App. 480, a policy declaring that it should cease to be binding if the property should be advertised for sale under a deed of trust or mortgage was held to be forfeited by an advertisement for sale of the property under a deed of trust. But a stipulation in a policy that it shall be void if notice be given of the sale of any property covered by the policy under a mortgage is inoperative in Louisiana, as it has reference to extrajudicial enforcement of a mortgage by means of notice to the mortgagor, which method is unknown to the law of that state (*Stenzel v. Pennsylvania Fire Ins. Co.*, 110 La. 1019, 35 South. 271, 98 Am. St. Rep. 481).

If a policy contains a union mortgage clause, the commencement of foreclosure proceedings will not prevent a recovery by the mortgagee for a subsequent loss, though the proceedings are prohibited by a clause in the body of the policy (*Lancashire Ins. Co. v. Boardman*, 58 Kan. 339, 49 Pac. 92, 62 Am. St. Rep. 621). But, if a policy is merely made payable to a mortgagee, the commencement of foreclosure proceedings will work a forfeiture.

Titus v. Glens Falls Ins. Co., 81 N. Y. 410, 8 Abb. N. C. 315; *Springfield Steam Laundry Co. v. Traders' Ins. Co.*, 66 Mo. App. 199.

However, it is to be noted that a contrary rule is announced in *Sharp v. Scottish Union & National Ins. Co.*, 69 Pac. 253, 136 Cal. 542, wherein the court held that a policy made payable to a mortgagee was not invalidated by the commencement of foreclosure proceedings. A mere stipulation against "change of ownership or increase of hazard" is not violated by the commencement of foreclosure proceedings (*Phenix Ins. Co. v. Union Mut. Life Ins. Co.*, 101 Ind. 392). So a stipulation forfeiting a policy on the passing or entry of a decree of foreclosure is not violated by the mere commencement of foreclosure proceedings (*Minnock v. Eureka Fire & Marine Ins. Co.*, 90 Mich. 236, 51 N. W. 367). And the same is true of a provision that a policy shall be void if the property becomes involved in litigation.

Farmers' & Merchants' Ins. Co. v. Newman, 58 Neb. 504, 78 N. W. 933; *Henton v. Farmers' & Merchants' Ins. Co.*, 1 Neb. (Unof.) 425, 95 N. W. 670.

(h) Premises becoming involved in litigation.

A condition in an insurance policy that it shall become void if the title or possession of the property is, or shall become, involved in litigation, is not against public policy, but is intended to protect the insurer from carrying insurance on property where the title or possession is so doubtful as to become involved in litigation. But such a clause is construed strictly against the insurer, and is not broken by a creditors' bill which does not involve either title or possession to the property insured (*Small v. Westchester Fire Ins. Co.* [C. C.] 51 Fed. 789). Nor is the clause violated by proceedings to oust a tenant, who is merely holding over without permission (*Hall v. Niagara Fire Ins. Co.*, 93 Mich. 184, 53 N. W. 727, 32 Am. St. Rep. 497, 18 L. R. A. 135); nor by a suit to recover possession of another building than the one insured, both buildings being located on

land assigned to insured as dower (*Western Assur. Co. v. Stoddard*, 88 Ala. 606, 7 South. 379).

In Nebraska the rule is announced that a clause declaring that a policy shall be void if the property becomes involved in litigation without notice to the insurer is not violated by an action brought without the consent of the insured. Thus proceedings by a mortgagee to foreclose his mortgage will not violate the clause (*Farmers' & Merchants' Ins. Co. v. Newman*, 58 Neb. 504, 78 N. W. 933), even though the policy is made payable to the mortgagee (*Henton v. Farmers' & Merchants' Ins. Co.*, 1 Neb. [Unof.] 425, 95 N. W. 670), if the conditions in the policy are not made applicable to the mortgagee. In Kentucky a recovery on a policy will not be barred because the insurer had no knowledge that the title was involved in litigation, if such litigation was terminated in insured's favor previous to loss (*Sprigg v. American Cent. Ins. Co.*, 101 Ky. 185, 40 S. W. 575). But in Iowa a policy containing a condition making it void in case an action affecting the title is begun is terminated by the commencement of a suit to foreclose a mechanic's lien, even though the insured is in no way responsible for the litigation (*Smith v. St. Paul Fire & Marine Ins. Co.*, 106 Iowa, 225, 76 N. W. 676).

Where a policy provides that if any proceedings are had, commenced, or taken for the sale of the property without the consent of the company, the policy shall from thenceforth be void, the failure of the insured to notify the insurer of adverse proceedings against him will not alone operate to defeat the policy until after the lapse of a reasonable time for that purpose (*Michigan State Ins. Co. v. Lewis*, 30 Mich. 41). In such a case it is for the jury to say what would be a reasonable time within which notice should be given.

16. SUBSEQUENT INCUMBRANCE OF PROPERTY INSURED AS GROUND OF FORFEITURE.

- (a) Nature and validity of condition.
- (b) Construction of condition in general.
- (c) Same—Voluntary or involuntary incumbrances.
- (d) What constitutes an incumbrance.
- (e) Same—Judgments.
- (f) Notice of and consent to incumbrances.
- (g) What constitutes a breach of condition.
- (h) Same—Invalid and inoperative incumbrances.
- (i) Same—Renewal of mortgage or lien.
- (j) Effect of breach of condition.
- (k) Same—As dependent on increase of risk.

(a) Nature and validity of condition.

Though a statement in *præsent*i as to incumbrances on the property will not be construed as a continuing warranty under which subsequent incumbrances will vitiate the insurance (*Howard Fire Ins. Co. v. Bruner*, 23 Pa. 50), if the statement made a part of the policy can fairly be construed as referring to the future it will be regarded as an express promissory warranty. Thus, where the application made a part of the policy declared that the policy should be void if insured should suffer a judgment which would be a lien on the premises, the stipulation was regarded as an express promissory warranty (*Egan v. Mutual Ins. Co.*, 5 Denio [N. Y.] 326). The same distinction is made where the stipulation is in the form of a condition in the policy. Thus, a provision that the policy shall be void if the property insured is not free from all liens was regarded as referring only to liens existing at the time the policy was issued (*Gould v. Dwelling House Ins. Co.*, 134 Pa. 570, 19 Atl. 793, 19 Am. St. Rep. 717).

Where the condition declares that the policy shall be void if the property "be incumbered, * * * and such fact be not stated in this policy or the assured's application for insurance," it refers only to incumbrances existing when the policy was issued, and cannot be regarded as a continuing warranty against future incumbrances (*Collins v. Merchants' & Bankers' Mut. Ins. Co.*, 95 Iowa, 540, 64 N. W. 602, 58 Am. St. Rep. 438). The latter portion of the condition is evidently the determining factor in the construction, as in other cases it has been held that a condition that the policy shall be void

if there be any incumbrance on the property, or if foreclosure proceedings be commenced, refers only to the future.

Orient Ins. Co. v. Burrus, 23 Ky. Law Rep. 656, 63 S. W. 453; *Omaha Fire Ins. Co. v. Thompson*, 50 Neb. 580, 70 N. W. 80.

Such conditions may, therefore, be construed as express promissory warranties that no incumbrance shall be placed on the property "without the consent" of the insurer.

Bowlus v. Phenix Ins. Co., 133 Ind. 106, 32 N. E. 319, 20 L. R. A. 400; *Ramer v. Insurance Co.*, 70 Mo. App. 47; *McNierney v. Agricultural Ins. Co.*, 48 Hun (N. Y.) 239.

In a general sense the stipulation as to subsequent incumbrances may there be regarded as a continuing or promissory warranty or as a condition subsequent (*Mistilski v. German Ins. Co.*, 64 Minn. 366, 67 N. W. 80). It is a part of the policy, though not necessarily on the face thereof. Thus, a stipulation that the loss shall be paid "in conformity to the conditions annexed to this policy" is a sufficient reference to conditions printed on the back of the policy to make a condition against incumbrances binding on the insured (*Kensington Nat. Bank v. Yerkes*, 86 Pa. 227).

The burden is on the insurer to show that the policy contains a condition against incumbrances (*Mistilski v. German Ins. Co.*, 64 Minn. 366, 67 N. W. 80).

So, if the policy declares that the by-laws of the company are a part of the contract, a by-law forbidding subsequent incumbrances is a part of the policy binding on the insured (*Edes v. Hamilton Mut. Ins. Co.*, 3 Allen [Mass.] 362). And generally it may be said that the condition is binding on the insured, irrespective of whether he knew of the condition.

Ramer v. Insurance Co., 70 Mo. App. 47; *Fuller v. Madison Mut. Ins. Co.*, 86 Wis. 599; *Brown v. Westchester Fire Ins. Co.*, 9 Kan. App. 526, 58 Pac. 276.

The condition is not objectionable on grounds of either public policy or good morals (*Nassauer v. Susquehanna Mut. Fire Ins. Co.*, 109 Pa. 507), but is a perfectly reasonable provision, and its validity is beyond question.

The validity of the condition has been asserted in *Dover Glass-Works Co. v. American Fire Ins. Co.*, 1 Marv. (Del.) 32, 29 Atl. 1039, 65 Am. St. Rep. 264; *Milwaukee Mechanics' Ins. Co. v. Niewedde*, 12 Ind. App. 145, 39 N. E. 757; *Taylor v. Anchor Mut. Fire Ins.*

Co., 116 Iowa, 625, 88 N. W. 807, 57 L. R. A. 323, 96 Am. St. Rep. 261; *Plath v. Minnesota Farmers' Mut. Fire Ins. Ass'n*, 23 Minn. 479, 23 Am. Rep. 697; *Sulphur Mines Co. v. Phoenix Ins. Co.*, 28 S. E. 856, 94 Va. 355; *Fuller v. Madison Mut. Ins. Co.*, 36 Wis. 599.

(b) Construction of condition in general.

The condition, though it takes the form of a provision that the policy shall be void "if the title of the property is transferred, incumbered, or changed" (*Ellis v. State Ins. Co.*, 61 Iowa, 577, 16 N. W. 744), does not refer merely to changes in title, but to any incumbrance on the property. Under general rules of construction the condition will be strictly construed as to the property affected thereby. Thus, where a policy covers several kinds of property, a condition against incumbrance on one kind only will not be extended so as to affect the insurance if another kind is incumbered (*Wright v. Fire Ins. Ass'n of London*, 12 Mont. 474, 31 Pac. 87, 19 L. R. A. 211). So, a provision in a policy that it should be void "if the subject of insurance be personal property, and be or become incumbered by a chattel mortgage," is limited strictly to incumbrances on personal property, and cannot be extended to incumbrances on real estate (*Jacoby v. West Chester Fire Ins. Co.*, 11 York Leg. Rec. [Pa.] 153). And where the policy covers engines, machinery, etc., it must appear that these articles retain their character as personal property and have not become fixtures, in order to render operative a clause relating to incumbrance by chattel mortgage (*Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 24 S. E. 393, 53 Am. St. Rep. 846). Moreover, an incumbrance on property not covered by the policy is not within the condition, though the property is commingled with property that is covered. Thus, a safe purchased after the policy is issued is not included in a policy on "saloon fixtures," so that a mortgage on the safe will fall within the condition (*Moriarty v. United States Fire Ins. Co.*, 19 Tex. Civ. App. 669, 49 S. W. 132). And if mortgaged property is subsequently placed in the building containing the property insured, whether the condition will become operative depends on whether any claim for loss is made as to such mortgaged property (*Schumitsch v. American Ins. Co.*, 48 Wis. 26, 3 N. W. 595). But parol testimony is not admissible to show that property not described in the policy was intended to be covered so as to predicate a breach of the condition against incumbrance (*Bromberg v. Minnesota Fire Ass'n*, 45 Minn. 318, 47 N. W. 975).

The condition refers, too, only to property on hand at the time of loss, and if, under the terms of a policy on personalty, certain of the property may be sold without forfeiting the insurance, the incumbrance of such property does not fall within the condition (*Dwelling House Ins. Co. v. Butterly*, 33 Ill. App. 626, affirmed in 133 Ill. 534, 24 N. E. 873). So, under an open policy on products while contained in a factory and in process of manufacture, an incumbrance by chattel mortgage of a part of the products of manufacture simply withdraws such portion from the operation of the policy (*Coleman v. Phoenix Ins. Co.*, 3 App. Div. 65, 38 N. Y. Supp. 986). But if a policy on a stock of merchandise is forfeited by the placing of a chattel mortgage on the stock, it cannot be revived as to additions to the stock placed in the store after the stock was incumbered (*Gray v. Guardian Assur. Co.*, 82 Hun, 380, 31 N. Y. Supp. 237).

It has been held in some cases that, where the condition is that the policy shall be void if "the property" is incumbered, the words "the property" must be regarded as referring to the whole property insured, and the condition is not operative when only a part of the property is mortgaged.

Phoenix Ins. Co. v. Lorenz (Ind. App.) 29 N. E. 604; *Born v. Home Ins. Co.*, 110 Iowa, 379, 81 N. W. 676, 80 Am. St. Rep. 300; *North British & Mercantile Ins. Co. v. Freeman* (Tex. Civ. App.) 83 S. W. 1091.

This phase of the question will be considered when the effect of a breach as to part of the property insured is discussed in its relation to the nature of the policy as an entire or a separable contract.¹

(c) Same—Voluntary or involuntary incumbrances.

An important phase of the question is whether the condition against subsequent incumbrances refers only to incumbrances voluntarily placed on the property by the insured, or whether it also includes incumbrances falling on the property against his will or by operation of law. The general rule is that, under the condition that the policy shall be void if the property shall hereafter be or become incumbered, the incumbrance must be by the voluntary act of the insured, and not created by operation of law.

Small v. Westchester Fire Ins. Co. (C. C.) 51 Fed. 789; *Phoenix Ins. Co. v. Pickel*, 119 Ind. 155, 21 N. E. 546, 12 Am. St. Rep. 393; *Phoenix Ins. Co. v. Smith*, 9 Kan. App. 823, 61 Pac. 501; *Baley v.*

¹ See post, p. 1894.

Homestead Fire Ins. Co., 80 N. Y. 21, 36 Am. Rep. 570; Green v. Homestead Fire Ins. Co., 82 N. Y. 517; Dover Glass Works v. American Fire Ins. Co., 1 Marv. (Del.) 32, 29 Atl. 1039, 65 Am. St. Rep. 264; Gerling v. Agricultural Ins. Co., 39 W. Va. 689, 20 S. E. 691.

The rule was also applied where the condition was that the policy should be void "on the creation of any lien" on the property (Steen v. Niagara Fire Ins. Co., 61 How. Prac. [N. Y.] 144), and where the condition was if any incumbrance "be placed" on the property (Lodge v. Capital Ins. Co., 91 Iowa, 103, 58 N. W. 1089); both phrases being construed as implying a voluntary act on the part of the insured. On the other hand, where the condition is that the policy shall be void if any incumbrance "fall" on the property, an incumbrance by operation of law is within the condition (Brown v. Commonwealth Mut. Ins. Co., 41 Pa. 187).

On the principles just stated, it has been held that the clause against incumbrances does not refer to judgments in invitum. Dover Glass Works v. American Fire Ins. Co., 1 Marv. (Del.) 32, 29 Atl. 1039, 65 Am. St. Rep. 264; Lodge v. Capital Ins. Co., 91 Iowa, 103, 58 N. W. 1089; Phenix Ins. Co. v. Smith, 9 Kan. App. 828, 61 Pac. 501; Baley v. Homestead Fire Ins. Co., 80 N. Y. 21, 36 Am. Rep. 570; Gerling v. Agricultural Ins. Co., 39 W. Va. 689, 20 S. E. 691; Steen v. Niagara Fire Ins. Co., 61 How. Prac. (N. Y.) 144.

But under the same principle judgments by confession come within the condition. Hill v. Pennsylvania Mut. Fire Ins. Co., 2 Luz. Leg. Reg. (Pa.) 465; Kensington Natl. Bank v. Yerkes, 86 Pa. 227; Seybert v. Pennsylvania Mut. Fire Ins. Co., 103 Pa. 282; Hench v. Agricultural Ins. Co., 122 Pa. 123, 15 Atl. 671, 9 Am. St. Rep. 74; Pennsylvania Mut. Fire Ins. Co. v. Schmidt, 119 Pa. 449, 13 Atl. 817.

(d) What constitutes an incumbrance.

Ordinary mortgages on real estate or chattel mortgages on personalty are, of course, incumbrances within the meaning of the condition. But in some cases, as a step preliminary to the determination of the validity of the policy, it has been necessary to decide whether the property has been incumbered—whether the instrument or transaction alleged to amount to an "incumbrance" is in fact within the meaning of that word as used in the policy. It is not always necessary that the instrument should be a mortgage in form. Thus, an instrument in the form of a conveyance of chattels in trust with power of sale, to secure an indebtedness recited therein, is within a condition relating to incumbrance by chattel

mortgage (*Hunt v. Springfield Fire & Marine Ins. Co.*, 20 App. D. C. 48). An executory contract for the sale of land, by the terms of which the title is not to pass unless vendee pays the deferred payment, is not a mortgage or incumbrance (*Home Ins. Co. v. Bethel*, 42 Ill. App. 475). But an instrument whereby a vendee of land agrees to deliver to his vendor one-half of the net proceeds of the land annually, during his life, and which provides that in case of performance of the contract "this mortgage should be null and void," and that, upon failure to perform, "this mortgage may be foreclosed," is an incumbrance, within the meaning of the condition, though the vendee has always performed his contract (*Continental Ins. Co. v. Vanlue*, 126 Ind. 410, 26 N. E. 119, 10 L. R. A. 843).

A vendee in a land contract had his interest insured in a fire policy. Thereafter the fee was conveyed by the vendor, and a new contract made between the vendee and the new owner of the fee, which called for the payment of the unpaid purchase money, back taxes, and unpaid interest; and subsequently, by agreement between the vendee, the new owner of the fee, and a third party, the second contract was surrendered, and a new contract of sale made, whereby the land was to be conveyed to the third party; the court finding that this was done to secure a debt owing from the first vendee to the third party. It was held that the transactions amounted to an incumbrance of the first vendee's interest, rendering the policy void, under its provisions forbidding an incumbrance. (*Hogue v. Farmers' Mut. Fire Ins. Co.*, 116 Wis. 658, 93 N. W. 849.)

Rent accrued under a lease is not an incumbrance, according to *Read v. State Ins. Co.*, 103 Iowa, 307, 72 N. W. 665, 64 Am. St. Rep. 180; but it was held in *Peet v. Dakota Fire & Marine Ins. Co.*, 7 S. D. 410, 64 N. W. 206, that an agreement permitting distraint and sale for unpaid rent constitutes an incumbrance, though no rent is due.

Unpaid taxes do not constitute an incumbrance within the condition.

Phenix Ins. Co. v. Pickel, 119 Ind. 155, 21 N. E. 546, 12 Am. St. Rep. 393; *Read v. State Ins. Co.*, 103 Iowa, 307, 72 N. W. 665, 64 Am. St. Rep. 180; *Dover Glass Works v. American Fire Ins. Co.*, 1 Marv. (Del.) 32, 29 Atl. 1089, 65 Am. St. Rep. 264.

The decision in the Delaware case is based on the principle heretofore discussed—that the tax lien is an involuntary lien.

A mechanic's lien is an incumbrance within the condition, according to *Smith v. St. Paul Fire & Marine Ins. Co.*, 106 Iowa, 225, 76

N. W. 676; and in the same case it was said that if it appeared that insured purchased material for the insured building from the persons claiming the lien introduced in evidence, and the lien described the same land as that on which the insured building is located, these facts were sufficient to show that the lien was claimed on the insured building. But it was said in *Omaha Fire Ins. Co. v. Thompson*, 50 Neb. 580, 70 N. W. 30, that the filing of a claim for a mechanic's lien is not sufficient to constitute an incumbrance. "The claim of lien alone is not evidence of existence of the lien, even as between the parties thereto. The statement does not establish a lien, but the claimant must, in addition thereto, prove the performance of labor or the furnishing of material for the erection, reparation, or removal of a house or other building, and other facts necessary to constitute a lien." It was, however, held in *Green v. Homestead Fire Ins. Co.*, 82 N. Y. 517, that, even if a mechanic's lien could be regarded as an incumbrance otherwise within the condition, it must be considered as an involuntary incumbrance, and therefore ineffective to forfeit the policy.

When the policy is on the interest of a mortgagor, a sale under execution of the mortgagor's right of redemption is an incumbrance within the condition (*Campbell v. Hamilton Mut. Ins. Co.*, 51 Me. 69).

(c) Same—Judgments.

In Pennsylvania it is the settled rule that a judgment is an incumbrance within the meaning of the condition.

Brown v. Commonwealth Mut. Ins. Co., 41 Pa. 187; *Kensington Nat. Bank v. Yerkes*, 86 Pa. 227.

The judgment is an incumbrance, though no execution could have been taken out on it.

Seybert's Adm'rs v. Pennsylvania Mut. Fire Ins. Co., 108 Pa. 282;
Hill v. Pennsylvania Mut. Fire Ins. Co., 2 Luz. Leg. Reg. (Pa.) 465.

Nor does it affect this result that the judgment was entered in violation of an agreement not to enter it.

Hench v. Agricultural Ins. Co., 122 Pa. 128, 15 Atl. 671, 9 Am. St. Rep. 74; *Pennsylvania Mut. Fire Ins. Co. v. Schmidt*, 119 Pa. 449, 18 Atl. 317.

In nearly all of these cases the judgment was by confession, and therefore strictly within the principle as to voluntary incumbrances.

It has, however, been held in many cases that a judgment in invitum is not within the condition, as the condition relates only to voluntary incumbrances.

Reference may be made to *Dover Glass Works v. American Fire Ins. Co.*, 1 Marv. (Del.) 82, 29 Atl. 1039, 65 Am. St. Rep. 264; *Phenix Ins. Co. v. Pickel*, 119 Ind. 155, 21 N. E. 546, 12 Am. St. Rep. 393; *Lodge v. Capital Ins. Co.*, 91 Iowa, 103, 58 N. W. 1089; *Phenix Ins. Co. v. Smith*, 9 Kan. App. 828, 61 Pac. 501; *Baley v. Homestead Fire Ins. Co.*, 80 N. Y. 21, 36 Am. Rep. 570; *Steen v. Niagara Fire Ins. Co.*, 61 How. Prac. (N. Y.) 144; *People's Mut. Fire Ins. Co. v. Bowersox*, 5 Ohio Cir. Ct. R. 444, 3 O. C. D. 218; *Gerling v. Agricultural Ins. Co.*, 39 W. Va. 689, 20 S. E. 691.

In *Chamberlain v. Insurance Company of North America*, 51 Hun, 636, 3 N. Y. Supp. 701, it was said that a judgment is not an incumbrance within the condition, as it is merely a general lien.

The introduction of an abstract of judgment against the insured is not sufficient proof of a judgment lien on insured property, which will forfeit the insurance (*North British & Mercantile Ins. Co. v. Gunter*, 12 Tex. Civ. App. 598, 35 S. W. 715).

(2) Notice of and consent to incumbrances.

Notice of subsequent incumbrances is not necessary in the absence of a provision to that effect (*Howard Fire Ins. Co. v. Bruner*, 23 Pa. 50); and, even under a provision for notice, forfeiture for failure to give notice cannot be declared in the absence of a clause to that effect (*Tiefenthal v. Citizens' Mut. Fire Ins. Co.*, 53 Mich. 306, 19 N. W. 9). In its present form, however, the condition declaring that the policy shall be void if the property becomes incumbered generally contains the proviso that such shall be the effect if notice of the incumbrance is not given to the insurer, and consent thereto obtained or indorsed on the policy. Under this clause the notice must be given in reasonable time, and, where the incumbrance was placed on the property 25 days before the loss, a notice given 25 days after the loss was not given within a reasonable time (*McGowan v. People's Mut. Fire Ins. Co.*, 54 Vt. 211, 41 Am. Rep. 843). Where the by-laws and policy of a mutual company required, in case of the mortgage of the property insured, written notice thereof to be given to the secretary, service of such notice by mail was sufficient to raise a presumption that it was received by the secretary, which might be rebutted, however, by proof to the contrary; it being the obligation of the insured to give the notice, and if other mode than personal service was resorted to it was at his own risk (*Plath v. Minnesota Farmers' Mut. Fire Ins. Ass'n*, 23

Minn. 479, 23 Am. Rep. 697). The constructive notice to all persons, afforded by the record of a mortgage, is not sufficient notice to an insurer (*Wicke v. Iowa State Ins. Co.*, 90 Iowa, 4, 57 N. W. 632).

Of course, where involuntary incumbrances are not regarded as within the condition, notice of such incumbrances is not necessary (*Phenix Ins. Co. of Brooklyn, N. Y., v. Smith*, 9 Kan. App. 828, 61 Pac. 501); but, even where judgments are regarded as incumbrances within the condition, notice thereof is all that is necessary, as to require consent to an incumbrance in invitum would be absurd (*Brown v. Commonwealth Mut. Ins. Co.*, 41 Pa. 187).

If indorsement of consent is required, parol consent is not sufficient (*McNierney v. Agricultural Ins. Co.*, 48 Hun [N. Y.] 239). An indorsement that the loss, if any, shall be payable to the mortgagee, is not sufficient as an indorsement of consent to a subsequent mortgage (*Atlas Reduction Co. v. New Zealand Ins. Co.* [C. C.] 121 Fed. 929). Where notice of an intended mortgage is given, and consent thereto obtained, the terms of the notice and consent must be strictly complied with (*Sentell v. Oswego County Farmers' Ins. Co.*, 16 Hun [N. Y.] 516).

A plea in bar that an incumbrance had been executed on the premises insured, against the provisions of the policy, should aver that the company did not assent and agree to such incumbrance, it being permissible with their consent (*Peoria Marine & Fire Ins. Co. v. Lewis*, 18 Ill. 553).

(g) What constitutes a breach of condition.

As a general rule, the giving of a mortgage on the property insured subsequent to the issuing of the policy is a breach of the condition. If the condition requires notice of and consent to such subsequent incumbrance, a failure to give notice (*Insurance Co. of North America v. Wicker*, 93 Tex. 390, 55 S. W. 740), or to give it within reasonable time (*McGowan v. People's Mut. Fire Ins. Co.*, 54 Vt. 211, 41 Am. Rep. 843), or a failure to comply with the terms of the notice and consent when given (*Sentell v. Oswego County Farmers' Ins. Co.*, 16 Hun [N. Y.] 516), is a breach of the condition. As the condition refers to the future, an incumbrance given before the policy issued is not a breach (*Omaha Fire Ins. Co. v. Thompson*, 50 Neb. 580, 70 N. W. 30); and for the same reason forfeiture of a renewal under the condition cannot be predicated on a mortgage existing at the time of the renewal (*Lebanon Mut. Ins. Co. v. Leathers* [Pa.] 8 Atl. 424). Where the company had notice of a

mortgage on the land on which the insured property was situated, the accumulation of interest on the mortgage is not a breach of the condition (*Fitzgibbons v. Merchants' & Bankers' Mut. Fire Ins. Co.* [Iowa] 101 N. W. 454).

The condition is not broken by an incumbrance given by a person other than the insured, and not covering his interest (*Weiss v. American Fire Ins. Co.*, 148 Pa. 349, 23 Atl. 991). But if the sole devisee of property, who is also executor of the will, procures insurance on the property running to himself, an indorsement on the policy that the property is held by the devisee "as executor of the will" does not make the insurance any less on his interest as devisee, so as to evade the effect of a mortgage subsequently given by him in his individual capacity (*Kiernan v. Agricultural Ins. Co.*, 72 Hun, 517, 25 N. Y. Supp. 438).

If the policy runs to joint owners, a mortgage by one of them on his interest is a breach (*Denver Tp. Mut. Fire Ins. Co. v. Resor*, 95 Ill. App. 197); and this rule applies where the policy runs to a partnership, and the incumbrance is a mortgage on the one-third interest of one of the partners or a judgment which is a lien on such interest (*Hicks v. Farmers' Ins. Co.*, 71 Iowa, 119, 32 N. W. 201, 60 Am. Rep. 781). But if the mortgage or other transaction constituting the incumbrance is between the partners only, it is not in Georgia a breach of the condition.

Georgia Home Ins. Co. v. Hall, 94 Ga. 630, 21 S. E. 828; *Alston v. Phenix Ins. Co.*, 27 S. E. 981, 100 Ga. 237.

The theory of these cases, as shown in the *Alston Case*, is that there is in such a transaction no diminution of interest which will increase the risk.

It is, of course, elementary that the property covered by the incumbrance must be that covered by the policy in order that there should be a breach of the condition. Thus, though the policy refers to the building insured as located on a farm of a certain number of acres, if the house is on a definite tract the giving of a mortgage on the other tract or portion of the farm will not constitute a breach.

Phenix Ins. Co. v. Hart, 149 Ill. 513, 36 N. E. 990, affirming 39 Ill. App. 517; *Eddy v. Hawkeye Ins. Co.*, 70 Iowa, 472, 30 N. W. 808, 59 Am. Rep. 444.

Whether the mortgage covers the property insured is a question for the jury (*Wright v. Susquehanna Mut. Fire Ins. Co.*, 110 Pa. 29, 20 Atl. 716).

A mortgage executed by husband and wife of land owned by the husband, on which there was a creamery building owned by the wife, to a mortgagee who is without notice that the building was not appurtenant to the land, is an incumbrance on the building, so as to be a breach of the condition (*Mallory v. Farmers' Ins. Co.*, 65 Iowa, 450, 21 N. W. 772).

(h) Same—Invalid and inoperative incumbrances.

To effect a breach of the condition the mortgage must be both valid and operative as an incumbrance. So there can be no breach by a mortgage to a fictitious person, never delivered and not securing any indebtedness. (*Fitchner v. Fidelity Mut. Fire Ass'n [Iowa]* 68 N. W. 710; *Id.*, 103 Iowa, 276, 72 N. W. 530.) Nor is there a breach if the mortgage was without consideration, as where the note it purported to secure was never delivered to the mortgagee (*Insurance Co. of North America v. Wicker*, 55 S. W. 740, 93 Tex. 390, affirming [*Tex. Civ. App.*] 54 S. W. 300). It has, however, been held in South Carolina (*Secrest v. Hartford Fire Ins. Co.*, 68 S. C. 378, 47 S. E. 680) that a condition that a policy on goods shall be void if the subject of insurance be or becomes incumbered by a chattel mortgage is violated where the insured executes a chattel mortgage on the goods, though it is afterwards set aside as a fraud upon the other creditors of insured under the assignment statute.

A mortgage defective in execution, as where a mortgage on the homestead is not executed by the wife, is not a breach (*Watertown Fire Ins. Co. v. Grover & Baker Sewing Mach. Co.*, 41 Mich. 131, 1 N. W. 961, 32 Am. Rep. 146). But where a mortgage is perfect on its face, and bears no evidence that the wife is to join therein, parol evidence that it was to become operative only on the release of the wife's dower is inadmissible (*East Texas Fire Ins. Co. v. Clarke*, 1 Tex. Civ. App. 238, 21 S. W. 277).

In *Olmstead v. Iowa Mut. Ins. Co.*, 24 Iowa, 503, it was held by the lower court that the fact of the mortgage being unstamped, though without intent to evade the revenue laws, rendered it so far inoperative that it did not defeat the policy. The supreme court based its decision on the ground of nondelivery.

A mortgage never delivered is inoperative, and consequently is not a breach of the condition.

Olmstead v. Iowa Mut. Ins. Co., 24 Iowa, 503; *Neale v. Woodcock*, 44 N. Y. Supp. 768, 15 App. Div. 618.

In *Hanscom v. Home Ins. Co.*, 90 Me. 333, 38 Atl. 324, the mortgage, though executed on the day of and before the fire, was not authenticated or delivered, nor was the money received thereon, until the day after the fire. It was therefore held that there was no effective incumbrance which could be regarded as a breach of the condition until after the rights of the parties had been fixed by the fire.

The delivery in escrow of a mortgage on insured property is not a breach of a condition in the policy against incumbrances where the event in which the mortgage was to become operative never happened (*Adler v. Germania Fire Ins. Co.*, 15 Misc. Rep. 471, 37 N. Y. Supp. 207). Where it was contended that the mortgage was delivered in escrow to become operative only on release of the wife's dower, this was held to be a question for the jury (*East Texas Fire Ins. Co. v. Clarke*, 79 Tex. 23, 15 S. W. 166, 11 L. R. A. 293). On a second appeal it was said that as the mortgage was perfect on its face, and bore no evidence that it was necessary for the wife to join therein, the fact that it was delivered to the mortgagee, accepted by him, and recorded was fatal to the contention that it was delivered as an escrow, only to become operative on the release of the wife's dower (*East Texas Fire Ins. Co. v. Clarke*, 1 Tex. Civ. App. 238, 21 S. W. 277).

The provision against incumbrances is not violated by the giving of a mortgage that is to become effective only on the performance of a condition by the mortgagee and such condition is never complied with (*Weigen v. Council Bluffs Ins. Co.*, 104 Iowa, 410, 73 N. W. 862). A somewhat similar principle was asserted in *German Ins. Co. v. Gibe*, 59 Ill. App. 614.

Where it was contended that there had been a breach of the condition against incumbrances, the mortgagee testified that he took the mortgage until he should be notified that a judgment in his favor against insured had been entered. Insured testified that she executed the mortgage for a few days, until the judgment could be rendered. The mortgage was filed, and the note was not returned, though in fact the judgment was entered prior to the execution of the mortgage. The court held that the mortgage must be regarded as effective at the time of execution, subject to be defeated on the happening of a condition subsequent, and not that the mortgage was intended to be ineffective if the judgment was entered. (*Thorne v. Aetna Ins. Co. of Hartford*, 102 Wis. 593, 73 N. W. 920.)

As a corollary to the general rule that an incumbrance, to constitute a breach of the condition, must be effective, is the further

principle that if the property insured is exempt as a homestead the entry of a judgment against the insured will not violate the condition.

This rule was asserted in *Eddy v. Hawkeye Ins. Co.*, 70 Iowa, 472, 30 N. W. 808, 59 Am. Rep. 444; *Smith v. Continental Ins. Co.*, 79 N. W. 126, 108 Iowa, 382; *Martin v. Fidelity Ins. Co.*, 119 Iowa, 570, 93 N. W. 562.

But in Indiana, where the right to exemption applies only to judgments in actions on contracts express or implied, an insured, claiming that the property insured is exempt from liability under the judgment, must show that the judgment arose in such an action (*Franklin Ins. Co. v. Feist*, 31 Ind. App. 390, 68 N. E. 188).

(1) Same—Renewal of mortgage or lien.

The condition against incumbrances is not broken by a mere change in the form of an existing incumbrance.

Greenlee v. North British & Mercantile Ins. Co., 102 Iowa, 427, 71 N. W. 534, 63 Am. St. Rep. 455; *Farmers' & Merchants' Ins. Co. v. Newman*, 58 Neb. 504, 78 N. W. 933.

Nor is it violated by the renewal of an incumbrance of which the insurer had notice.

Bowlus v. Phenix Ins. Co., 133 Ind. 106, 32 N. E. 319, 20 L. R. A. 400; *Kansas Farmers' Fire Ins. Co. v. Saindon*, 52 Kan. 486, 85 Pac. 15, 89 Am. St. Rep. 356; *Brown v. Westchester Fire Ins. Co.*, 9 Kan. App. 526, 58 Pac. 276; *Georgia Home Ins. Co. v. Stein*, 72 Miss. 943, 18 South. 414; *Koshland v. Home Mut. Ins. Co.*, 31 Or. 321, 49 Pac. 864; *Id.*, 50 Pac. 567; *Koshland v. Fire Ass'n*, 31 Or. 362, 49 Pac. 865; *Kister v. Lebanon Mut. Ins. Co.*, 128 Pa. 553, 18 Atl. 447, 15 Am. St. Rep. 696, 5 L. R. A. 646.

As shown by the discussion of this question in the *Koshland* and the *Kister* Cases, the theory of these decisions is that where the policy is issued with knowledge of an existing incumbrance the subsequent renewal thereof, given for the purpose of discharging the old incumbrance, does not increase the risk, because it practically remains the same. This question is, however, dependent on whether by the change or renewal the amount of indebtedness is increased or decreased in proportion to the security. If there is an increase the renewal is a violation of the condition, but if there is a decrease there is no breach.

Russell v. Cedar Rapids Ins. Co., 71 Iowa, 69, 32 N. W. 95; *Russell v. Cedar Rapids Ins. Co.*, 78 Iowa, 216, 42 N. W. 654, 4 L. R. A.

538; *Weiss v. American Fire Ins. Co. of Philadelphia*, 148 Pa. 849, 23 Atl. 991.

In *Johansen v. Home Fire Ins. Co.*, 54 Neb. 548, 74 N. W. 866, the land on which the insured building stood was mortgaged for \$2,500. Another tract belonging to the insured was incumbered to the amount of \$1,300. Five hundred dollars of these debts was a common charge on both tracts. After the policy was written the insured took up all the mortgages, and executed in their stead a mortgage on both tracts to secure \$3,500, being the old debts with accrued interest. It was held that the incumbrance on the insured property had been substantially changed and increased in amount, and the court could not speculate on the relative values of the two tracts or the probable manner of enforcement of the mortgages to ascertain if the risk had been increased.

It is incumbent on the insured to show that the subsequent mortgage was not the creation of a new debt or an increase of the original debt (*Kansas Farmers' Fire Ins. Co. v. Saindon*, 53 Kan. 623, 36 Pac. 983). The addition of accrued interest will not render the renewal mortgage a breach of the condition.

Kansas Farmers' Fire Ins. Co. v. Saindon, 52 Kan. 486, 35 Pac. 15, 39 Am. St. Rep. 356; *Brown v. Westchester Fire Ins. Co.*, 9 Kan. App. 526, 58 Pac. 276.

The increase must be actual, and it is not sufficient that by a mistake in computation it is made to appear that the amount of the debt is increased, if in fact and in law there is no increase (*Bowlus v. Phenix Ins. Co.*, 133 Ind. 106, 32 N. E. 319, 20 L. R. A. 400).

In accordance with the principles just discussed it has been held that the giving of a second mortgage as additional security for the amount found to be due under a first mortgage is not a breach of the condition (*Mowry v. Agricultural Ins. Co.*, 64 Hun, 137, 18 N. Y. Supp. 834, affirmed without opinion 138 N. Y. 642, 34 N. E. 512). So, too, where the original mortgage was payable in installments, a subsequent reloan to the mortgagor of an installment after payment by him, and the taking of a mortgage therefor, do not increase the incumbrance, so as to constitute a breach of a condition against further incumbrances (*Georgia Home Ins. Co. v. Stein*, 72 Miss. 943, 18 South. 414). And if the amount is not increased it does not affect the result that the new mortgage is given to a different mortgagee (*Dougherty v. German-American Ins. Co.*, 67 Mo. App. 526).

In *Tarbell v. Vermont Mut. Fire Ins. Co.*, 63 Vt. 53, 22 Atl. 533, it appeared that T. paid part of the price of land purchased by L.,

and took an equitable mortgage thereon to secure himself. The property was insured in T.'s name, the policy being conditioned that notice of incumbrances should be given to the directors in writing, who thereupon might confirm or cancel the policy. Subsequently T.'s claim against L. was assumed by K., who took a deed from T. and gave back his notes and a mortgage. These notes were to be paid by L., and included some other indebtedness from him to T. Neither T. nor K. claimed any interest in the property except as mortgagees. L. remained in possession. It was held that the transaction created a new mortgage, which was a breach of the condition.

(4) Effect of breach of condition.

In the absence of a stipulation to that effect, the mere placing of a subsequent incumbrance on the insured property will not forfeit the policy.

Dutton v. New England Mut. Fire Ins. Co., 29 N. H. 153; Howard Ins. Co. v. Bruner, 23 Pa. 50.

Nor will failure to give notice of such incumbrance effect a forfeiture, in the absence of a stipulation (Tiefenthal v. Citizens' Mut. Fire Ins. Co., 53 Mich. 306, 19 N. W. 9).

It is obvious that where there is a specific condition in the policy against incumbrances a breach of the condition is ground of forfeiture, especially if the incumbrance is in existence at the time of loss. So where a statement as to incumbrances is regarded as an express promissory warranty, noncompliance therewith is a ground of forfeiture. (Egan v. Mutual Ins. Co., 5 Denio [N. Y.] 326.) A clause in the by-laws declaring that the policy shall be void if during its life there be any incumbrances so as to reduce the interest of assured to less than the amount of the insurance, without consent of the company, does not modify a provision in a policy thereafter issued declaring that it shall be void, unless consent in writing is indorsed thereon, if the interest of the assured should thereafter be incumbered (Houdeck v. Merchants' & Bankers' Ins. Co., 102 Iowa, 303, 71 N. W. 354). And where the incumbrance is a judgment entered on warrant of attorney it does not affect the result that the insured did not know it was entered.

Seybert's Adm'r v. Pennsylvania Mut. Fire Ins. Co., 103 Pa. 282; Pennsylvania Mut. Fire Ins. Co. v. Schmidt, 119 Pa. 449, 13 Atl. 817; Hench v. Agricultural Ins. Co., 122 Pa. 128, 15 Atl. 671, 9 Am. St. Rep. 74.

It has been held in Iowa (Supple v. Iowa State Ins. Co., 58 Iowa, 29, 11 N. W. 716) that the effect of creating a mortgage on the prop-

erty is to make the policy absolutely void without any affirmative action on the part of the company, though it is conceded that assent to the mortgage indorsed upon the policy would revive it. It has, however, been held in New York that the breach does not forfeit the policy ipso facto, but merely gives the insurer an option to declare a forfeiture (*Lobee v. Standard Live-Stock Ins. Co.*, 12 Misc. Rep. 499, 33 N. Y. Supp. 657).

The general rule that a breach of the condition against incumbrances is ground for forfeiture must be modified where the incumbrance is merely temporary, and is not in existence at the time of loss. It may be regarded as settled by the weight of authority that the effect of the incumbrance is merely to suspend the risk, and on the cancellation or discharge of the incumbrance the policy is revived.

This doctrine is supported by *Born v. Home Ins. Co.*, 110 Iowa, 379, 81 N. W. 676, 80 Am. St. Rep. 300; *McKibban v. Des Moines Ins. Co.*, 114 Iowa, 41, 86 N. W. 38; *State Ins. Co. v. Schreck*, 27 Neb. 527, 43 N. W. 340, 20 Am. St. Rep. 696, 6 L. R. A. 524; *Omaha Fire Ins. Co. v. Dierks*, 43 Neb. 473, 61 N. W. 740; *Johansen v. Home Fire Ins. Co.*, 54 Neb. 548, 74 N. W. 866; *Home Fire Ins. Co. v. Johansen*, 80 N. W. 1047, 59 Neb. 349; *Tompkins v. Hartford Fire Ins. Co.*, 49 N. Y. Supp. 184, 22 App. Div. 380.

There is, however, no presumption of payment or discharge (*Gould v. Holland Purchase Ins. Co.*, 16 Hun (N. Y.) 538). On the contrary, the presumption is that an incumbrance shown to have been placed on the property exists at the time of loss, and the burden is on the insured to show its cancellation or discharge (*Home Fire Ins. Co. v. Johansen*, 80 N. W. 1047, 59 Neb. 349).

The sufficiency of the evidence to show the discharge of the incumbrance is considered in *State Ins. Co. v. Schreck*, 27 Neb. 527, 43 N. W. 340, 20 Am. St. Rep. 696, 6 L. R. A. 524.

That the breach of the condition effects an absolute forfeiture so that cancellation or discharge of the incumbrance will not revive the policy, is the rule in Arkansas and Texas.

German-American Ins. Co. v. Humphrey, 62 Ark. 348, 35 S. W. 428, 54 Am. St. Rep. 297; *Insurance Co. of North America v. Wicker*, 88 Tex. 390, 55 S. W. 740, affirming judgment (Tex. Civ. App.) 54 S. W. 300.

To be available as a ground of forfeiture, the incumbrance proved must conform, as to the mortgagee, to the allegation (*German Ins. Co. v. Fairbank*, 32 Neb. 750, 49 N. W. 711, 29 Am. St. Rep. 459).

(k) Same—As dependent on increase of risk.

When the policy contains a condition referring specifically to subsequent incumbrances, and declaring the policy void if any such are placed on the property, the question of increase of risk is not a factor in determining the effect of a breach of the condition.

Milwaukee Mechanics' Ins. Co. v. Niewedde, 12 Ind. App. 145, 39 N. E. 757; *Ellis v. State Ins. Co.*, 61 Iowa, 577, 16 N. W. 744; *Lee v. Agricultural Ins. Co.*, 79 Iowa, 379, 44 N. W. 683; *Born v. Home Ins. Co.*, 110 Iowa, 379, 81 N. W. 676, 80 Am. St. Rep. 300.

The theory of the Iowa cases is that under such a condition the subsequent incumbrance will be regarded as an increase of risk as a matter of law. But if the policy contains such a condition, and the instrument or transaction alleged to constitute an incumbrance is not one in fact, as a judgment in invitum, the insurer cannot invoke the general condition against increase of risk in order to forfeit the policy. (*Lodge v. Capital Ins. Co.*, 91 Iowa, 103, 58 N. W. 1089.)

In the absence of a special stipulation as to subsequent incumbrances, it cannot be said that the placing of an incumbrance on the property is, as a matter of law, an increase of risk.

This is the rule laid down in *Howard Fire Ins. Co. v. Bruner*, 23 Pa. 50, and in Iowa in *Crittenden v. Springfield Fire & Marine Ins. Co.*, 85 Iowa, 652, 52 N. W. 548, 39 Am. St. Rep. 321, and *Collins v. Merchants' & Bankers' Mut. Ins. Co.*, 95 Iowa, 540, 64 N. W. 602, 58 Am. St. Rep. 438, in which the Lee and Ellis Cases were distinguished on the ground that they contained a special condition against future incumbrances.

The general rule that there is not a necessary increase of risk by subsequent incumbrances has been asserted in other cases.

Eddy v. Hawkeye Ins. Co., 70 Iowa, 472, 30 N. W. 808, 59 Am. Rep. 444; *Greenlee v. North British & Mercantile Ins. Co.*, 102 Iowa, 427, 71 N. W. 534, 63 Am. St. Rep. 455; *Tiefenthal v. Citizens' Mut. Fire Ins. Co.*, 53 Mich. 306, 19 N. W. 9.

The question is one for the jury. *Russell v. Cedar Rapids Ins. Co.*, 71 Iowa, 69, 32 N. W. 95; *Crittenden v. Springfield Fire & Marine Ins. Co.*, 85 Iowa, 652, 52 N. W. 548, 39 Am. St. Rep. 321; *Collins v. Merchants' & Bankers' Mut. Ins. Co.*, 95 Iowa, 540, 64 N. W. 602, 58 Am. St. Rep. 438.

The theory on which the placing of subsequent incumbrances on the property is regarded as an increase of risk is that the interest of the insured is thereby decreased, and the moral hazard is corre-

spondingly increased, in that the motives impelling the insured to use care and diligence in the preservation of the property are diminished.

Alston v. Phenix Ins. Co., 27 S. E. 981, 100 Ga. 287; *Ellis v. State Ins. Co.*, 61 Iowa, 577, 16 N. W. 744; *Weigen v. Council Bluffs Ins. Co.*, 104 Iowa, 410, 78 N. W. 862; *Home Fire Ins. Co. v. Bernstein*, 55 Neb. 260, 75 N. W. 839; *Nassaure v. Susquehanna Mut. Fire Ins. Co.*, 109 Pa. 507; *Stevens v. Queens Ins. Co.*, 81 Wis. 335, 51 N. W. 555, 29 Am. St. Rep. 905.

Consequently, in determining whether there has been an increase of risk, the incumbrance must be an actual, and not a merely nominal, incumbrance (*Weigen v. Council Bluffs Ins. Co.*, 104 Iowa, 410, 78 N. W. 862); and where there is a mere change in form there must be an increase in amount.

Russell v. Cedar Rapids Ins. Co., 71 Iowa, 69, 32 N. W. 95; *Russell v. Cedar Rapids Ins. Co.*, 78 Iowa, 216, 42 N. W. 654, 4 L. R. A. 538; *Johansen v. Home Fire Ins. Co.*, 54 Neb. 548, 74 N. W. 866; *Koshland v. Fire Ass'n*, 31 Or. 362, 49 Pac. 865; *Koshland v. Home Mut. Ins. Co. (Or.)* 50 Pac. 567; *Kister v. Lebanon Mut. Ins. Co.*, 128 Pa. 553, 18 Atl. 447, 15 Am. St. Rep. 696, 5 L. R. A. 646; *Gould v. Dwelling House Ins. Co.*, 134 Pa. 570, 19 Atl. 793, 19 Am. St. Rep. 717.

An Ohio statute declares that an insurance company shall have the building insured examined by its agent, and that in the absence of any change increasing the risk without the company's consent, and with intention of fraud on the part of the insured, the policy shall not be defeated.² In an early case (*Henderson v. Ohio Farmers' Ins. Co.*, 2 Ohio Dec. 189, 2 Ohio N. P. 17) it was held that under this statute increase of risk must be shown, and the principle was again asserted in *People's Mut. Fire Ins. Co. v. Bowersox*, 5 Ohio Cir. Ct. R. 444, 3 O. C. D. 218. The Supreme Court, however, has taken a different view of the statute, and has held (*Webster v. Dwelling House Ins. Co.*, 53 Ohio St. 558, 42 N. E. 546, 30 L. R. A. 719, 53 Am. St. Rep. 658) that the statute does not apply to a specific condition forbidding incumbrances. The theory of the court is that the examination required of the agent before taking a risk relates to the physical condition of the property, such as an inspection would disclose, and does not relate to the matter of incumbrances; and hence the change referred to in the statute relates to some physical change in the insured building, its use or its sur-

² Rev. St. § 3643.

roundings, which would, by reason of changed conditions, naturally increase the hazard incurred by the company, and does not relate to a change respecting incumbrances.

17. SPECIAL CIRCUMSTANCES AND CONDITIONS AFFECTING THE RISK.

- (a) In general.
- (b) Methods of heating building.
- (c) Same—Use of heat in manufacturing.
- (d) Method of lighting premises.
- (e) Use of steam engine on the premises.
- (f) Miscellaneous conditions or circumstances.
- (g) Insurance against accidental discharge of automatic sprinkler.
- (h) Agreements impairing insurer's right of subrogation.

(a) In general.

There are many circumstances or conditions connected with the property insured which, arising after the policy has taken effect, have been looked upon by the insurer as so altering the risk as to afford a ground for forfeiture. Some of these miscellaneous conditions are made the subject of special stipulations in the policy, but generally the contention is that a contingency arising is a breach of the condition declaring that the policy shall be void if the risk be increased by any means within the knowledge or control of the insured. The theory is that the insurer, in entering into the contract of insurance, can be presumed to insure only against risks arising from the usual and customary use of the particular property insured, and consequently the introduction of any element which materially increases the risk will forfeit the policy. (*Washington Mut. Ins. Co. v. Merchants' & Manufacturers' Mut. Ins. Co.*, 5 Ohio St. 450.) There must, however, be an actual increase of risk (*Schmidt v. Peoria Marine & Fire Ins. Co.*, 41 Ill. 295), and it must be permanent in its nature; that is, the change must be permanent and habitual.

Williams v. New England Mut. Fire Ins. Co., 31 Me. 219; *Au Sable Lumber Co. v. Detroit Manufacturers' Fire Ins. Co.*, 89 Mich. 407, 50 N. W. 870; *Leggett v. Aetna Ins. Co.*, 10 Rich. Law (S. C.) 202.

According to *Schmidt v. Peoria Marine & Fire Ins. Co.*, 41 Ill. 295, the policy is inoperative only while the increased risk exists, and on the termination of the increased risk the liability of the insurer again attaches.

The phrase "change increasing the risk within the knowledge and control of the insured" implies that the knowledge and control of the insured is an important factor.

Insurance Co. of North America v. McDowell, 50 Ill. 120, 99 Am. Dec. 497; *Aurora Fire Ins. Co. v. Eddy*, 55 Ill. 213. But it was held, in *Long v. Beeber*, 106 Pa. 466, 51 Am. Rep. 532, that the increase of risk would be within the condition, if caused by the act of a tenant.

The phrase does not refer to mere negligence of the insured.

Des Moines Ice Co. v. Niagara Fire Ins. Co., 99 Iowa, 193, 68 N. W. 600; *Mickey v. Burlington Ins. Co.*, 35 Iowa, 174, 14 Am. Rep. 494.

As the stipulation relating to increase of risk refers to the subsequent condition of the property, and not to conditions existing when the policy issued (*Straker v. Phenix Ins. Co.*, 101 Wis. 413, 77 N. W. 752), in order to determine whether the risk has been increased, reference must be had to the risk originally assumed, and the subsequent risk compared therewith (*Girard Fire & Marine Ins. Co. v. Stephenson*, 37 Pa. 293, 78 Am. Dec. 423). The question whether the risk has been increased is pre-eminently one for the jury.

Daniels v. Equitable Fire Ins. Co., 48 Conn. 105; *Orient Ins. Co. v. McKnight*, 197 Ill. 190, 64 N. E. 339, affirming 96 Ill. App. 525; *Schaeffer v. Farmers' Mut. Fire Ins. Co.*, 80 Md. 563, 31 Atl. 317, 45 Am. St. Rep. 361; *Girard Fire & Marine Ins. Co. v. Stephenson*, 37 Pa. 293, 78 Am. Dec. 423; *Farmers' Mutual Fire Ins. Co. v. Moyer*, 97 Pa. 441; *Long v. Beeber*, 106 Pa. 466, 51 Am. Rep. 532; *Pool v. Milwaukee Mechanics' Ins. Co.*, 91 Wis. 530, 65 N. W. 54, 51 Am. St. Rep. 919.

The condition usually provides for notice to the insurer of the increased risk. Verbal notice is sufficient under this clause (*Planters' Mut. Ins. Co. v. Rowland*, 66 Md. 236, 7 Atl. 257); but notice need not be given of increased risks already known to the insurer or its agent (*Mechanics' Ins. Co. v. Hodge*, 149 Ill. 298, 37 N. E. 51, affirming 46 Ill. App. 479).

(b) Methods of heating building.

When the statements as to the methods employed in heating the building are in the present tense, they cannot be regarded as continuing warranties.

Schmidt v. Peoria Marine & Fire Ins. Co., 41 Ill. 295; *Aurora Fire Ins. Co. v. Eddy*, 55 Ill. 213; *New York Belting & Packing Co. v. Washington Fire Ins. Co.*, 23 N. Y. Super. Ct. 428.

It was said, in *Alston v. Mechanics' Mutual Ins. Co.*, 4 Hill (N. Y.) 329, reversing 1 Hill, 510, that an oral statement by the insured that he would discontinue the use of a fireplace and use a stove cannot be regarded as a promissory representation, on which forfeiture could be predicated, if in fact he continued to use the fireplace.

If a statement that no stoves are used in the building can be construed as a warranty, it is at most a warranty that no stove is to be habitually kept and used in it (*Williams v. New England Mut. Fire Ins. Co.*, 31 Me. 219). Consequently the merely temporary use of a stove for some special purpose is not a breach of the warranty.

Aurora Fire Ins. Co. v. Eddy, 55 Ill. 213; *Williams v. New England Mut. Ins. Co.*, 31 Me. 219.

Where a policy contains a provision that it should be void if the risk is increased, and there is a clause in the policy to the effect that "the insured has permission to use naphtha in his business, but fire or lights are not permitted in the building, except a small stove in the office," the placing of an additional stove in a room in which naphtha was used forfeited the policy (*Daniels v. Equitable Fire Ins. Co.*, 48 Conn. 105).

In several interesting cases the issue has been raised whether the stove or other heating apparatus has been used as contemplated by the special condition referring to the use of stoves, or so as to forfeit the policy under the general condition against increase of risk. Such a question was raised in an early case (*Tillou v. Kingston Mut. Ins. Co.*, 7 Barb. [N. Y.] 570), where it was said that a mere statement that a furnace is designed "for burning hard coal," is not a covenant that it shall be used for nothing else. It may be used for other fuel, if the risk is not increased. Generally the question involved has been whether the stove was properly connected with the chimney, or whether the chimney was properly constructed. In *Loud v. Citizens' Mut. Ins. Co.*, 2 Gray (Mass.) 221, it was held, however, that a statement that the stove and funnel were well secured referred only to the season that stoves are generally in use, and there could be no forfeiture because they were not properly connected with the chimney at other seasons, though fire may have resulted therefrom, due to the acts of third persons. So, in *Mickey v. Burlington Ins. Co.*, 35 Iowa, 174, 14 Am. Rep. 494, where the pipe, which passed through the ceiling and into the chimney on the

second floor, was removed above the second floor, and a fire was afterwards built in the stove, it was held that the act of removing the pipe was not such a breach of condition respecting the keeping of the stove and pipes in proper condition as to defeat the policy.

A covenant that the insurer "will not be answerable for any loss arising from the use of fires in buildings unprovided with a good and substantial stove, or brick chimney," does not require that a stove in which fires are used should be built into and form part of a brick chimney (*Madsden v. Phoenix Fire Ins. Co.*, 1 S. O. 24).

Generally it may be said that a substantial compliance with the conditions is sufficient. Thus, where the statement was that the stovepipes entered brick chimneys and did not pass through any partitions, it was said that if the chimney should be made of tile, or any metal, so that it would be as noncombustible as brick or stone, or if a partition should be made of brick or stone, so that there would be no additional risk in a pipe passing through it, the covenant would not be violated (*Bankhead v. Des Moines Ins. Co.*, 70 Iowa, 387, 30 N. W. 740). And whether there has been such a substantial compliance is a question for the jury. Similarly, a warranty that a chimney will be built is a warranty that it will be built in a reasonable time (*Murdock v. Chenango County Mut. Ins. Co.*, 2 N. Y. 210). But where the statements in the application are qualified as true so far as "material to the risk," a statement that the applicant will build a chimney within a certain time is not an absolute warranty, and a failure to build it will not forfeit the policy, unless such failure is material to the risk (*Waterbury v. Dakota Fire & Marine Ins. Co.*, 6 Dak. 468, 43 N. W. 697). A breach of an agreement to build a chimney within six months is not available as a defense, unless pleaded (*Phoenix Ins. Co. v. Barnd*, 16 Neb. 89, 20 N. W. 105).

The use of a stove in a room that has no chimney does not release an insurance company from the payment of a loss by fire resulting therefrom, when the premises are not within corporate limits, and the charter and by-laws of the company do not prohibit it (*Castner v. Farmers' Mut. Fire Ins. Co.*, 50 Mich. 273, 15 N. W. 452).

When it is attempted to forfeit the policy because of the use of stoves, or because of the method of such use, under the general condition, it must, of course, appear that there has been an increase of risk.

Schmidt v. Peoria Marine & Fire Ins. Co., 41 Ill. 295, 298; *Newhall v. Union Mut. Fire Ins. Co.*, 52 Me. 180; *Jones Mfg. Co. v. Man-*

Manufacturers' Mut. Fire Ins. Co., 8 Cush. (Mass.) 82, 54 Am. Dec. 742;
Fabyan v. Union Mut. Fire Ins. Co., 83 N. H. 208.

In the determination of this question it is necessary to consider whether the use of stoves is usual and customary in buildings devoted to the purposes for which the building insured is used (*Girard Fire & Marine Ins. Co. v. Stephenson*, 37 Pa. 293, 78 Am. Dec. 423). It has been held in some cases, also, that the use of the stoves must have caused the loss.

Schmidt v. Peoria Marine & Fire Ins. Co., 41 Ill. 295; *Landes v. Safety Mut. Fire Ins. Co.*, 190 Pa. 536, 42 Atl. 961.

(c) Same—Use of heat in manufacturing.

The substitution of a fire drier for a steam drier in a hominy mill is not necessarily an increase of risk; but the question is one for the jury (*North British & Mercantile Ins. Co. v. Steiger*, 13 Ill. App. 482). In determining whether there is an increase of risk, reference must be had to the risk assumed and whether the additional process is usual and appropriate to the business. Thus, where a "steam flouring mill" was insured, and in conditions annexed to the policy mills requiring fire heat were denominated as "hazardous," the question was whether the addition of a kiln-drying corn-meal mill was an increase of risk, the court said that to determine this question it must be considered whether the grinding of corn meal was a usual and appropriate part of, or incident to, the business of a steam flouring mill, and, if so, secondly, whether the kiln-drying corn-meal operation was also a usual and appropriate incident to the business of such a steam flouring mill (*Washington Mut. Ins. Co. v. Merchants' & Manufacturers' Mut. Ins. Co.*, 5 Ohio St. 450). So, where the policy covered a "stock of drugs, chemicals, and other merchandise, hazardous and extrahazardous," the insurer claimed that the policy became void by reason of the fact that the insured had heated on a stove on the premises about five gallons of inflammable ointment, and that this caused the fire. It appeared, however, that it was customary for druggists to use heat in the preparation of ointments, as was done in this instance; and it was held, therefore, that there was no forfeiture, if the risk was not increased beyond what was fairly contemplated by the policy. (*Brown v. Kings County Fire Ins. Co.*, 31 How. Prac. [N. Y.] 508.)

Where the contention was that there had been an increase of risk by a change of the position of a smokestack on a factory, the court

properly excluded evidence that defendant, about the time plaintiff's policy was issued, gave policies at the same rates on buildings in the same vicinity, similar to plaintiff's, and having smokestacks arranged as plaintiff's was at the time of the fire (*Willow Grove Creamery Co. v. Planters' Mut. Ins. Co.*, 77 Md. 532, 26 Atl. 1024).

(d) Method of lighting premises.

A statement in the application that "no open lamps are used" is a promissory representation (*Clark v. Manufacturers' Ins. Co.*, 5 Fed. Cas. 889). So an agreement not to work by artificial light, in an application made a part of the policy, is a promissory warranty (*Mechanics' Ins. Co. v. Thompson*, 57 Ark. 279, 21 S. W. 468). Such statements refer to the habitual use of lights, and a statement that closed lights only are used is not falsified by the use of a hand lamp to light up with (*Howard Fire Ins. Co. v. Bruner*, 23 Pa. 50). Nor is the warranty that the insured is not to work by artificial light broken by the occasional use of an artificial light for a purpose other than performing work (*Mechanics' Ins. Co. v. Thompson*, 57 Ark. 279, 21 S. W. 468). Where a policy of insurance forbade the use of open lights on the premises insured, but at the same time permitted necessary repairs, the use of the open lights in repairing could not be considered a breach of the policy, as the agreement not to use such lights must be construed to relate to the ordinary use of lights about the premises, and not to the special and necessary use in making the repairs permitted by the policy (*Au Sable Lumber Co. v. Detroit Manufacturers' Fire Ins. Co.*, 89 Mich. 407, 50 N. W. 870). And a policy forbidding the carrying of open lights on the premises is not forfeited if such act is done without the insured's knowledge and consent, if he has used the care and diligence of a prudent man to prevent it (*Insurance Co. of North America v. McDowell*, 50 Ill. 120, 99 Am. Dec. 497).

(e) Use of steam engine on the premises.

Fire policies, especially those covering farm property, often contain conditions in one form or another, prohibiting the operation of steam engines on the premises. Of course, a breach of such a condition forfeits the policy (*Farmers' Mut. Fire Ins. Co. v. Hull*, 77 Md. 498, 27 Atl. 169). A condition prohibiting the use of an engine "for threshing out crops" is not broken by the use of an engine for grinding bark for a tannery, also covered by the policy (*Schaeffer*

v. Farmers' Mutual Fire Ins. Co., 80 Md. 563, 31 Atl. 317, 45 Am. St. Rep. 361). But, where the policy prohibited the use of a "steam farm engine," a portable engine originally purchased for logging purposes, but adapted to use on a farm, is within the prohibition, in the absence of evidence that there is a special kind of engines known as "steam farm engines" (Wilson v. Union Mut. Fire Ins. Co., 75 Vt. 320, 55 Atl. 662). It is not necessary that such engine should be constantly worked. If it is used as often as the work for which it is designed requires, it is a breach of the condition. And it does not affect the result that the policy contains a clause insuring engines, etc., if there are other engines which are actually covered by the description. Where the by-laws of an insurance company prohibited the insuring of any building "situated within 50 yards of a railroad on which steam power is employed, or of any forges, foundries, furnaces, rolling mills, powder mills, paper and oil mills, cotton mills, or, in general, any mills, factories, or machineries driven by steam power," and provided that if the owner of any insured building "should convert it to some other purpose, or should carry on therein any of the trades" thereinbefore set forth, the policy on his premises should be deemed of no force or effect, the use of a portable steam engine near a barn, for the purpose of threshing grain therein, was no such violation of the by-laws as would avoid the policy (Farmers' Mut. Fire Ins. Co. v. Moyer, 97 Pa. 441). Resolutions passed by the board of directors of a mutual insurance company, suspending the policy of one using steam, in threshing, within 200 yards of the insured premises, do not affect a policy holder having no notice of their passage (Martin v. Mutual Fire Ins. Co., 45 Md. 51).

Generally the condition relied on is the condition providing that the policy shall be void if the risk be increased. Under such a condition, the issue is, of course, whether the use of the engine increased the risk.

Orient Ins. Co. v. McKnight, 64 N. E. 339, 197 Ill. 190, affirming 96 Ill. App. 525; *Girard Fire & Marine Ins. Co. v. Stephenson*, 37 Pa. 293, 78 Am. Dec. 423; *Minneapolis Threshing Machine Co. v. Darnall*, 13 S. D. 279, 83 N. W. 266.

This is a question for the jury, as it cannot be said that the use necessarily increases the risk (*Farmers' Mut. Fire Ins. Co. v. Moyer*, 97 Pa. 441); and this is true, even though the use of the

engine caused the fire (*German Ins. Co. v. Hart*, 16 Ky. Law Rep. 344). The change contemplated by the condition is something permanent in its nature, and consequently a mere temporary use of an engine is not within the condition (*Adair v. Southern Mut. Ins. Co.*, 107 Ga. 297, 33 S. E. 78, 45 L. R. A. 204, 73 Am. St. Rep. 122).

But, where a policy is on a tannery "without steam," the placing of steam power in the tannery will be regarded as an increase by the provisions of the policy (*Diehl v. Adams County Mut. Ins. Co.*, 58 Pa. 443, 98 Am. Dec. 302). Where a mill was insured, and an engine subsequently added to the plant, evidence that the boiler and engine were placed in a safe building detached from the mill, and that the connection between the engine and the mill was by a shaft through a window, and that the wall opposite the engine house was of stone, authorized the finding that the annexation of a steam power did not increase the risk (*Parker v. Arctic Fire Ins. Co.*, 59 N. Y. 1).

If the risk was actually increased, it does not affect the result that the use of the engine was by a tenant and not by the insured personally (*Long v. Beeber*, 106 Pa. 466, 51 Am. Dec. 532).

The use, by the assured, of a steam engine to operate a cornsheller, near an insured corncrib, is within the meaning of a clause in the policy that it shall be void "if there be any change in the exposure, by the erection or occupation of adjacent buildings or by any means whatever in the control or knowledge of the assured." *Davis v. Western Home Ins. Co.*, 81 Iowa, 496, 46 N. W. 1073, 25 Am. St. Rep. 509, 10 L. R. A. 359.

In *Schaeffer v. Farmers' Mutual Fire Ins. Co.*, 80 Md. 563, 31 Atl. 317, 45 Am. St. Rep. 361, the policy provided that if an engine be stationed on the premises the company shall appoint a committee to ascertain the amount of increased risk, and that the insured shall give an additional premium note therefor. Under this condition notice to a general agent of an insurance company that the insured is using an engine on his premises is notice to the company, so as to require it to ascertain the increase of risk, as provided by the policy. On a second appeal (*Farmers' Mutual Fire Ins. Co. v. Schaeffer*, 82 Md. 377, 33 Atl. 728), it was said that if the committee was not appointed forfeiture could not be enforced, and that it was for the jury to determine whether the time elapsing between the notice to the general agent of the use of the engine and the loss was sufficient to enable the company to ascertain through the ap-

propriate committee such facts, and also for the insured to give the additional premium note.

Notice of the placing of an engine on the premises to the agent cannot be shown by evidence of conversations with third parties in which the erection of the engine was spoken of. *Sykes v. Perry County Mut. Fire Ins. Co.*, 84 Pa. 79.

(f) Miscellaneous conditions or circumstances.

The use of certain appliances for fumigating the building is not necessarily within the condition against increase of risk; but this is a question for the jury.

Pool v. Milwaukee Mechanics' Ins. Co., 91 Wis. 530, 65 N. W. 54, 51 Am. St. Rep. 919; *Pool v. Norwich Union Fire Assur. Soc.*, 65 N. W. 57, 91 Wis. 542.

Nor is it necessarily within the condition that the insured started a fire in rubbish collected near the building and the loss resulted therefrom (*Des Moines Ice Co. v. Niagara Fire Ins. Co.*, 99 Iowa, 193, 68 N. W. 600).

In *Redman v. Hartford Fire Ins. Co.*, 47 Wis. 89, 1 N. W. 393, 32 Am. Rep. 751, the application contained statements as to the lubricating oil used in the mill insured, and concluded with the stipulation that the application was a just and full exposition of all the facts and circumstances in regard to the property insured, so far as the same were known to the applicant and were material to the risk. The court held that a violation of the warranty would not forfeit the policy under the stipulation, unless the breach was known to the insured and material to the risk. And in *Copp v. German-American Insurance Co.*, 51 Wis. 637, 8 N. W. 127, where a statement that only lard and sperm oil would be used for lubricating purposes was regarded as a promissory warranty, the court held that substantial compliance therewith was sufficient, and the warranty was not broken if the insured ordered lard and sperm oil, and believed he was using it, if the oil used, though containing lard and sperm oil, was compounded with petroleum, it appearing that such oil was in fact as good and as safe as lard and sperm oil.

A clause against smoking on the premises is not violated, where the insured has prohibited smoking, on his attention being called to the fact that smoking was being done and he has no knowledge of any violation of his command; he having used due care and diligence to see that no smoking is done on the premises.

Insurance Co. of North America v. McDowell, 50 Ill. 120, 99 Am. Dec. 497; *Aurora Fire Ins. Co. v. Eddy*, 55 Ill. 213.

Where the question whether smoking was allowed on the premises was answered in the negative, the court held that this referred only to the rule established at the time of the application, and did not refer to the future, and that the mere fact that other persons, and even one of the insured, smoked on the premises, did not forfeit the policy; it appearing that the insured had as a matter of fact forbidden smoking (*Hosford v. Germania Fire Ins. Co.*, 127 U. S. 399, 8 Sup. Ct. 1199, 32 L. Ed. 196).

Where a company agreed to reinsure certain risks, the reinsured company agreeing to report the risks of that class to the reinsuring company, the fact that the reinsured company did not report all risks of that class for reinsurance will not afford a ground for forfeiture as to the risks that were reported and duly reinsured (*Appeal of Fame Ins. Co.*, 83 Pa. 396).

(g) Insurance against accidental discharge of automatic sprinkler.

In *Wertheimer-Swartz Shoe Co. v. United States Casualty Co.*, 172 Mo. 135, 72 S. W. 635, 61 L. R. A. 766, 95 Am. St. Rep. 500, the policy insured against the accidental discharge of an automatic sprinkler system. It was held that a clause providing that assured shall immediately notify insurer of any known defect which shall render the sprinkler system more than usually hazardous, and shall cause such defect to be immediately repaired, applies to defects in the sprinkling machine only, and has no reference to defects in any of the other appliances in assured's building. Consequently the insurer was liable, though the sprinkler pipe was broken by the placing of the fastening rods of the iron shutters over the sprinkler pipes. This being the act of a servant, it could not be regarded as a willful act of the insured, within a clause providing that the policy shall not cover a loss resulting from or caused by the willful act of the insured.

(h) Agreements impairing insurer's right of subrogation.

Policies generally contain conditions intended to secure to the insurer the right of subrogation against any person or corporation responsible or ultimately liable for the loss, as, for instance, the common carrier when the insurance is on goods in transit, or the wrongdoer when the loss is the result of a tort. Policies covering mortgagee's interests also provide that, in case of loss, the insurer shall be subrogated to the mortgagee's rights against the mortgaged property. It is generally recognized that any act or agree-

ment on the part of the insured which impairs or defeats the insurer's rights under these conditions forfeits the policy.

Sussex County Mut. Ins. Co. v. Woodruff, 28 N. J. Law, 541; *Dilling v. Draemel*, 16 Daly, 104, 9 N. Y. Supp. 497; *Dundee Chemical Works v. New York Mut. Ins. Co.*, 12 Misc. Rep. 353, 33 N. Y. Supp. 628; *Bloomingtondale v. Columbia Ins. Co.*, 84 N. Y. Supp. 572; *Phoenix Ins. Co. v. Parsons*, 129 N. Y. 86, 29 N. E. 87; *Insurance Co. of North America v. Easton*, 73 Tex. 167, 11 S. W. 180, 3 L. R. A. 424; *Carstairs v. Mechanics' & Traders' Ins. Co. (C. O.)* 18 Fed. 473.

In the *Bloomingtondale* Case it was said that it did not affect the result that the loss was claimed to have been caused by an incendiary fire for which the carrier was not liable, as the insurer should be allowed the right to litigate the question of the carrier's liability. The right of recovery is affected, however, only to the extent of the release of the wrongdoer.

Atlantic Ins. Co. v. Storrow, 5 Paige (N. Y.) 235; *Aetna Fire Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 335, 30 Am. Dec. 90; *Dilling v. Draemel*, 16 Daly, 104, 9 N. Y. Supp. 497.

In *Packham v. German Fire Ins. Co.*, 91 Md. 515, 46 Atl. 1066, 50 L. R. A. 828, 80 Am. St. Rep. 461, the policy, covering plaintiff's office furniture and fixtures, contained a clause by which the insured agreed that, on payment of a loss, the company should be subrogated to the insured's right to recover therefor from any other person or corporation. The specific property insured, together with other property of plaintiff, was destroyed by fire caused by the negligence of a gas company. Plaintiff sued the gas company, and by compromise, from which the loss on office furniture and fixtures was excluded, judgment was rendered against the gas company and paid. It was held that by this settlement with the gas company plaintiff destroyed the insurer's right of subrogation under the policy, and consequently forfeited his right to recover thereunder. The acts of the owner in making a settlement with a railroad company for the killing of a horse insured cannot affect the rights of an assignee of the policy (*Algase v. Horse Owners' Mut. Indemnity Ass'n*, 77 Hun, 472, 29 N. Y. Supp. 101).

Where the insurance was on advances on a cargo, it appeared that the owner had requested insured to protect his advances, so that in case of loss he would not look to the owner for reimbursement, and insured replied that he had "covered the amount by in-

insurance," it was held that, as insured was thereby estopped from asserting any claim against the owner in case of loss, it was a breach of the condition; and it does not affect the result that the insured did not realize that he had destroyed the insurer's right of subrogation (*Phoenix Ins. Co. v. Parsons*, 129 N. Y. 86, 29 N. E. 87). The right of subrogation against a carrier may be impaired, so as to forfeit the policy, by a clause in the bill of lading providing that the carrier, on being held liable for the loss, shall have the benefit of any insurance on the goods (*Fayerweather v. Phenix Ins. Co.*, 118 N. Y. 324, 23 N. E. 192, 6 L. R. A. 805). But even this clause could not be made the basis of forfeiture, as impairing the right of subrogation, when the policy, which was on whisky to be shipped, limited the insurer's liability to the excess in value over \$20 per barrel, and the valuation for the purposes of shipment was placed at \$20 per barrel (*St. Paul Fire & Marine Ins. Co. v. Kidd*, 55 Fed. 238, 5 C. C. A. 88).

A condition in a policy on the excess of value above \$20 per barrel of spirits to be forwarded by carrier, that the assured, on payment of loss, should assign all his claim against the carrier, and that any act of the assured waiving or tending to defeat or decrease any such claim before or after the insurance should avoid the policy, is not broken by the shipment of 75 barrels of spirits covered by the policy, of the actual value of \$7,308, at a stipulated valuation with the carrier of \$20 per barrel, as the condition provides only that an existing liability of the carrier, when perfected, shall not be waived or diminished by the assured, but not that he shall perfect such liability. *Kidd v. Greenwich Ins. Co.* (C. C.) 85 Fed. 351.

And generally, where the policy provides that if any agreement be made by the insured with the carrier by which such carrier stipulates to have, in case of loss for which he may be liable, the benefit of the insurance, the insurer shall be discharged of any liability for such loss, the condition must be confined to cases where the carrier is liable for the loss, and the policy will remain in force as respects losses for which the carrier is not legally responsible (*Pennsylvania R. Co. v. Manheim Ins. Co.* [D. C.] 56 Fed. 301).

In *Eddy v. London Assur. Corp.*, 65 Hun, 307, 20 N. Y. Supp. 216, where the policy was taken out by the owner, loss payable to the mortgagee, the mortgage clause provided that, whenever the insurer should pay the mortgagee any sum for loss and should claim that as to the mortgagor no liability therefor existed, the insurer should to the extent of such payment be thereupon legally

subrogated to all the rights of the mortgagee under all securities held as collateral. It was also provided that no subrogation should impair the right of the mortgagee to recover the full amount of his claim. The mortgagee commenced foreclosure proceedings, which were pending at the time of the loss, and the company claimed that by the prosecution to decree and sale of these suits after the loss its subrogation rights had been impaired, and that it was not therefore liable. The court held that, under the provision that no right of subrogation should impair the right of the mortgagee to recover the full amount of his claim, such action could not be held to impair the right of subrogation.

The right of the insurer to subrogation to the rights of a mortgagee may be impaired by the mortgagee's taking a deed to the property (*Thomas v. Montauk Fire Ins. Co.*, 43 Hun [N. Y.] 218). But such will not be the result if the agreement to take the conveyance in full satisfaction of the debt is not consummated before the loss (*Magoun v. Firemen's Fund Ins. Co.*, 86 Minn. 486, 91 N. W. 5, 91 Am. St. Rep. 370). The insured is not bound to keep his claim, as to which the insurer might have the right of subrogation, from expiring, or to take active steps to enforce the same, especially after loss, unless the insurer has notified him of the desire to be subrogated to his rights and offered to indemnify him against costs and expenses (*Royal Insurance Co. v. Stinson*, 103 U. S. 25, 26 L. Ed. 473). The rights of the parties are fixed by the loss, and any act of the insured thereafter affecting the right of subrogation cannot be made a ground of forfeiture (*Sussex County Mut. Ins. Co. v. Woodruff*, 26 N. J. Law, 541).

18. FAILURE TO COMPLY WITH CONDITIONS AS TO PRECAUTIONS AGAINST LOSS AS GROUND OF FORFEITURE.

- (a) Nature and construction of statements and conditions in general.
- (b) Notice of sickness of animal insured.
- (c) Method of disposing of ashes.
- (d) Appliances for extinguishing fires—Water supply.
- (e) Same—Force pump.
- (f) Same—Maintaining automatic sprinkler.
- (g) Employment of watchman.
- (h) Same—What is a sufficient compliance with condition or statement.
- (i) Same—Time during which watch must be kept.
- (j) Same—Necessity that watchman should be on or near premises.
- (k) Same—Temporary absence.
- (l) Same—Sleeping while on duty.
- (m) Same—Negligence of watchman.
- (n) Same—Effect of breach of condition.

(a) Nature and construction of statements and conditions in general.

Positive and unqualified stipulations as to the precautions to be used to prevent fires are in the nature of continuing or promissory warranties.

Aurora Fire Ins. Co. v. Eddy, 49 Ill. 106; *Blumer v. Phoenix Ins. Co.*, 45 Wis. 622.

In the *Blumer Case* Justice Taylor, in a dissenting opinion, took the position that the stipulation must be material in order to be a continuing warranty; and this is also the rule in Pennsylvania (*Frisbie v. Fayette Mut. Ins. Co.*, 27 Pa. 325). If, however, the statements or stipulations are qualified, they will be regarded as representations only, and, though prospective in operation, will be governed by the principles applied to representations generally.

Houghton v. Manufacturers' Mut. Fire Ins. Co., 8 Metc. (Mass.) 114, 41 Am. Dec. 489; *Jones Mfg. Co. v. Manufacturers' Mut. Fire Ins. Co.*, 8 Cush. (Mass.) 82, 54 Am. Dec. 742; *Phoenix Assurance Co. v. Munger Improved Cotton Machine Mfg. Co.*, 92 Tex. 297, 49 S. W. 222, affirming (Civ. App.) 49 S. W. 271.

In view of this principle, it is said that representations made by the owner of a factory, in an application for insurance thereon, concerning the modes of conducting business at the factory and the precautions taken to guard against fire, amount to a stipulation that such methods and precautions shall be substantially followed

during the term of the insurance (*Houghton v. Manufacturers' Mut. Fire Ins. Co.*, 8 Metc. [Mass.] 114, 41 Am. Dec. 489). All that is required of the insured is that he should take such precautions and exercise the degree of care which may reasonably be expected of ordinarily prudent persons under like conditions (*Price v. Patrons' & Farmers' Home Protection Co.*, 77 Mo. App. 236). But, in the absence of a condition requiring it, he is not bound to do certain things merely because other persons in the same line of business do them. Thus, the fact that the farmers in the vicinity usually market their cotton before the time of the year when the fire occurred which destroyed the insured's gin house and cotton therein does not impose on the insured any obligation to do so (*Williamson v. New Orleans Ins. Co.*, 84 Ala. 106, 4 South. 36).

In determining whether the insured has been ordinarily diligent in complying with the stipulations, the condition of the building and circumstances generally must be considered. Thus, a different rule will apply when the building is in process of construction from that which will govern if the building is completed (*Gloucester Mfg. Co. v. Howard Fire Ins. Co.*, 5 Gray [Mass.] 497, 66 Am. Dec. 376). So, where the insured agreed to make certain improvements that would tend to diminish the danger of fire, it was held that he had a reasonable time to comply with the agreement, and that, having used all reasonable efforts to put in the improvement before a fire occurred, the company could not resist payment because it was not in (*Viele v. Germania Ins. Co.*, 26 Iowa, 9, 96 Am. Dec. 83). And, though the agreement may require that the work should be done in a reasonable time, a demand for compliance is necessary before forfeiture can be declared (*Howell v. Hartford Fire Ins. Co.*, 12 Fed. Cas. 700). The failure to make the improvement within a certain time does not render the policy absolutely void (*Manufacturers' & Merchants' Mut. Ins. Co. v. Armstrong*, 145 Ill. 469, 34 N. E. 553, affirming 45 Ill. App. 217). Moreover, a substantial compliance is all that is required.

Cady v. Imperial Ins. Co., 4 Fed. Cas. 984; *Nicoll v. American Ins. Co.*, 18 Fed. Cas. 231.

The insured is not bound to allege and prove affirmatively a compliance with the stipulations as to precautions against loss. A general allegation that he has performed all the conditions on his part to be performed is sufficient. *Cowan v. Phenix Ins. Co.*, 78 Cal. 181, 20 Pac. 408; *Redman v. Aetna Ins. Co.*, 49 Wis. 431, 4 N. W. 591.

(b) Notice of sickness of animal insured.

A provision in a policy of insurance on a horse that, if the animal shall become sick or disabled, the insured shall notify the company within a certain time, is valid, and a failure to give the required notice will forfeit the policy.

Green v. Northwestern Live Stock Ins. Co., 87 Iowa, 358, 54 N. W. 349; *Swain v. Security Live Stock Ins. Co.*, 165 Mass. 321, 43 N. E. 105.

A notice not given until nine days after the animal is taken sick is not given in time (*Illinois Live Stock Ins. Co. v. Kirkpatrick*, 61 Ill. App. 74). A failure to notify the insurer is not excused by the fact that the insured could not have done so, in the exercise of reasonable diligence, before the horse died, since the agreement amounted to a warranty, and the question of the usefulness of telegraphing was not involved (*Johnston v. Northwestern Live Stock Ins. Co.*, 83 N. W. 641, 107 Wis. 337). But the condition does not require the owner immediately to notify the insurer of a sickness which lasted only ten minutes or less, and did not recur again at least for seven weeks (*Kells v. Northwestern Live Stock Ins. Co.*, 64 Minn. 390, 67 N. W. 215, 71 N. W. 5, 58 Am. St. Rep. 541).

Since the condition is in the nature of a condition subsequent, it is not necessary for the insured to plead and prove compliance therewith (*Johnston v. Northwestern Live Stock Ins. Co.*, 94 Wis. 117, 68 N. W. 868). The fact that the surgeon sent by a live stock insurance company to treat a horse belonging to insured did not complain, on seeing the horse, that he had not been called in time to treat it, is evidence that notice of the disease was given promptly (*Smith v. People's Mut. Live Stock Ins. Co.*, 173 Pa. 15, 33 Atl. 567).

(c) Method of disposing of ashes.

Where it is stated in the application that ashes are thrown out, but the statement cannot under the phraseology of the policy be regarded as a warranty, it cannot be regarded as a ground for forfeiture that some ashes had been placed in a box in the building for domestic purposes (*Protection Ins. Co. v. Harmer*, 2 Ohio St. 452, 59 Am. Dec. 684). Even if a stipulation that ashes are at all times kept in a brick receptacle is to be regarded as a promissory warranty, substantial compliance is all that is necessary, and it is sufficient if the ashes are kept in a mode equally safe (*Underhill v.*

Agawam Mut. Fire Ins. Co., 6 Cush. [Mass.] 440). But where an application for insurance on a schoolhouse stated that the ashes were taken up in metallic vessels, which were not allowed to stand on wood with ashes in them, and that the ashes, if deposited in or near the building, were in brick or stone vaults, and it appeared that the boy employed by the school committee to take charge of the building, for two or three weeks before the fire, without orders, placed the ashes in a wooden barrel in a shed adjoining the schoolhouse, the court held that, while the continuing warranty as to disposition of ashes would not be breached by a mere occasional failure to comply therewith by a servant, yet as there was here a continuous placing of the ashes in a wooden barrel, contrary to the terms of the contract, the policy was forfeited (*City of Worcester v. Worcester Mut. Fire Ins. Co.*, 9 Gray [Mass.] 27).

(d) Appliances for extinguishing fires—Water supply.

Stipulations in the policy that a certain supply of water and facilities for using the same will be kept in the insured building, or even statements that such supply is kept ready for use, are in the nature of promissory warranties.

Mechanics' Ins. Co. v. Thompson, 57 Ark. 279, 21 S. W. 468; *Cowan v. Phenix Ins. Co.*, 78 Cal. 181, 20 Pac. 408; *Aurora Fire Ins. Co. v. Eddy*, 49 Ill. 106; *Jones Mfg. Co. v. Manufacturers' Mut. Fire Ins. Co.*, 8 Cush. (Mass.) 82, 54 Am. Dec. 742; *New York Belting & Packing Co. v. Washington Fire Ins. Co.*, 10 Bosw. (N. Y.) 428.

But, when the statement was in a survey made by the insurer's agent some days after the policy issued, it cannot be regarded as a warranty on the part of the insured (*Le Roy v. Park Ins. Co.*, 39 N. Y. 56).

It is recognized that various circumstances may make a literal compliance with such statements or stipulations difficult, if not impossible. Thus, when there was no fire in the building in winter, casks of water would freeze and become useless (*Aurora Fire Ins. Co. v. Eddy*, 49 Ill. 106). It is, therefore, the established rule that a fair and substantial compliance with the condition is sufficient.

Cady v. Imperial Ins. Co., 4 Fed. Cas. 984; *Aurora Fire Ins. Co. v. Eddy*, 49 Ill. 106; *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416, 59 Am. Dec. 192; *New York Belting & Packing Co. v. Washington Fire Ins. Co.*, 10 Bosw. (N. Y.) 428.

Consequently neglect by the servants of the insured to obey his orders to keep the water casks full will not forfeit the policy (*Daniels v. Hud-*

son River Fire Ins. Co., 12 Cush. [Mass.] 416, 59 Am. Dec. 192). In a general sense, however, it is incumbent on the insured to keep a supply of water and buckets in serviceable condition and accessible at the places designated (*Aurora Fire Ins. Co. v. Eddy*, 49 Ill. 106; *Id.*, 55 Ill. 213). It is not necessary that the water should be actually in the room designated. It is sufficient if it is in an entry connected therewith, if readily accessible. (*Cady v. Imperial Ins. Co.*, 4 Fed. Cas. 984.) But it is not a sufficient compliance if the water is in an adjoining room, and is inaccessible by reason of the piling of merchandise around the door (*Mechanics' Ins. Co. v. Thompson*, 57 Ark. 279, 21 S. W. 468).

Where the statement was that there was a cask of water in each room, and it appeared that there was a cask in each story of the building, it may be shown that, though there was a partition in a certain story, an opening therein made the cask accessible to both rooms (*Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. [Mass.] 416, 59 Am. Dec. 192). So it may be shown that in "factory parlance" the attic and basement are not regarded as "floors," within a stipulation that there is "water on each floor" (*New York Belting & Packing Co. v. Washington Fire Ins. Co.*, 10 Bosw. [N. Y.] 428).

The statements in the application must be taken to be made with reference to the condition of the buildings at the time, and require a performance of the conditions or stipulations adapted to that state of things. Therefore a warranty in a policy on buildings in the course of construction, "Water tanks to be well supplied with water at all times," is complied with if the tanks at the commencement of the risk are reasonably advanced toward completion, compared with the then state of the buildings, and their construction is afterwards continued with reasonable dispatch until the time of the fire (*Gloucester Mfg. Co. v. Howard Fire Ins. Co.*, 5 Gray [Mass.] 497, 66 Am. Dec. 376).

A policy required the assured to keep a supply of water constantly on top of the mill, which was part of the insured premises, in readiness for immediate use. It appeared that a tank about two feet deep and three feet square was located on the roof, but below the apex, and was fed by a small flume. The policy did not provide on what part of the roof the water supply should be kept, and no specific amount of water was mentioned as being necessary. It was, therefore, for the jury to decide whether the tank was sufficiently supplied with water, and their finding will not be disturbed (*Sierra M., S. & M. Co. v. Hartford Fire Ins. Co.*, 76 Cal. 235, 18 Pac. 267).

Though a breach of the stipulation as to water supply existing at the time of loss will forfeit the policy (*Southern Ins. Co. v. White*, 58 Ark. 277, 24 S. W. 425), a mere temporary breach of such a stipulation, not existing at the time of the fire and in no way contributing to the loss, will not be a ground for forfeiture (*Phoenix Assur. Co. v. Munger Improved Cotton Mach. Mfg. Co.* [Tex. Civ. App.] 49 S. W. 271). It has even been held, in Alabama and in Texas, that, though the breach existed at the time of the loss, there will be no forfeiture if, had the water supply been as represented or agreed, it would have been of no avail in preventing the loss.

Syndicate Ins. Co. v. Catchings, 104 Ala. 176, 16 South. 46; *Delaware Ins. Co. v. Harris*, 26 Tex. Civ. App. 537, 64 S. W. 867.

(c) Same—Force pump.

The application in some instances contains the statement that there is a force pump on the premises. The courts do not agree in their construction of this statement. In *Gilliat v. Pawtucket Mut. Fire Ins. Co.*, 8 R. I. 282, 91 Am. Dec. 229, the court held that such statement was not a continuing warranty, in view of a subsequent inquiry as to future conduct. On the other hand, in *Sayles v. Northwestern Ins. Co.*, 21 Fed. Cas. 609, a statement that "there is" a force pump on the premises "at all times in condition for use" was regarded as a continuing warranty. Such was also the view taken in *Copp v. German-American Ins. Co.*, 51 Wis. 637, 8 N. W. 127, though the court may have been influenced by the further agreement to have on hand a proper supply of hose for use in connection with the pump. But, in any event, it was said in the *Copp* Case, and also in *Cady v. Imperial Ins. Co.*, 4 Fed. Cas. 984, that a substantial compliance with the warranty is sufficient. And in the *Sayles* Case, though the court took the position that literal compliance is necessary in the case of a warranty, it was nevertheless said that the rule applied also to the insured, and that the terms of his agreement would be literally construed, and could not be extended to include anything not necessarily implied therein.

In accordance with these principles it has been held that, where the statement is that a force pump is being constructed, forfeiture cannot be predicated on delay, though it is unreasonable, unless demand of compliance is first made (*Howell v. Hartford Fire Ins. Co.*, 12 Fed. Cas. 700). And whether the delay is reasonable or not is a question for the jury. So a statement that there is a force pump on the premises is not a warranty that the pump shall at all

times be in good working order (*Gilliat v. Pawtucket Mut. Fire Ins. Co.*, 8 R. I. 282, 91 Am. Dec. 229). There can, therefore, be no forfeiture where the motive power of the factory is stopped for repairs, thus making it impossible to use the force pump.

Brighton Mfg. Co. v. Fire Ass'n (C. C.) 33 Fed. 234; *Brighton Mfg. Co. v. Reliance Ins. Co.* (C. C.) 33 Fed. 235; *Townsend v. Northwestern Ins. Co.*, 18 N. Y. 168.

The theory of these decisions is that the insurer assumed the risks incident to the making of ordinary repairs. So, too, it has been held that the warranty that the pump shall be at all times ready for use is not broken where it was rendered useless by the freezing of the stream furnishing power to the mill. (*Cady v. Imperial Ins. Co.*, 4 Fed. Cas. 984.) In *Sayles v. Northwestern Ins. Co.*, 21 Fed. Cas. 609, it was said that, though the warranty implied that there should always be power for the operation of the pump, it did not imply that any particular kind of power should be furnished, and it was also conceded that forfeiture could not be claimed when the use of the pump was made impossible by the fire itself. In a leading case (*Albion Lead Works v. Williamsburg City Fire Ins. Co.* [C. C.] 2 Fed. 479) it was said that the warranty could not be regarded as implying that the pump should always be ready for use, as it could not be construed as implying that the factory should be operated or ready for operation on Sundays, holidays, etc. This case went further, and held that there could be no forfeiture on the ground that the pump had been broken several weeks before the fire and not repaired. While the failure to repair the pump was negligence, great in degree, still it was negligence by the servants of the insured, or by themselves in the conduct of their business and the care of their property against which they were insured.

It was also said, in *Cady v. Imperial Ins. Co.*, 4 Fed. Cas. 984, that there was no breach of the warranty because the pump was not in working order for several months, if it was repaired prior to the fire.

(f) Same—Maintaining automatic sprinkler.

An insurance on a "mill building and additions, including * * * automatic sprinkler equipment complete," is not a warranty that the sprinkler equipment shall remain in the building during the life of the policy (*Firemen's Ins. Co. v. Appleton Paper & Pulp Co.*,

161 Ill. 9, 43 N. E. 713, affirming 59 Ill. App. 511). Consequently the assured may remove the sprinkler equipment, for the purpose of supplanting it with a more complete one, without avoiding the policy. The change may be so negligently made as to forfeit the policy under the condition as to increase of risk; but this is a question for the jury. A stipulation that an automatic sprinkler is in complete working order, and that insured will use due diligence to maintain the system during the full term of the insurance, is not a warranty in the technical sense, but a condition, under which the burden is on the insurer to show a failure to use due diligence to maintain the system in complete working order after the policy had taken effect (*Fuller v. New York Fire Ins. Co.*, 184 Mass. 12, 67 N. E. 879).

A policy on a sawmill stipulated that the insured should use due diligence to maintain in complete working order the automatic sprinkler system then in use, and that no change should be made in such system without the consent of the insurer. During the life of the policy a heavy frost froze the water in the sprinkler, and burst some of its pipes, and, though extra care in watching the plant was taken and immediate steps were taken to have the sprinkler repaired by the concern which installed it, a loss by fire occurred before the repairs were complete. It was held that the accident to the sprinkler system was not an increase of risk which would relieve the insurer from liability for the loss, nor were the repairs a change in the system, within the meaning of the policy, so as to discharge the insurer.

Cummer Lumber Co. v. Associated Manufacturers' Mut. Fire Ins. Corp.,
78 N. Y. Supp. 668, 67 App. Div. 151, affirmed without opinion in
178 N. Y. 633, 66 N. E. 1106.

(g) Employment of watchman.

Among the precautions against loss usually required in the insurance of stores, factories, etc., is the employment of a watchman. In some early cases, where the application was made a part of the policy and a warranty on the part of the insured, statements as to the employment of a watchman on the premises insured, though in the present tense, were construed as express promissory warranties.

Wilson v. Hampden Fire Ins. Co., 4 R. I. 159; *First Nat. Bank v. Insurance Co. of North America*, 50 N. Y. 45.

Thus, in *Blumer v. Phoenix Ins. Co.*, 45 Wis. 623, where, in answer to the question as to the employment of a watchman, the insured stated "one or two hands sleep in the mill," the court held this was an express promissory warranty; and this was reasserted on a second appeal (48 Wis. 535, 4 N. W. 674, 33 Am. Rep. 830). Justice Taylor dissented, on the ground that the statement could be construed as one in *præsenti* only, especially in view of the form of other questions intended to cover the future conduct of the insurer, in which the future tense was expressed. Justice Taylor also lays stress on the fact that there is nothing to show that the sleeping of one or two hands in the mill was regarded as material by the insurer.

Conditions or agreements as to the employment of watchmen at night, or when the mill or factory is not in operation, are regarded as express promissory warranties in *Cowan v. Phenix Ins. Co.*, 73 Cal. 181, 20 Pac. 408; *Rankin v. Amazon Ins. Co.* (Cal.) 25 Pac. 280; *McKenzie v. Scottish Union & National Ins. Co.*, 112 Cal. 548, 44 Pac. 922; *Crocker v. People's Mut. Fire Ins. Co.*, 8 Cush. (Mass.) 79; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136, 86 Am. Dec. 862; *Hovey v. American Mut. Ins. Co.*, 2 Duer. (N. Y.) 554; *Power v. City Fire Ins. Co.*, 8 Phila. (Pa.) 566, 2 Leg. Op. 167; *Miller v. Germania Ins. Co.*, 84 Leg. Int. (Pa.) 839.

Where, however, the statement as to the employment of a watchman is not referred to as a part of the contract and a warranty, it is to be construed as at best a promissory representation, though material to the risk.

Glendale Woolen Co. v. Protection Ins. Co., 21 Conn. 19, 54 Am. Dec. 309; *Sheldon v. Hartford Fire Ins. Co.*, 22 Conn. 235, 58 Am. Dec. 420; *Houghton v. Manufacturers' Ins. Co.*, 8 Metc. (Mass.) 114, 41 Am. Dec. 489; *King Brick Mfg. Co. v. Phoenix Ins. Co.*, 164 Mass. 291, 41 N. E. 277.

So, where the stipulation is on a slip pasted on the face of the policy in such manner that it might be read into the policy, either among the warranties or the representations, it will be construed as a representation only (*Hart v. Niagara Fire Ins. Co.*, 9 Wash. 620, 38 Pac. 213, 27 L. R. A. 86). So a statement that a constant watch is kept was regarded in *McGannon v. Michigan Millers' Mut. Fire Ins. Co.*, 127 Mich. 636, 87 N. W. 61, 54 L. R. A. 739, 89 Am. St. Rep. 501, as merely a representation, to be substantially complied with, and not an absolute warranty. Another policy covering the same property and based on substantially the same state-

ments was involved in *McGannon v. Millers' Nat. Ins. Co.*, 171 Mo. 143, 71 S. W. 160, 94 Am. St. Rep. 778, and the statement was there regarded, not as a warranty, but rather as a condition subsequent. In Pennsylvania the construction of a statement as a promissory warranty depends to a large extent on its materiality. Therefore it was held, in *Frisbie v. Fayette Mutual Ins. Co.*, 27 Pa. 325, that a statement that a clerk sleeps in the store will not be regarded as a promissory warranty, unless shown to be material. The principle on which Justice Taylor, in the *Blumer Case*, based his dissent, that statements in *præsenti* cannot be construed as continuing warranties, is also asserted in several jurisdictions.

Grubbs v. Virginia Fire & Marine Ins. Co., 110 N. C. 108, 14 S. E. 516; *Frisbie v. Fayette Mut. Ins. Co.*, 27 Pa. 325; *Virginia Fire & Marine Ins. Co. v. Buck*, 88 Va. 517, 13 S. E. 973.

It has even been held that, where the insurer knows that it is the custom of mills like the one insured to close down and remain unoccupied in winter, a statement that a watchman is always on duty will not be construed as a continuing warranty (*May v. Buckeye Mut. Ins. Co.*, 25 Wis. 291, 3 Am. Rep. 76).

(h) Same—What is a sufficient compliance with condition or statement.

In some cases it has been said that, as a statement as to the employment of a watchman is an express promissory warranty, it must be strictly complied with.

First National Bank v. Insurance Co. of North America, 50 N. Y. 45; *Power v. City Fire Ins. Co.*, 8 Phila. (Pa.) 566, 2 Leg. Op. 167.

But the rule of literal and strict construction also requires that the warranty or condition shall not be extended by implication to impose on the insured any duty beyond that actually expressed by the words used (*Hovey v. American Mut. Ins. Co.*, 2 Duer [N. Y.] 554). Whether regarded as a warranty or not, the statement or condition can be construed only to impose such obligations as it can reasonably be presumed the parties intended (*McGannon v. Millers' Nat. Ins. Co.*, 171 Mo. 143, 71 S. W. 160, 94 Am. St. Rep. 778); that is to say, whether regarded as a representation, a warranty, or a condition, substantial compliance with the terms of the statement or promise is sufficient.

London & L. Ins. Co. v. Gertelsen, 106 Ky. 815, 51 S. W. 617; *Houghton v. Manufacturers' Mut. Fire Ins. Co.*, 8 Metc. (Mass.) 114, 41 Am.

Dec. 489; *Crocker v. People's Mut. Fire Ins. Co.*, 8 Cush. (Mass.) 79; *Parker v. Bridgeport Ins. Co.*, 10 Gray (Mass.) 302; *King Brick Mfg. Co. v. Phoenix Ins. Co.*, 164 Mass. 291, 41 N. E. 277; *McGannon v. Michigan Millers' Mut. Fire Ins. Co.*, 127 Mich. 636, 87 N. W. 61, 54 L. R. A. 739, 89 Am. St. Rep. 501; *Hanover Fire Ins. Co. v. Gustin*, 40 Neb. 828, 59 N. W. 375; *Blumer v. Phoenix Ins. Co.*, 45 Wis. 633.

In view of the principle that substantial compliance is sufficient, it has been said that a statement that "a good watch" is kept means a suitable and proper watch (*Parker v. Bridgeport Ins. Co.*, 10 Gray [Mass.] 302). Though some other precaution cannot be substituted in place of the keeping of a watchman (*Power v. City Fire Ins. Co.*, 8 Phila. [Pa.] 566), and a mere pretense or colorable compliance will not save a forfeiture, yet it does not necessarily mean a constant watch. If in good faith and without fraud a watchman was kept on the premises for such time or at such hours as in the honest exercise of ordinary care and prudence was deemed sufficient for the safety of the building, that would be a compliance with the provision (*Crocker v. People's Mut. Fire Ins. Co.*, 8 Cush. [Mass.] 79).

Reasonable care on the part of the insured to secure a reliable watchman is all that is required. *London & Lancashire Ins. Co. v. Gertelsen*, 106 Ky. 815, 51 S. W. 617; *King Brick Mfg. Co. v. Phoenix Ins. Co.*, 164 Mass. 291, 41 N. E. 277; *McGannon v. Michigan Millers' Mut. Fire Ins. Co.*, 127 Mich. 636, 87 N. W. 61, 54 L. R. A. 739, 89 Am. St. Rep. 501; *McGannon v. Millers' Nat. Ins. Co.*, 171 Mo. 143, 71 S. W. 160, 94 Am. St. Rep. 778; *Burlington Fire Ins. Co. v. Coffman*, 13 Tex. Civ. App. 439, 35 S. W. 406; *Phoenix Assur. Co. v. Coffman*, 10 Tex. Civ. App. 631, 32 S. W. 810.

To determine this, as said in the *Crocker Case*, it may be shown that the insured has followed the customs observed in other similar factories in this regard. But, in any event, the question of sufficiency of the compliance is one for the jury. (*Percival v. Maine M. M. Ins. Co.*, 33 Me. 242.)

The stipulation that a watchman shall be employed merely requires that some person shall exercise watchful care and supervision over the premises, and it is immaterial that he is not called a watchman. Thus a bookkeeper and barn boss, whose duty it is to supervise the premises by day, is a watchman during that time (*Au Sable Lumber Co. v. Detroit Mfrs.' Mut. Fire Ins. Co.*, 89 Mich. 407, 50 N. W. 870). One employed merely to sleep on the premises is

not a watchman (*Brooks v. Standard Fire Ins. Co.*, 11 Mo. App. 349). And one who is employed by day in a mine half a mile from the mill, and who sleeps in a house 1,000 feet away, is not a watchman (*Wenzel v. Commercial Ins. Co.*, 67 Cal. 438, 7 Pac. 817). Where a sheriff, who had levied on the property, put his deputy in charge to hold possession under the levy, such deputy was not a watchman, within the requirement (*First Nat. Bank v. Insurance Co. of North America*, 50 N. Y. 45, affirming 5 Lans. 203). Generally speaking, however, what constitutes a watchman within the stipulation is for the jury (*Virginia Fire & Marine Ins. Co. v. Buck*, 88 Va. 522, 13 S. E. 973).

(1) Same—Time during which watch must be kept.

Though, as already said, the stipulation does not necessarily mean that there must be a constant watch, yet, if the condition is that there shall be a watchman on duty every night from a certain hour until the usual time of beginning work in the morning, it is not complied with if there is no watch kept between midnight on Saturday night and midnight on Sunday night.

Glendale Woolen Co. v. Protection Ins. Co., 21 Conn. 19, 54 Am. Dec. 309; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136, 86 Am. Dec. 362, reversing 29 Barb. 552, and overruling *Ripley v. Astor Ins. Co.*, 17 How. Prac. 444.

But the question whether there had been a sufficient compliance with the condition was regarded as one for the jury in *Parker v. Bridgeport Ins. Co.*, 10 Gray (Mass.) 302, where in fact no watch was ever kept on the premises after 12 o'clock Saturday night, or at all on Sunday night, other than the workmen sleeping there, who were instructed to, and habitually did, examine the mill with reference to fires before going to bed.

In the leading case of *Houghton v. Manufacturers' Mut. Fire Ins. Co.*, 8 Metc. (Mass.) 114, 41 Am. Dec. 489, where it was stated, in answer to the question, that no watch was kept, but that the mill was examined 30 minutes after work, it was said that this clause meant that the examination should be made 30 minutes after the actual cessation of work and not 30 minutes after the usual time of quitting work. Moreover, it meant 30 minutes after general work had ceased, though a single machine might remain in operation for a special purpose, or certain of the hands might be in the factory for special purposes. But, in view of the further statement that the

mill was sometimes operated extra hours, the insured was bound to make such examination after extra, as well as regular, work.

Where the statement was that there was no watch, "except people working in the mill" at night, it was not a breach that no watch was kept while the mill was shut down. *Prieger v. Exchange Mut. Ins. Co.*, 6 Wis. 89. A statement that a watch is always kept of fire and lights, followed by a statement that watch is kept from the middle of September to the middle of March, does not require a watch to be kept prior to September 15th, when there was no fire or lights in the building. *Nicoll v. American Ins. Co.*, 18 Fed. Cas. 231. So a statement that a watchman is kept on duty does not require that a watchman should be employed while a mill is closed for the winter, in view of a known custom of mills of like character to shut down and remain unoccupied during the winter. *May v. Buckeye Mutual Ins. Co.*, 25 Wis. 291, 3 Am. Rep. 76.

In a recent case (*Central Montana Mines Co. v. Fireman's Fund Ins. Co.* [Minn.] 99 N. W. 1120, rehearing denied 100 N. W. 3) the policy covered certain mining property, consisting of a quartz mill, bunk house, assay house, and other offices necessary to and constituting a part of the entire system. The policy specified specific amounts upon these different buildings, and contained a warranty "that at all times when the property herein described" shall be idle a day and night watchman shall be kept on duty, "provided that, if the property be idle or shut down for more than thirty days at any one time, notice must be given to the company, and permission to remain idle for such time must be indorsed thereon, or the policy shall cease." The quartz mill was not in operation during the winter months, and had not been started up when the fire occurred. The court held, however, that the warranty must be regarded as referring to the whole property, and, as the mine was in operation and the other buildings in use, the property was not idle, so as to require the employment of a watchman.

(j) Same—Necessity that watchman should be on or near premises.

A warranty that a watchman is on duty at all times means on or about the premises, so that a fire thereon would not progress without discovery (*Gibson v. Farmers' & Mechanics' Ins. Co.*, 1 Cin. R. 410, 13 Ohio Dec. 629). So, if the one employed as a watchman habitually sleeps in a building several hundred feet away from the insured premises, the condition is not complied with.

Rankin v. Amazon Ins. Co. (Cal.) 25 Pac. 260; *Rankin v. Amazon Ins. Co.*, 89 Cal. 203, 26 Pac. 872, 23 Am. St. Rep. 460; *Wenzel v.*

Commercial Ins. Co., 67 Cal. 438, 7 Pac. 817; Trojan Min. Co. v. Fireman's Ins. Co., 67 Cal. 27, 7 Pac. 4; Same v. Citizens' Ins. Co. (Cal.) 7 Pac. 6.

So, too, it was not a compliance with the condition where one in charge of a mill only visited the premises each night about 10 o'clock, and again about 3 o'clock in the morning, sleeping the rest of the night in a house about 400 yards from the mill (McKenzie v. Scottish Union & National Ins. Co., 112 Cal. 548, 44 Pac. 922).

If the watchman is actually engaged in watching over the premises, it is not absolutely necessary that he should be actually in the insured building. So, where the watchman was not in the mill proper, but was in front of a blacksmith shop belonging to the mill property, but not insured, about 65 feet from the mill, and was engaged in watching over the premises, the ground where he stood being higher than that on which the mill stood, giving him a view of the whole property, the court held that the warranty was complied with (Sierra M. S. & M. Co. v. Hartford Fire Ins. Co., 76 Cal. 235, 18 Pac. 267). Similarly, a stipulation in a policy on a mill not in operation, providing that a watchman shall be employed about the premises night and day, is complied with as to the day watch if, under instructions, the foreman of the adjoining mill and yards, while at work in such yards, exercises a supervision and watch over the insured premises (Spies v. Greenwich Ins. Co., 97 Mich. 310, 56 N. W. 560).

Conversely it is not a breach of warranty where the watchman, without the knowledge of the insured, was employed by the owner of adjoining premises, which could be overlooked from the insured premises, to keep a watch over such adjoining premises while on the insured premises. Hovey v. American Mut. Ins. Co., 2 Duer (N. Y.) 554.

In Andes Ins. Co. v. Shipman, 77 Ill. 189, the policy covered a distillery. The distillery premises contained other buildings not covered by the policy. It was held that a clause requiring a watchman to be on the premises constantly while the distillery was closed for repairs did not require him to be in any particular building, and therefore there was no breach if at the time of the fire he was in the office building, not connected with the distillery proper.

(k) Same—Temporary absence.

The rule that the watchman must be on the premises does not, however, imply that he cannot leave them, even for a short time;

and it is well settled that the temporary absence of the watchman without the knowledge of the insured is not a breach of the condition.

Kansas Mill Owners' & Manufacturers' Mut. Fire Ins. Co. v. Metcalf, 59 Kan. 383, 53 Pac. 68; *King Brick Mfg. Co. v. Phoenix Ins. Co.*, 164 Mass. 291, 41 N. E. 277; *McGannon v. Michigan Millers' Mut. Fire Ins. Co.*, 127 Mich. 636, 87 N. W. 61, 54 L. R. A. 739, 89 Am. St. Rep. 501; *McGannon v. Millers' Nat. Ins. Co.*, 71 S. W. 160, 171 Mo. 143, 94 Am. St. Rep. 778; *Hanover Fire Ins. Co. v. Gustin*, 40 Neb. 828, 59 N. W. 375; *Virginia Fire & Marine Ins. Co. v. Buck*, 88 Va. 517, 13 S. E. 973.

Especially is this true where the absence is for the purpose of getting his meals or performing some act in the line of his duty.

Au Sable Lumber Co. v. Detroit Mfrs' Mut. Fire Ins. Co., 89 Mich. 407, 50 N. W. 870; *Hanover Fire Ins. Co. v. Gustin*, 40 Neb. 828, 59 N. W. 375; *David Gibson & Co. v. Farmers' & Mechanics' Ins. Co.*, 1 Cin. R. 410, 13 Ohio Dec. 629.

The rule is not opposed by *Trojan Mining Co. v. Fireman's Ins. Co.*, 67 Cal. 27, 7 Pac. 4, though the case is often cited as an authority for the principle that the temporary absence of the watchman is fatal to the policy. Such was not, however, the decision in the case. The complaint alleged that a watchman was employed by plaintiff in and upon the premises day and night, and was upon the premises at the time of the fire. The answer denied that a watchman was in and upon the premises day and night, and averred that at the time of the fire and for more than two hours prior thereto no watchman was in and upon the premises. The case was decided on the distinct issue thus presented, and not on general principles. The decision in this case was followed in *Trojan Mining Co. v. Citizens' Ins. Co. (Cal.)* 7 Pac. 6.

An application for insurance contained a clause requiring a record to be kept of a watchman's performance of duty. It appeared that such record could not be kept without a watch clock, but no such clock was on the premises, and this fact was well known to the company's agents, who made the contract. It was held that, since the agents knew that the record could not be kept when they made the contract, the company could not defend on the ground that no record was kept. *Andes Ins. Co. v. Shipman*, 77 Ill. 189.

(1) Same—Sleeping while on duty.

In accordance with the principle that the condition as to the employment of a watchman does not imply that a constant watch

should be kept, or that the watchman should be constantly moving about on the lookout for fire, it has been held that when a watchman makes regular rounds of the premises there is a compliance with the condition, though between the rounds he sits down and reads (*London & Lancashire Ins. Co. v. Gerteisen*, 106 Ky. 815, 51 S. W. 617). The fact that the watchman in the course of the night occasionally overlooks adjoining premises is not a breach (*Hovey v. American Mut. Ins. Co.*, 2 Duer [N. Y.] 554). In other words, while it is the duty of the insured to employ an ordinarily competent and reliable watchman, he does not warrant that such watchman will never take his eyes off the premises, or even that he will always be awake. It has, therefore, been held that the fact that the watchman was asleep when the fire broke out does not show a breach of the condition.

Andes Ins. Co. v. Shipman, 77 Ill. 189; *Phoenix Assur. Co. of London, England, v. Coffman*, 10 Tex. Civ. App. 631, 32 S. W. 810; *Burlington Fire Ins. Co. v. Coffman*, 13 Tex. Civ. App. 439, 35 S. W. 406.

This principle has been applied, even where the watchman was asleep in a house 30 rods from the insured premises (*Power v. City Fire Ins. Co.*, 8 Phila. [Pa.] 566).

(m) Same—Negligence of watchman.

The principles laid down in the cases discussed in the preceding subdivisions are to a great extent based on the theory that the duty of a watchman is performed if he exercises the same degree of care and diligence that an ordinarily prudent person would exercise (*Kansas Mill Owners' & Manufacturers' Mut. Fire Ins. Co. v. Metcalf*, 59 Kan. 383, 53 Pac. 68). Moreover, since mere negligence on the part of insured or his servants is a risk covered by the policy, the contract cannot be forfeited because of the negligence of the watchman.

King Brick Mfg. Co. v. Phoenix Ins. Co., 164 Mass. 291, 41 N. E. 277; *Phoenix Assur. Co. v. Coffman*, 10 Tex. Civ. App. 631, 32 S. W. 810; *Burlington Fire Ins. Co. v. Coffman*, 13 Tex. Civ. App. 439, 35 S. W. 406.

As a watchman's diligence cannot be measured by the amount of his pay, evidence as to the amount is not admissible. *Virginia Fire & Marine Ins. Co. v. Buck*, 88 Va. 517, 13 S. E. 973.

This principle has been discussed in some of the California cases, in view of the statute (Civ. Code, § 2629) declaring that negligence

of the insured or his agents shall not exonerate the insurer from liability for the loss. Thus, in *Sierra M., S. & M. Co. v. Hartford Fire Ins. Co.*, 76 Cal. 235, 18 Pac. 267, it was said that, even if the watchman was not actually on the premises at the time the fire broke out, this was a mere negligence on his part, which did not excuse the insurer. On the other hand, the statute was regarded as inapplicable where the insured has failed to employ a watchman to perform the duties required by the condition.

Rankin v. Amazon Ins. Co. (Cal.) 25 Pac. 260; *Rankin v. Amazon Ins. Co.*, 80 Cal. 203, 26 Pac. 872, 23 Am. St. Rep. 460; *McKenzie v. Scottish Union & National Ins. Co.*, 112 Cal. 548, 44 Pac. 922.

(n) Same—Effect of breach of condition.

It is, of course, elementary that a breach of the stipulation for the employment of a watchman will forfeit the policy.

McKenzie v. Scottish Union & National Ins. Co., 112 Cal. 548, 44 Pac. 922; *Glendale Woolen Co. v. Protection Ins. Co.*, 21 Conn. 19, 54 Am. Dec. 809; *Blumer v. Phoenix Ins. Co.*, 45 Wis. 622.

In *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136, 86 Am. Dec. 362, it was said that the materiality of the condition did not affect the question; but it has generally been held that the breach must be material or increase the risk.

Parker v. Bridgeport Ins. Co., 10 Gray (Mass.) 302; *King Brick Mfg. Co. v. Phoenix Ins. Co.*, 164 Mass. 291, 41 N. E. 277; *Grubbs v. Virginia Fire & Marine Ins. Co.*, 110 N. C. 108, 14 S. E. 516.

In *Miller v. Germania Fire Ins. Co.*, 34 Leg. Int. (Pa.) 339, the loss occurred while there was no watchman; and it has been held in New York that the failure to keep a watchman would forfeit the policy, whether the loss was due to such failure or not.

Ripley v. Aetna Ins. Co., 30 N. Y. 136, 86 Am. Dec. 362; *First Nat. Bank v. Insurance Co. of North America*, 50 N. Y. 45.

In recent cases in other jurisdictions it has, however, been held that the failure to have a watchman on the premises must have contributed to loss.

London & Lancashire Ins. Co. v. Gertelsen, 106 Ky. 815, 51 S. W. 617; *Hart v. Niagara Fire Ins. Co.*, 9 Wash. 620, 38 Pac. 213, 27 L. R. A. 86.

A representation that a constant watch is kept is not descriptive of the risk, within the statute of Maine (Rev. St. c. 49, § 20), de-

claring that erroneous descriptions do not prevent recovery, unless the error materially increases the risk (*King Brick Mfg. Co. v. Phoenix Ins. Co.*, 164 Mass. 291, 41 N. E. 277). In *McGannon v. Michigan Millers' Mut. Fire Ins. Co.*, 127 Mich. 636, 87 N. W. 61, 54 L. R. A. 739, 89 Am. St. Rep. 501, the Michigan statute (Comp. Laws 1897, § 5180), providing that no policy of fire insurance should thereafter be declared void by the insurer for the breach of any conditions, if insurer has not been injured by such breach, or where loss has not occurred during such breach, was applied to the condition relative to employment of watchman.

19. BREACH OF "IRON SAFE CLAUSE" AS GROUND OF FORFEITURE.

- (a) Nature and purpose of "iron safe clause."
- (b) Same—Construction as a warranty.
- (c) What constitutes compliance with condition in general.
- (d) Taking and keeping inventory.
- (e) Keeping books of account.
- (f) Keeping books and papers in fireproof safe.
- (g) Effect of breach of condition.

(a) Nature and purpose of "iron safe clause."

Among the important stipulations incorporated into policies on stock in trade is what is known as the "iron safe clause." This clause provides in substance that the assured will take a complete itemized inventory of stock on hand at least once in each calendar year, and, unless such inventory has been taken within twelve calendar months prior to the date of the policy, one shall be taken in detail within thirty days after such date. The assured also agrees to keep a set of books, showing a complete record of business transacted, including all purchases and sales, both for cash and credit, together with the last inventory of said business, and further covenants and agrees to keep such books and inventory securely locked in a fireproof safe at night, and at all times when the store mentioned in the policy is not actually open for business, or in some secure place not exposed to a fire which would destroy the house where such business is carried on, "and in case of loss the assured agrees and covenants to produce such books and inventory, and in the event of a failure to produce the same this policy shall be deemed

null and void, and no suit or action at law shall be maintained thereon for any such loss."

The latter portion of the clause, set off in quotation marks, relates particularly to procedure after loss, and the construction and effect thereof does not enter into the present discussion. But, so far as it relates to the conduct of the insured prior to the loss, it cannot be regarded as merely incidental and of importance only as it may be related to the furnishing of proofs of loss. *Scottish Union & National Ins. Co. v. Stubbs*, 27 S. E. 180, 98 Ga. 754.

The object of the clause is to facilitate the ascertainment of the extent of the loss.

Georgia Home Ins. Co. v. Allen, 119 Ala. 436, 24 South. 399; *Sun Mut. Ins. Co. v. Dudley*, 65 Ark. 240, 45 S. W. 539; *Continental Fire Ins. Co. v. Cummings* (Tex. Civ. App.) 78 S. W. 378.

It is a perfectly reasonable condition, is valid, and is binding on the assured, in the absence of fraud.

Georgia Home Ins. Co. v. Allen, 30 South. 537, 123 Ala. 451; *Southern Ins. Co. v. Parker*, 61 Ark. 207, 32 S. W. 507; *Germania Ins. Co. v. Bromwell*, 62 Ark. 43, 34 S. W. 83; *Sun Mut. Ins. Co. v. Dudley*, 65 Ark. 240, 45 S. W. 539; *Liverpool & L. & G. Ins. Co. v. Morris*, 79 Ga. 666, 5 S. E. 125; *Southern Fire Ins. Co. v. Knight*, 111 Ga. 622, 36 S. E. 821, 52 L. R. A. 70, 78 Am. St. Rep. 216; *Farmers' Fire Ins. Co. v. Bates*, 65 Ill. App. 37; *Niagara Fire Ins. Co. v. Forehand*, 169 Ill. 626, 48 N. E. 830; *Sowers v. Mutual Fire Ins. Co.*, 85 N. W. 763, 113 Iowa, 551; *Maupin v. Scottish Union & National Ins. Co.*, 45 S. E. 1008, 53 W. Va. 557.

The clause applies only to insurance on stocks of merchandise; and this is true, though the building and store furniture and fixtures are also covered by the policy.

Hanover Fire Ins. Co. v. Crawford, 121 Ala. 258, 25 South. 912, 77 Am. St. Rep. 55; *Sowers v. Mutual Fire Ins. Co.*, 113 Iowa, 551, 85 N. W. 763; *Mitchell v. Mississippi Home Ins. Co.*, 72 Miss. 53, 18 South. 86, 48 Am. St. Rep. 535; *Miller v. Delaware Ins. Co.* (Okl.) 75 Pac. 1121, 65 L. R. A. 173; *Roberts, Willis & Taylor Co. v. Sun Mutual Ins. Co.*, 13 Tex. Civ. App. 64, 35 S. W. 955, writ of error denied 37 S. W. 311, 90 Tex. 78; *Palatine Ins. Co. v. McKinley* (Tex. Civ. App.) 37 S. W. 1133; *Sun Mut. Ins. Co. v. Tufts*, 50 S. W. 180, 20 Tex. Civ. App. 147.

(b) Same—Construction as a warranty.

Though the decisions are by no means uniform, the rule that the "iron safe clause," where properly made a part of the policy, is a

promissory warranty, may be regarded as settled by the weight of authority.

Reference may be made to the following cases: *Western Assur. Co. v. Redding*, 68 Fed. 708, 15 C. C. A. 619; *Western Assur. Co. v. Althelmer Bros.*, 58 Ark. 565, 25 S. W. 1067; *Southern Ins. Co. v. Parker*, 61 Ark. 207, 32 S. W. 507; *Scottish Union & National Ins. Co. v. Stubbs*, 27 S. E. 180, 98 Ga. 754; *Southern Fire Ins. Co. v. Knight*, 111 Ga. 622, 36 S. E. 821, 52 L. R. A. 70, 78 Am. St. Rep. 216; *Forehand v. Niagara Ins. Co.*, 58 Ill. App. 161; *Farmers' Fire Ins. Co. v. Bates*, 60 Ill. App. 89; *German Ins. Co. v. Bates*, 60 Ill. App. 43; *Farmers' Ins. Co. v. Bates*, 65 Ill. App. 87; *Citizens' Ins. Co. v. Sprague*, 8 Ind. App. 275, 35 N. E. 720; *Hanover Fire Ins. Co. v. Dole*, 20 Ind. App. 333, 50 N. E. 772; *Connecticut Fire Ins. Co. v. Jeary*, 83 N. W. 78, 60 Neb. 338, 51 L. R. A. 698; *Kelley-Goodfellow Shoe Co. v. Liberty Ins. Co.*, 8 Tex. Civ. App. 227, 28 S. W. 1027; *Standard Fire Ins. Co. of Kansas City v. Willock* (Tex. Civ. App.) 29 S. W. 218; *American Fire Ins. Co. v. First Nat. Bank* (Tex. Civ. App.) 30 S. W. 384; *Home Ins. Co. v. Cary*, 10 Tex. Civ. App. 300, 31 S. W. 321; *American Fire Ins. Co. v. Center* (Tex. Civ. App.) 33 S. W. 554; *Brown v. Palatine Ins. Co.*, 89 Tex. 590, 35 S. W. 1060; *Northwestern Nat. Ins. Co. v. Mize* (Tex. Civ. App.) 34 S. W. 670; *Roberts, Willis & Taylor Co. v. Sun Mutual Ins. Co.*, 19 Tex. Civ. App. 338, 48 S. W. 559; *Fire Association v. Masterson*, 25 Tex. Civ. App. 518, 61 S. W. 962; *Fire Association v. Calhoun*, 28 Tex. Civ. App. 409, 67 S. W. 153; *Delaware Ins. Co. v. Monger & Henry* (Tex. Civ. App.) 74 S. W. 792; *Ætna Ins. Co. v. Fitze* (Tex. Civ. App.) 78 S. W. 370; *Maupin v. Scottish Union & National Ins. Co.*, 53 W. Va. 557, 45 S. E. 1003; *Rosenthal Clothing & Dry Goods Co. v. Scottish Union & National Ins. Co.* (W. Va.) 46 S. E. 1021.

In view of the general rule that a statement or stipulation, to be construed as a warranty, must appear in the policy or be made a part thereof by appropriate reference, it is, of course, necessary that the iron safe clause, to have the effect of a promissory warranty, should be made a part of the policy. The clause is, however, seldom printed in the body of the policy. Generally it is printed on a slip or rider, and attached to the policy when stock in trade is insured. In many instances the clause is part of the slip on which the description of the property is written. When properly attached, as by paste or mucilage, so that it appears in the proper sequence of the clauses and conditions, and is referred to as forming a part of the policy (identified by number), it becomes a part of the contract and a warranty.

Lozano v. Palatine Ins. Co., 24 C. C. A. 85, 78 Fed. 278; *Goldman v. North British Mercantile Ins. Co.*, 48 La. Ann. 223, 19 South.

182; *Crigler v. Standard Fire Ins. Co.*, 49 Mo. App. 11; *Kelley-Goodfellow Shoe Co. v. Liberty Ins. Co.*, 8 Tex. Civ. App. 227, 28 S. W. 1027; *American Fire Ins. Co. v. First Nat. Bank* (Tex. Civ. App.) 80 S. W. 384; *Home Ins. Co. v. Cary*, 10 Tex. Civ. App. 800, 31 S. W. 321; *American Fire Ins. Co. v. Center* (Tex. Civ. App.) 83 S. W. 554; *Allred v. Hartford Fire Ins. Co.* (Tex. Civ. App.) 87 S. W. 95; *City Drug Store v. Scottish Union & National Ins. Co.* (Tex. Civ. App.) 44 S. W. 21; *Couch & Gilliland v. Home Protection Fire Ins. Co.* (Tex. Civ. App.) 73 S. W. 1077.

In many of the foregoing cases stress is laid on the fact that the iron safe clause is part of the rider containing the description of the property, and consequently, unless such rider is to be regarded as a part of the contract, there would be no policy.

An allegation that there was attached to and made a part of the policy an iron safe clause, which is set out in *hæc verba*, is a sufficient allegation that such clause properly constituted a part of the policy. *City Drug Store v. Scottish Union & National Ins. Co.* (Tex. Civ. App.) 44 S. W. 21.

On the other hand, if the slip or rider containing the clause is not properly attached to the policy, the clause can be regarded as a representation only. Thus, in *Goddard v. East Texas Fire Ins. Co.*, 67 Tex. 69, 1 S. W. 906, 60 Am. Rep. 1, the rider was attached to the policy after the description of the property and in the middle of a sentence, with which it had no proper connection, so that, when taken in connection with the context, it was devoid of meaning; nor was there any reference thereto as forming part of the policy. The court held, therefore, that it could not be regarded as a warranty, but as a representation only. So, where the rider was attached to the margin of the policy (*Georgia Home Ins. Co. v. McKinley*, 14 Tex. Civ. App. 7, 37 S. W. 606), and not referred to in the body of the policy, so as to identify it as a part thereof, the clause was regarded as a representation.

In *Virginia Fire & Marine Ins. Co. v. Morgan*, 90 Va. 290, 18 S. E. 191, where the insured agreed in the application to keep his books of account in an iron safe, the application being made a part of the policy, the stipulation was regarded as a warranty. But where the insured answered in the affirmative the question, "Do you agree to keep merchandise and cash accounts?" (*Ætna Ins. Co. v. Norman*, 12 Ind. App. 652, 40 N. E. 1116), the statement was regarded as referring to the present only and consequently not a continuing warranty. So a statement that account of stock is taken every three months was held not to be a continuing warranty (*Wynne v. Liverpool & London & Globe Ins. Co.*, 71 N. C. 121).

A condition in the policy that the account of loss shall be sustained, "if required, by books of accounts and other vouchers," does not imply a warranty on the part of the insured to keep books of account (*Wightman v. Western Mar. & Fire Ins. Co.*, 8 Rob. [La.] 442).

The Court of Appeals of Kentucky has adopted the rule that the iron safe clause is not a warranty. The theory of the court is that the clause is without consideration, and is in its essential features merely a provision for the preservation of testimony. Moreover, it is not material to the risk, within Act Feb. 4, 1874, providing that misrepresentations, unless material to the risk or fraudulent, shall not forfeit the policy.

The rule is asserted in *Phoenix Ins. Co. v. Angel*, 38 S. W. 1067, 18 Ky. Law Rep. 1084; *Mechanics' & Traders' Ins. Co. v. Floyd*, 49 S. W. 548, 20 Ky. Law Rep. 1538; *Citizens' Ins. Co. v. Crist*, 56 S. W. 658, 22 Ky. Law Rep. 47; *Niagara Fire Ins. Co. v. Heflin*, 60 S. W. 393, 22 Ky. Law Rep. 1212; *Germania Ins. Co. v. Ashby*, 112 Ky. 308, 65 S. W. 611, 99 Am. St. Rep. 295.

But, even if the iron safe clause is to be construed as a promissory warranty, it must be regarded as in the nature of a condition subsequent.

Western Assur. Co. v. Redding, 68 Fed. 708, 15 C. C. A. 619; *Liverpool & London & Globe Ins. Co. v. Kearney*, 94 Fed. 314, 36 C. C. A. 285; *Georgia Home Ins. Co. v. Allen*, 119 Ala. 436, 24 South. 399; *Hanover Fire Ins. Co. v. Crawford*, 121 Ala. 258, 25 South. 912, 77 Am. St. Rep. 55; *Niagara Fire Ins. Co. v. Heflin*, 22 Ky. Law Rep. 1212, 60 S. W. 393; *Germania Ins. Co. v. Ashby*, 112 Ky. 308, 65 S. W. 611, 99 Am. St. Rep. 295; *Kingman v. Lancashire Ins. Co.*, 54 S. C. 599, 32 S. E. 762; *McNutt v. Virginia Fire & Marine Ins. Co.* (Tenn. Ch. App.) 45 S. W. 61.

(c) What constitutes compliance with condition in general.

On the theory that the iron safe clause is a promissory warranty, and therefore governed by the rules that usually obtain in the case of warranties, it has been held in some jurisdictions that strict compliance with the terms of the clause is necessary.

This is the rule laid down in *Western Assur. Co. v. Althelmer Bros.*, 58 Ark. 565, 25 S. W. 1067; *Farmers' Fire Ins. Co. v. Bates*, 60 Ill. App. 39; *German Ins. Co. v. Bates*, 60 Ill. App. 43; *Goldman v. North British Mercantile Ins. Co.*, 48 La. Ann. 223, 19 South. 132; *Northwestern Nat. Ins. Co. v. Mize* (Tex. Civ. App.) 34 S. W. 670; *L. Rosenthal Clothing & Dry Goods Co. v. Scottish Union & National Ins. Co.* (W. Va.) 46 S. E. 1021; *Virginia Fire & Marine Ins. Co. v. Morgan*, 90 Va. 290, 18 S. E. 191.

It is to be noted, however, that in the *Alzheimer Case* there was in fact a strict compliance, and in the *Goldman Case* there was not even a substantial compliance. The rule of strict compliance seems to have been modified in later decisions in Illinois (*Fire Ass'n v. Short*, 100 Ill. App. 553), and has been overruled in Texas (*Brown v. Palatine Ins. Co.*, 89 Tex. 590, 35 S. W. 1060).

On the other hand, on the theory that, though the iron safe clause may be a promissory warranty, it is in effect a condition subsequent, which should be construed strictly against the right of forfeiture (*McNutt v. Virginia Fire & Marine Ins. Co.* [Tenn. Ch. App.] 45 S. W. 61), it has been held in other jurisdictions and by the weight of authority that a substantial compliance with the terms of the clause is sufficient.

Reference to the following cases is deemed sufficient: *Jones v. Southern Ins. Co.* (C. C.) 38 Fed. 19; *Western Assur. Co. v. Redding*, 68 Fed. 708, 15 C. C. A. 619; *Western Assur. Co. v. McGlathery*, 115 Ala. 213, 22 South. 104, 67 Am. St. Rep. 26; *Georgia Home Ins. Co. v. Allen*, 119 Ala. 436, 24 South. 399; *Liverpool & L. & G. Ins. Co. v. Kearney*, 2 Ind. T. 67, 46 S. W. 414, affirmed in 94 Fed. 314, 36 C. C. A. 265; *Burnett v. American Central Ins. Co.*, 68 Mo. App. 843; *Meyer Bros. v. Insurance Co. of North America*, 73 Mo. App. 166; *Malin v. Mercantile Town Mut. Ins. Co.*, 105 Mo. App. 625, 80 S. W. 56; *Connecticut Fire Ins. Co. v. Jeary*, 60 Neb. 338, 83 N. W. 78; *McNutt v. Virginia Fire & Marine Ins. Co.* (Tenn. Ch. App.) 45 S. W. 61; *Brown v. Palatine Ins. Co.*, 89 Tex. 590, 35 S. W. 1060, reversing 34 S. W. 462; *Royal Ins. Co. v. Brown* (Tex. Civ. App.) 36 S. W. 591; *German Ins. Co. v. Pearlstone*, 18 Tex. Civ. App. 706, 45 S. W. 832; *Western Assur. Co. v. Kemendo*, 94 Tex. 367, 60 S. W. 661; *Fire Association v. Calhoun*, 28 Tex. Civ. App. 409, 67 S. W. 153; *Ætna Ins. Co. v. Fitze* (Tex. Civ. App.) 78 S. W. 370; *Continental Fire Ins. Co. v. Cummings* (Tex. Civ. App.) 78 S. W. 378; *Virginia Fire & Marine Ins. Co. v. Cummings* (Tex. Civ. App.) 78 S. W. 716; *Phoenix Assur. Co. v. Stenson* (Tex. Civ. App.) 79 S. W. 866; *Pennsylvania Fire Ins. Co. v. Brown* (Tex. Civ. App.) 36 S. W. 590, on rehearing.

But the rule of substantial compliance does not apply when there has been no compliance (*Fire Ass'n v. Masterson*, 25 Tex. Civ. App. 518, 61 S. W. 962), or where there has been a clear case of negligence on the part of the insured (*Rives v. Fire Ass'n* [Tex. Civ. App.] 77 S. W. 424).

In a leading Nebraska case (*Connecticut Fire Ins. Co. v. Jeary*, 83 N. W. 78, 60 Neb. 338, 51 L. R. A. 698) it has been said that the various provisions of the iron safe clause should be construed con-

jointly, and, to work a forfeiture of the policy, there must be a failure to perform all the conditions named, and not any particular one of them. This principle has been reasserted in *Connecticut Fire Ins. Co. v. Waugh*, 60 Neb. 353, 83 N. W. 1118.

(d) Taking and keeping inventory.

One of the provisions of the iron safe clause is that the insured shall within a certain period or at stated times take an inventory of his stock. As has been said, the iron safe clause applies only to insurance on stocks of merchandise. Consequently it will apply where the keeper of a billiard room carries a stock of tobacco and confectionery in connection with his business (*Sowers v. Mutual Fire Ins. Co.*, 113 Iowa, 551, 85 N. W. 763).

But a provision, in a policy on a ginhouse, that a "correct account of the cotton put into and taken out of the ginhouse" shall be kept, does not apply when no cotton is insured and no claim made for the loss of cotton. *Hartford Fire Ins. Co. v. Walker* (Tex. Civ. App.) 60 S. W. 820.

The absence of such a provision in the clause cannot, however, be supplied by the provision relative to keeping and producing the last inventory (*Fire Ass'n of Philadelphia v. Short*, 100 Ill. App. 553).

A statement that an inventory is taken every three months, if construed as a promissory warranty, does not require that such inventory must be taken on the exact day three months after a prior one was taken (*Wynne v. Liverpool & L. & G. Ins. Co.*, 71 N. C. 121). So it was said, in *Forehand v. Niagara Ins. Co.*, 58 Ill. App. 161, that a condition requiring the insured to take an inventory of the stock at least once a year, and keep books of account correctly detailing purchases and sales, does not require him to take an inventory immediately upon obtaining the insurance.

The judgment in this case was reversed in *Niagara Fire Ins. Co. v. Forehand*, 169 Ill. 626, 48 N. E. 830, because the Appellate Court also held that it was not necessary that the insured should at once begin to keep a proper set of books of account.

The provision as to taking inventory may provide that an inventory shall be taken at least once a year. Under such a provision it has been held that the insured is entitled to a reasonable time within which to take an inventory after the policy issued (*Allen v. Milwaukee Mechanics' Ins. Co.*, 106 Mich. 204, 64 N. W. 15). Other cases have gone even further, and have held that, though the

policy runs for only a year, the insured has practically the whole year within which to take an inventory, and a failure to take it before the loss is not ground for forfeiture, if the loss occurs before the end of the year.

Citizens' Ins. Co. v. Sprague, 8 Ind. App. 275, 35 N. E. 720; *Hanover Fire Ins. Co. v. Dole*, 20 Ind. App. 333, 50 N. E. 772; *North British & Merc. Ins. Co. v. Rudy*, 28 Ind. App. 472, 60 N. E. 9; *McCollum v. Niagara Fire Ins. Co.*, 61 Mo. App. 352; *Howerton v. Iowa State Ins. Co.*, 80 S. W. 27, 105 Mo. App. 575.

So, where the condition is that, if no inventory has been taken within 12 months, the insured shall take an inventory within 30 days from the issuance of the policy, he has the whole period within which to comply with the provision, and a failure to take an inventory will not affect his rights, if the loss occurs within the 30 days (*Continental Ins. Co. v. Waugh*, 60 Neb. 348, 83 N. W. 81). If the policy is assigned to a purchaser of the goods, the assignee has 30 days from the date of the assignment within which to take the inventory (*Bayless v. Merchants' Town Mut. Ins. Co.*, 106 Mo. App. 684, 80 S. W. 289).

A clause providing that the insured shall take an inventory at least once in each calendar year, that, unless one had been taken within 12 months prior to the date of the policy, one should be taken within 30 days thereafter, and that assured should keep such inventory, "and also the last preceding inventory," if such has been taken, requires that the inventory taken preceding the date of the policy should be kept (*Continental Ins. Co. v. Cummings* [Tex. Sup.] 81 S. W. 705). But the words "last preceding inventory" do not refer to an inventory taken more than 12 months prior to the issuance of the policy (*Continental Ins. Co. of New York v. Waugh*, 60 Neb. 348, 83 N. W. 81). If the last inventory has been kept, and exhibited after the fire, its subsequent loss is not ground for forfeiture (*Pelican Ins. Co. v. Wilkerson*, 53 Ark. 353, 13 S. W. 1103).

Invoices of stock purchased are not an inventory, within the meaning of the clause requiring an inventory to be taken and kept.

Southern Fire Ins. Co. v. Knight, 36 S. E. 821, 111 Ga. 622; *Fire Association of Philadelphia v. Masterson*, 25 Tex. Civ. App. 518, 61 S. W. 962. Reference may also be made to *Home Ins. Co. of New York v. Delta Bank*, 71 Miss. 608, 15 South. 932, where it was held that, if no inventory had been taken, the insured was not obliged to produce invoices, under the clause requiring the production of last inventory.

The words "last inventory" refer only to the inventory of the goods insured, and fixtures need not be included; nor is the inventory incomplete because some item of the loss claimed does not appear therein (*Manchester Fire Ins. Co. v. Simmons*, 12 Tex. Civ. App. 607, 35 S. W. 722). The insured is required to take such an inventory as will show the character of the goods, and a mere summary of the stock is not sufficient to comply with the clause.

Delaware Ins. Co. v. Monger & Henry (Tex. Civ. App.) 74 S. W. 792;
Fire Ass'n of Philadelphia v. Calhoun, 67 S. W. 153, 28 Tex. Civ. App. 409.

In *Roberts, Willis & Taylor Co. v. Sun Mut. Ins. Co.*, 13 Tex. Civ. App. 64, 35 S. W. 955, decided in the fourth district, the court took the position that a summary was sufficient; but on the second appeal, heard in the fifth district and reported in 19 Tex. Civ. App. 338, 48 S. W. 559, the court held that a mere summary was insufficient, and subsequently a writ of error was denied by the Supreme Court. The rule in Texas must therefore be regarded as settled.

Evidence that other insurance policies require "itemized inventories" is not admissible to prove that the term "inventory," standing without qualification in a policy in suit, means only a summary of an inventory. *Roberts, Willis & Taylor Co. v. Sun Mut. Ins. Co.*, 19 Tex. Civ. App. 338, 48 S. W. 559.

(c) Keeping books of account.

The iron safe clause provides that the insured shall "keep a set of books, showing a complete record of business transacted, including all purchases and sales, both for cash and credit." Under this one who is insured in the dual capacity of owner and warehouseman must keep accounts showing his transactions in both capacities (*Rives v. Fire Ass'n of Philadelphia* [Tex. Civ. App.] 77 S. W. 424). It is complied with if the books begin with the date of the issuance of the policy (*Liverpool & L. & G. Ins. Co. v. Sheffy*, 71 Miss. 919, 16 South. 307); and where the policy was transferred with the consent of the company, and an inventory taken immediately thereafter, a set of books showing a record of transactions from the date of the transfer is a sufficient compliance with the clause (*Scottish Union & National Ins. Co. v. Moore* [Tex. Civ. App.] 81 S. W. 573).

In several cases, where the iron safe clause also contained the provision requiring an inventory to be taken within a specified

time after the policy issued, it has been held that, as the books of account would be of little or no value until the inventory was taken, the provisions must be read together, and it would be sufficient if the keeping of books was begun when the inventory was taken.

Bayless v. Merchants' Town Mut. Ins. Co., 80 S. W. 289, 106 Mo. App. 684; *Continental Ins. Co. v. Waugh*, 60 Neb. 348, 83 N. W. 81.

This doctrine has even been extended in some instances to the cases where the clause provides that inventory shall be taken annually, and it has been said that the keeping of books need not begin until the inventory was taken, though it was also held that the insured had the whole year within which to take an inventory.

Hanover Fire Ins. Co. v. Dole, 20 Ind. App. 333, 50 N. E. 772; *North British & Merc. Ins. Co. v. Rudy*, 26 Ind. App. 472, 60 N. E. 9.

That this application of the principle is manifestly unreasonable seems to have been appreciated in only one case. In *Niagara Ins. Co. v. Forehand*, 169 Ill. 626, 48 N. E. 830, the Supreme Court of Illinois reversed the Appellate Court (58 Ill. App. 161) on this very point, holding that the provision as to taking inventory did not qualify the requirement as to keeping books of account.

The provision as to keeping books of account requires that the insured shall keep such books in such a manner as that they shall constitute a record of business transactions which a person of ordinary intelligence accustomed to accounts can understand.

Liverpool & London & Globe Ins. Co. v. Kearney, 21 Sup. Ct. 326, 180 U. S. 132, 45 L. Ed. 460; *American Cent. Ins. Co. v. Ware*, 46 S. W. 129, 65 Ark. 336; *Burnham v. Greenwich Ins. Co.*, 63 Mo. App. 85; *Burnett v. American Central Ins. Co.*, 68 Mo. App. 343; *Connecticut Fire Ins. Co. v. Clark*, 24 Ohio Cir. Ct. R. 33.

It is not necessary that the books should be kept according to any particular system, nor that they should be such a scientific system of books as would satisfy an expert accountant in a large business house in a city.

Liverpool & London & Globe Ins. Co. v. Kearney, 21 Sup. Ct. 326, 180 U. S. 132, 45 L. Ed. 460, affirming 36 O. C. A. 265, 94 Fed. 314; *Western Assur. Co. v. McGlathery*, 115 Ala. 213, 22 South. 104, 67 Am. St. Rep. 26; *Liverpool & L. & G. Ins. Co. v. Ellington*, 94 Ga. 785, 21 S. E. 1006; *McNutt v. Virginia Fire & Marine Ins. Co.* (Tenn. Ch. App.) 45 S. W. 61.

So, where the insured was in business in a little country town in Florida, and his books, kept in the most primitive style, were far from being what a good accountant would consider a complete set of books (*Western Assur. Co. v. Redding*, 68 Fed. 708, 15 C. C. A. 619, 30 U. S. App. 442), the court held that, if the insured kept a set of books which were as good as ordinarily kept in such a store and business, and exercised good faith in the matter, his policy was not avoided merely by the fact that the books were not what an expert would consider a complete set of books. If his books are kept in the manner customary with merchants (*Jones v. Southern Ins. Co.* [C. C.] 38 Fed. 19), and as elaborate and complete as is usually the case in stores of like character (*Burnett v. American Cent. Ins. Co.*, 68 Mo. App. 343), it is sufficient. Whether the books are sufficient, within these principles, is a question for the jury (*Western Assur. Co. v. Alzheimer Bros.*, 58 Ark. 565, 25 S. W. 1067); and an expert cannot testify, in regard to a particular set of books, that he never saw anything like it before (*Morris v. Imperial Ins. Co.*, 106 Ga. 461, 32 S. E. 595).

The books must show with reasonable certainty a complete record of the insured's business transactions, including purchases and sales for cash or credit (*Phoenix Ins. Co. v. Padgitt* [Tex. Civ. App.] 42 S. W. 800). If they do not show these facts, so as to furnish the data necessary to enable the insurers to test the accuracy of the accounts delivered to them, or afford any satisfactory idea of the amount of goods on hand and destroyed by the fire, the insured cannot recover (*Pelican Ins. Co. v. Wilkerson*, 53 Ark. 353, 13 S. W. 1103). But occasional clerical errors or omissions do not render the books insufficient (*Ætna Ins. Co. v. Fitze* [Tex. Civ. App.] 78 S. W. 370). Generally it is sufficient if the amount of purchases and sales can be ascertained, and cash transactions distinguished from the credit, though it may be difficult to do it (*Liverpool & L. & G. Ins. Co. v. Ellington*, 94 Ga. 785, 21 S. E. 1006). But the fact that the books were not so kept as to furnish proof against the customer to whom credit has been extended, in event of suit against him, does not render them insufficient as to the insurer. They are admissions that the goods have been sold out of the stock, and their sufficiency, as between the merchant and his customer, is no concern of the insurer. (*German Ins. Co. v. Pearlstone*, 18 Tex. Civ. App. 706, 45 S. W. 832.) So, where the insured did not pretend to sell for credit, but in some instances extended credit for insignificant amounts, entering the transac-

tions as cash sales, putting credit tickets in the cash, whether these were ever paid by the customer was no concern of the insurer, and it was not necessary that these should be entered as credit sales, if the insured intended to treat them as cash sales (*American Cent. Ins. Co. v. Ware*, 65 Ark. 336, 46 S. W. 129). In the same case it was said that small credit sales charged in a memorandum book kept by a clerk, from which they would be erased, and the amount entered as a cash sale when paid, are properly recorded, and such memorandum book will be treated as one of the books of the firm. If, however, there were regular credit sales, which were purposely not entered in the books, with intent to deceive the insurer, there was no compliance with the provision (*Beville v. Merchants' Ins. Co.* [Tex. Civ. App.] 46 S. W. 914).

It is not a breach of the clause that no account is kept of the goods taken out by the insured for his own consumption (*Ætna Ins. Co. v. Fitze* [Tex. Civ. App.] 78 S. W. 370); nor because, in exchanging goods for country produce, no entries are made until the produce is sold, when the proceeds are entered in the cash account (*Meyer v. Insurance Co. of North America*, 73 Mo. App. 166). The requirement is not complied with by the preservation of slips from a cash register (*Monger & Henry v. Delaware Ins. Co.* [Tex. Sup.] 79 S. W. 7, affirming [Tex. Civ. App.] 74 S. W. 792). The clause is not complied with where the only record of cash sales kept is a cashbook, in which no detailed transactions are recorded and only the aggregate amount of cash derived from all sources is set down at the end of the day (*Everett-Ridley-Ragan Co. v. Traders' Ins. Co.* [Ga.] 48 S. E. 918). But, where insured had been in business less than a year when his property was burned, and all the original invoices, showing the amount of goods purchased, were preserved, and his cash sales were deposited each day in a bank, thereby preserving a complete record thereof, and he had a small book showing his credit sales, there was no breach of the clause requiring him to keep a complete set of books, showing the record of his business, etc. (*First Nat. Bank v. Cleland* [Tex. Civ. App.] 82 S. W. 337).

A daybook and ledger, showing merely credit sales, are not sufficient. *German Ins. Co. v. Bates*, 67 Ill. App. 370. Nor are a cashbook and inventory. *Sun Mut. Ins. Co. v. Dudley*, 45 S. W. 539, 65 Ark. 240. A bank pass book, containing deposits for cash sales, intermingled with deposits of money borrowed, is not a substitute for a book recording cash sales. *J. W. Gillum & Co. v. Fire Ass'n of Philadelphia*, 106 Mo. App. 673, 80 S. W. 283. It is not, however,

absolutely necessary that a book called a "cashbook" should be kept. *Liverpool & L. & G. Ins. Co. v. Ellington*, 94 Ga. 785, 21 S. E. 1006. Nor is it necessary that a warehouse book should be kept. *Sun Mutual Ins. Co. v. Searles*, 78 Miss. 62, 18 South. 544.

Though, in view of the general rule that a substantial compliance is sufficient, it may be stated as a general principle that the purpose of the clause is accomplished when insured produces data from which the amount and value of the goods in stock at the time of the fire can be reasonably estimated (*Malin v. Mercantile Town Mut. Ins. Co.*, 105 Mo. App. 625, 80 S. W. 56), the provision requiring the assured to keep a set of books is not complied with by producing books kept by others for themselves, though showing the facts required to be shown by plaintiff's books.

Morris v. Imperial Ins. Co., 32 S. E. 595, 106 Ga. 461; *Rives v. Fire Ass'n* (Tex. Civ. App.) 77 S. W. 424.

Where the insurer pleaded that the insured did not keep a set of books as required by the iron safe clause, a reply alleging that insured had kept a set of books and offering to produce them is insufficient, in that it fails to show what books had been kept and would be produced (*Western Assur. Co. v. McGlathery*, 115 Ala. 213, 22 South. 104, 67 Am. St. Rep. 26).

(f) Keeping books and papers in fireproof safe.

One of the most important provisions of the "iron safe clause," and the one from which it derives its name, is the requirement that the insured shall keep his books of account and inventory "securely locked in a fireproof safe at night, and at all times when the store is not actually open for business, or in some secure place not exposed to a fire which would destroy the building where the business is carried on." The purpose of this provision is to secure the preservation of the books and papers required to be produced after loss by the last provision of the clause. It has, therefore, been held (*Western Assur. Co. v. McGlathery*, 115 Ala. 213, 22 South. 104, 67 Am. St. Rep. 26) that, if the books are actually preserved, the policy will not be forfeited for mere form because they were not preserved in the exact method provided in the policy. So, if the insured believes his store to be in danger from a fire then raging, and has no confidence in the quality of his safe, it is but an act of

prudence on his part if he removes his books from the safe to some other place of safety.

Liverpool & London & Globe Ins. Co. v. Kearney, 21 Sup. Ct. 323, 180 U. S. 132, 45 L. Ed. 460, affirming 94 Fed. 314, 36 C. C. A. 265; *Liverpool & London & Globe Ins. Co. v. Kearney*, 94 Fed. 314, 36 C. C. A. 265, affirming 46 S. W. 414, 2 Ind. T. 67; *Phoenix Ins. Co. v. Schwartz*, 115 Ga. 113, 41 S. E. 240, 57 L. R. A. 752, 90 Am. St. Rep. 98.

And it does not affect the result that the inventory, or some of the books necessary to be preserved, are lost in the removal, in the absence of negligence (*East Texas Fire Ins. Co. v. Harris*, 7 Tex. Civ. App. 647, 25 S. W. 720).

A safe such as is commonly used, and such as, in the judgment of prudent men in the locality of the property insured, is sufficient, is "a fireproof safe," within the meaning of the clause (*Liverpool & London & Globe Ins. Co. v. Kearney*, 21 Sup. Ct. 326, 180 U. S. 132, 45 L. Ed. 460, affirming 94 Fed. 314, 36 C. C. A. 265). The insured does not warrant the safe to be fireproof (*Knoxville Fire Ins. Co. v. Hird*, 4 Tex. Civ. App. 82, 23 S. W. 393); and he has complied with the condition if he in good faith buys a safe represented and sold on the market as a fireproof safe, believing it to be such (*Fire Ass'n of Philadelphia v. Short*, 100 Ill. App. 553). Consequently his right to recover is not affected, though the safe and its contents are destroyed by the fire.

Sneed v. British American Assur. Co., 73 Miss. 279, 18 South. 928; *Underwriters' Fire Ass'n v. Palmer & Co.* (Tex. Civ. App.) 74 S. W. 603.

The provision that the books shall be kept in the safe at night and at all times when the store is not actually open for business does not mean that they must be in the safe from sunset to sunrise, but from the time the business of the day is ended and the store actually closed. Thus, where it appeared that it was customary for the insured to keep his store open as late as 9 or 10 o'clock at night, the door being locked to keep intruders out, but, when customers knocked for admission, they were admitted and waited upon (*Jones v. Southern Ins. Co.* [C. C.] 38 Fed. 19), the court held that the store was actually open for business so long as it was lighted and the insured or his clerk there ready and able and desirous to sell goods. This principle was followed in *Sun Ins. Co. v. Jones*, 54 Ark. 376, 15 S. W. 1034. It has also been held that the provision

does not apply to a suspension of business caused by a fire raging in the vicinity and threatening the building, business operations being interrupted by the danger; but the insured is within the terms of the policy if he uses reasonable diligence to remove the books to a place of safety (*Phoenix Ins. Co. v. Schwartz*, 41 S. E. 240, 115 Ga. 113, 57 L. R. A. 752, 90 Am. St. Rep. 98). Where the policy covers a stock of liquors in a saloon, failure to comply with the provision will forfeit the policy, though it appears that the saloon was in connection with a hotel, that the insured kept but one set of books for the hotel and saloon, that he was obliged to frequently refer to the same for the settlement of his guests' accounts, and for that reason kept them under a counter, and they were not placed in the safe oftener than once a month (*Southern Ins. Co. v. Parker*, 61 Ark. 207, 32 S. W. 507).

To sustain the defense of a breach of a stipulation requiring insured to keep the last inventory and his books in a fireproof safe "at night and at all times when the store is not actually open for business," the burden is on the insurer to prove that the fire occurred at a time mentioned in the stipulation. *Allemania Fire Ins. Co. v. Fred*, 11 Tex. Civ. App. 811, 82 S. W. 243; *First Nat. Bank v. Cleland* (Tex. Civ. App.) 82 S. W. 337.

As the insured is obliged to keep books of account only from the time the policy issued, the provision as to placing such books in the safe cannot be extended to apply to old sets of books relating to transactions prior to the date of the policy (*Liverpool & London & Globe Ins. Co. v. Sheffy*, 71 Miss. 919, 16 South. 307). So, under the clause providing that the last preceding inventory shall be kept in the safe, contained in a policy dated September 12th, it is sufficient if the inventory taken in July is in the safe, though an inventory was also taken in January (*Phoenix Assur. Co. of London v. Stenson* [Tex. Civ. App.] 79 S. W. 866). A rough inventory, taken in pencil and on tablet paper, subject to revision and correction, and afterwards to be copied in ink in a bound book, according to custom, is not the "complete" inventory which, under the provisions of the "iron safe clause," must be kept in a fireproof safe or other place of security, especially when the assured was not in default as to the taking of the inventory, and the insurance company could not have complained if no attempt whatever had been made to take an inventory before the fire (*St. Landry Wholesale Mercantile Co. v. Teutonia Ins. Co.*, 113 La. 1053, 37 South. 967).

Under the rule of substantial compliance it has been held that the

fact that a book containing the transactions of the day preceding the fire was not in the safe would not forfeit the policy.

Brown v. Palatine Ins. Co., 89 Tex. 590, 35 S. W. 1060, reversing (Tex. Civ. App.) 34 S. W. 462; *Pennsylvania Fire Ins. Co. v. Brown* (Tex. Civ. App.) 86 S. W. 590; *Sun Mutual Ins. Co. v. Brown* (Tex. Civ. App.) 86 S. W. 591; *Royal Ins. Co. v. Brown*, Id.

The principle has been applied even where the book containing some transactions for nearly a month before the fire was inadvertently left out of the safe.

Western Assur. Co. v. Redding, 68 Fed. 708, 15 O. C. A. 619, 30 U. S. App. 442; *German Ins. Co. v. Pearlstone*, 18 Tex. Civ. App. 706, 45 S. W. 882.

On the other hand, it was held, in *Georgia Home Ins. Co. v. Allen*, 119 Ala. 436, 24 South. 399, that the failure to place in the safe the blotter containing the sales for the four days immediately preceding the fire was a breach of the condition.

Where the last preceding inventory was left out of the safe and lost, it will not cause a forfeiture if the books and a subsequent inventory show the contents of the lost inventory.

Continental Fire Ins. Co. v. Cummings (Tex. Civ. App.) 78 S. W. 378; *Virginia Fire & Marine Ins. Co. v. Same*, Id. 716.

The accidental failure to place a book containing part of an invoice in the safe is not fatal, where the total has been carried into the ledger (*Merchants' Nat. Ins. Co. v. Dunbar*, 88 Ill. App. 574). Duplicate invoices are a sufficient substitute for an inventory accidentally left out of the safe and destroyed (*McNutt v. Virginia Fire & Marine Ins. Co.* [Tenn. Ch. App.] 45 S. W. 61). But the lost inventory cannot be supplied by proving its footings (*J. W. Gillum & Co. v. Fire Ass'n of Philadelphia*, 106 Mo. App. 673, 80 S. W. 283). In Kentucky, where the iron safe clause is regarded as merely a stipulation for the preservation of testimony and not a provision for forfeiture, it has been held that the loss of a small cash book, not placed in the safe, may be supplied from the books of the bank where the insured deposited (*Niagara Fire Ins. Co. v. Heflin*, 60 S. W. 393, 22 Ky. Law Rep. 1212).

While the insured cannot be held responsible for the destruction of his books, due to pure accident, when he has exercised due diligence in placing them in a place of safety, as allowed by the policy

(*East Texas Fire Ins. Co. v. Harris*, 7 Tex. Civ. App. 647, 25 S. W. 720), he is responsible if, through the negligence of himself or his employes, his books and inventory are not placed in the safe as required, and are in consequence of such failure destroyed.

Goldman v. North British Mercantile Ins. Co., 48 La. Ann. 223, 19 South. 132; *Allred v. Hartford Fire Ins. Co.* (Tex. Civ. App.) 37 S. W. 96; *Western Assurance Co. v. Kemendo*, 94 Tex. 367, 60 S. W. 661, reversing (Tex. Civ. App.) 57 S. W. 293; *Fire Association v. Calhoun*, 28 Tex. Civ. App. 409, 67 S. W. 153; *Rives v. Fire Ass'n* (Tex. Civ. App.) 77 S. W. 424.

Nor is a failure to preserve the inventory excused by the fact that such inventory, by reason of the rapid changes in the stock, will not represent the quantity and kind of stock on hand at the time of loss (*Western Assur. Co. v. Kemendo*, 94 Tex. 367, 60 S. W. 661).

(g) Effect of breach of condition.

The iron safe clause being in the nature of a promissory warranty, a breach thereof in a substantial particular will forfeit the policy.

Reference may be made to *Lozano v. Palatine Ins. Co.*, 78 Fed. 278, 24 C. C. A. 85; *Georgia Home Ins. Co. v. Allen*, 128 Ala. 451, 30 South. 537; *Robinson v. Aetna Fire Ins. Co.*, 128 Ala. 477, 30 South. 665; *Scottish Union & National Ins. Co. v. Stubbs*, 98 Ga. 754, 27 S. E. 180; *Hester v. Scottish Union & National Ins. Co.*, 41 S. E. 552, 115 Ga. 454; *German Ins. Co. v. Bates*, 60 Ill. App. 48; *Farmers' Fire Ins. Co. v. Bates*, 65 Ill. App. 37; *Niagara Fire Ins. Co. v. Forehand*, 48 N. E. 830, 169 Ill. 626; *Gibson v. Missouri Town Mut. Ins. Co.*, 82 Mo. App. 515; *Keet-Rountree Dry Goods Co. v. Mercantile Town Mut. Ins. Co.*, 100 Mo. App. 504, 74 S. W. 469; *Miller v. Delaware Ins. Co.* (Okl.) 75 Pac. 1121, 65 L. R. A. 173; *Standard Fire Ins. Co. of Kansas City v. Willock* (Tex. Civ. App.) 29 S. W. 218; *American Fire Ins. Co. v. Center* (Tex. Civ. App.) 33 S. W. 554; *Delaware Ins. Co. v. Monger* (Tex. Civ. App.) 74 S. W. 792.

It has been held, however, in *McCollum v. Niagara Fire Ins. Co.*, 61 Mo. App. 352, and in *Tillis v. Liverpool & London & Globe Ins. Co.* (Fla.) 35 South. 171, that a breach of the clause did not render the policy absolutely void, but voidable only at the election of the insurer. The intent of the insured in failing to comply with the clause was regarded as a factor in *Merchants' Nat. Ins. Co. v. Dunbar*, 88 Ill. App. 574; but, as the clause is a warranty, materiality is not essential, according to *Scottish Union & Nat. Ins. Co. v. Stubbs*, 98 Ga. 754, 27 S. E. 180.

In Kentucky the iron safe clause is regarded merely as a stipulation for the better preservation of evidence, and it has been held, therefore, that, as it does not affect the risk, a noncompliance therewith will not forfeit the policy, in view of the provisions of Act Feb. 4, 1874, declaring that statements or descriptions in any application for a policy of insurance shall be deemed and held representations, and not warranties, nor shall any misrepresentation, unless material or fraudulent, prevent a recovery on the policy.

Phoenix Ins. Co. v. Angel, 18 Ky. Law Rep. 1084, 38 S. W. 1067; *Mechanics' & Traders' Ins. Co. v. Floyd*, 20 Ky. Law Rep. 1538, 49 S. W. 543; *Citizens' Ins. Co. v. Crist*, 22 Ky. Law Rep. 47, 56 S. W. 658.

So, in Tennessee, it has been held that a covenant that insured will at night keep his books of account in an iron safe, or in some place not exposed to fire which would destroy the insured building, is within Acts 1895, p. 332, c. 160, § 22 (Shannon's Code, § 3306), providing that no warranty in the negotiation of a contract or policy of insurance shall, unless made with intent to deceive, or unless the matter represented increase the risk or loss, avoid the policy (*Continental Fire Ins. Co. v. Whitaker & Dillard*, 79 S. W. 119, 64 L. R. A. 451). It has been held in Iowa (*Johnson v. Farmers' Ins. Co.*, 102 N. W. 502) that, under Code, § 1743, providing that conditions in a contract of insurance making the policy void shall not prevent recovery thereon by the insured if the failure to observe such provisions, or the violation thereof, does not contribute to the loss, the failure of insured to keep a set of books as required by the policy, and the violation by him of an iron safe clause contained therein, do not defeat a recovery, where there is neither pleading nor proof that such matters in any manner contributed to the loss. On the other hand, it has been held, in Georgia (*Scottish Union & National Ins. Co. v. Stubbs*, 98 Ga. 754, 27 S. E. 180), that the provisions of Code 1882, § 2803, relating to the materiality of representations in policies, refer only to representations as to the facts concerning the condition of the property, and not to conditions in the policy like the iron safe clause.

Under the provisions of Code 1899, c. 125, §§ 61, 64, the insured need not allege and prove compliance with the iron safe clause. *Rosenthal Clothing & Dry Goods Co. v. Scottish Union & National Ins. Co.* (W. Va.) 46 S. E. 1021. According to *Copeland v. Western Assur. Co.*, 43 S. C. 26, 20 S. E. 754, a breach of the clause must be alleged, to be available; but in *Knoxville Fire Ins. Co. v. Avery*,

95 Tenn. 296, 32 S. W. 256, evidence of a breach was said to be admissible under the general issue. The burden is on the insurer to show the breach. *Pennsylvania Fire Ins. Co. v. O. D. Young & Co.*, 25 Ky. Law Rep. 1850, 78 S. W. 127; *German Ins. Co. v. Pearlstone*, 45 S. W. 832, 18 Tex. Civ. App. 706. Whether there has been a breach of the clause is, of course, a question for the jury. *Morris v. Imperial Ins. Co.*, 29 S. E. 927, 103 Ga. 567; *Howerton v. Iowa State Ins. Co.*, 80 S. W. 27, 105 Mo. App. 575; *Landes v. Safety Fire Ins. Co.*, 190 Pa. 536, 42 Atl. 961.

20. VIOLATION OF CONDITION AS TO OTHER INSURANCE AS GROUND OF FORFEITURE.

- (a) Nature and construction of condition in general.
- (b) Effect of breach of condition.
- (c) Same—Knowledge and good faith of insured.
- (d) Same—Increase of risk.
- (e) Same—Termination of additional insurance.
- (f) Sufficiency of notice of additional insurance.
- (g) Sufficiency of consent to additional insurance.
- (h) What constitutes other insurance in general.
- (i) Identity of subject-matter.
- (j) Same—Commingleing insured goods with goods otherwise insured.
- (k) Insurance of separate interests.
- (l) Same—Interests of mortgagor and mortgagee.
- (m) Renewal of existing insurance in same or other company.
- (n) Assignment of policy to person holding other insurance.
- (o) Void or inoperative policies.
- (p) Same—Estoppel of insured to assert invalidity.
- (q) Insurance in excess of stipulated amount.
- (r) Concurrent insurance.
- (s) Necessity of maintaining other insurance to amount stipulated.

(a) Nature and construction of condition in general.

It is the settled policy of insurers against loss by fire to protect themselves against incendiarism and negligence by compelling the insured to bear some part of the risk, so that if the property shall be destroyed he will suffer loss notwithstanding his insurance. To this end the insurer limits the amount of his own insurance upon the property to a sum less than its value, and guards against other insurance being effected upon the same property without his consent by stipulations, etc. The object of such stipulations is to place the insured in such a position respecting the property that, from considerations of self-interest, he not only will not willfully burn it,

but will be watchful and careful in guarding against fire. This being the purpose of the stipulations against other insurance, they are not contrary to public policy, but are valid and enforceable conditions, and constitute a material part of the contract.

Reference may be made to *State Mut. Fire Ins. Co. v. Roberts*, 31 Pa. 438; *Hughes v. Insurance Co.*, 40 Neb. 626, 59 N. W. 112; *Battaille v. Merchants' Ins. Co.*, 3 Rob. (La.) 384; *Orient Ins. Co. v. Prather*, 25 Tex. Civ. App. 446, 62 S. W. 89.

And it is immaterial whether or not the insured has actual knowledge of the fact that the condition against other insurance is contained in his policy (*Cleaver v. Traders' Ins. Co.*, 71 Mich. 414, 39 N. W. 571, 15 Am. St. Rep. 275). If he accepts a policy containing stipulations as to other insurance he is bound thereby, and cannot afterwards question the regularity of the stipulations.

Hygum v. Aetna Ins. Co., 11 Iowa, 21; *Lattomus v. Farmers' Mutual Fire Ins. Co.*, 3 Houst. (Del.) 404.

Often a policy provides against other insurance without notice or consent, "whether valid or invalid." The validity of such a sweeping condition is questioned by Ladd, J., in *Gee v. Cheshire County Mut. Fire Ins. Co.*, 55 N. H. 65, 20 Am. Rep. 171, in so far as it prohibits invalid insurance. But this dictum is not approved by the later cases. The courts regard a provision against subsequent invalid insurance as serving to prevent a possible motive to destroy the property or negligence in the care thereof, the same as a general condition against subsequent insurance. It is said that if an insured should believe his subsequent insurance valid, as he might do whether it was so or not, such belief would tend to raise the motive intended to be guarded against as certainly as if the insurance were valid. Therefore the condition is generally regarded as valid and enforceable.

Donogh v. Farmers' Fire Ins. Co., 104 Mich. 503, 62 N. W. 721; *Sugg v. Hartford Fire Ins. Co.*, 98 N. C. 143, 3 S. E. 732; *Wilson v. Aetna Ins. Co.*, 12 Tex. Civ. App. 512, 33 S. W. 1085.

If a stipulation against subsequent insurance is contained in the policy or the by-laws of the insurer, if a mutual company, it is generally regarded as a condition or promissory warranty.

Hutchinson v. Western Ins. Co., 21 Mo. 97, 64 Am. Dec. 218; *Hygum v. Aetna Ins. Co.*, 11 Iowa, 21; *Buffalo Steam Engine Works v. Sun Mut. Ins. Co.*, 17 N. Y. 401.

But a stipulation in a policy that the insured warrants certain statements to be true, among which is one that he will report to the insurer any other insurance taken out by him, does not make a warranty of the obligation not to take out further insurance without notice (*Fidelity & Casualty Company of New York v. Carter*, 57 S. W. 315, 23 Tex. Civ. App. 359).

The construction of a clause prohibiting subsequent insurance, either entirely or beyond a specified amount, is, of course, largely dependent on the wording of the particular condition.

A condition requiring a person "insuring" to notify the insured of other insurance "effected" applies to subsequent as well as prior insurance. *Warwick v. Monmouth County Mut. Fire Ins. Co.*, 44 N. J. Law, 83, 43 Am. Rep. 348. So does a condition requiring a person insuring to give notice of other insurance "made" on the property. *Harris v. Ohio Ins. Co.*, 5 Ohio, 466, and *Stacey v. Franklin Fire Ins. Co.*, 2 Watts & S. (Pa.) 506. A condition in a mutual policy that if a member insure in another company his policy shall be considered "sunk" applies only to subsequent insurance (*Uhler v. Farmers' American Fire Ins. Co.*, 4 Leg. Gaz. [Pa.] 354); and so does a condition that a policy shall become void if any other insurance "be made" exceeding a certain amount (*Mussey v. Atlas Mut. Ins. Co.*, 14 N. Y. 79). A provision in a charter making a policy void in case of other insurance, unless consented to by indorsement, applies to subsequent insurance in another company. *Lockwood v. Middlesex Mutual Assur. Co.*, 47 Conn. 553. A stipulation that a policy shall be void if insured "has or shall hereafter make" other insurance includes insurance effected at the same time. *United Firemen's Ins. Co. v. Thomas*, 92 Fed. 127, 34 C. C. A. 240, 47 L. R. A. 450.

A provision in a charter of a mutual company that if insurance on "any house or building" shall subsist in said company and in any other company at the same time its policy shall be void, only prohibits other insurance when the original policy is "on a house or building." *Illinois Mut. Fire Ins. Co. v. O'Nelle*, 13 Ill. 89. The word "assigns" in a provision against other insurance by "insured or assigns" means assignees of the policy, not of the property. *Bates v. Commercial Ins. Co.*, 1 Cin. Super. Ct. Rep'r, 523, 13 Ohio Dec. 698. "Other insurance," as contained in a stipulation against "other insurance, valid or otherwise," means insurance in addition to that effected by the policy itself or allowed under its terms. *Georgia Home Ins. Co. v. Campbell*, 102 Ga. 106, 29 S. E. 148.

Though a policy prohibits other insurance, yet if it contains an indorsement permitting concurrent insurance up to a specified amount, or requires the maintenance of insurance to a certain per

cent. of the value of the property, additional insurance which does not exceed the specified sum or per cent. may be made without endangering the original policy. Thus a rider limiting the total insurance permitted to a certain per cent. of the value of the property insured permits additional insurance, prior or subsequent, not exceeding in all the per cent. named (*Palatine Ins. Co. v. Ewing*, 92 Fed. 111, 34 C. C. A. 236); and a policy requiring the maintenance of a certain amount of insurance permits other insurance without notice until the stipulated amount is reached (*Dolan v. Missouri Town Mut. Fire Ins. Co.*, 88 Mo. App. 666). Likewise the attaching of a slip permitting "other concurrent insurance" will prevent a forfeiture (*Medley v. German Alliance Ins. Co.* [W. Va.] 47 S. E. 101). And where a policy stipulates that the total insurance permitted is limited to three-fourths of the actual cash value of the property covered and to be concurrent therewith, the insured may procure insurance in other companies up to the three-fourths limit (*Bush v. Missouri Town Mut. Ins. Co.*, 85 Mo. App. 155). So an 80 per cent. average or concurrent insurance clause, providing that the insurer shall not be liable for any greater proportion of the loss than the sum insured bears to 80 per cent. of the actual cash value of the property at the time a loss occurs, impliedly permits other insurance, both prior and subsequent, until the property is insured up to 80 per cent. of its cash value (*Nestler v. Germania Fire Ins. Co.* [Sup.] 91 N. Y. Supp. 29, affirming 89 N. Y. Supp. 782, 44 Misc. Rep. 97).

A provision permitting "additional insurance" refers to both prior and subsequent insurance. *Behrens v. Germania Ins. Co.*, 58 Iowa, 26, 11 N. W. 719. And a provision permitting "total" concurrent insurance in a specified amount includes the amount insured by the policy containing the provision. *Senor v. Western Millers' Mut. Fire Ins. Co.*, 181 Mo. 104, 79 S. W. 687, and *East Texas Fire Ins. Co. v. Blum*, 76 Tex. 653, 13 S. W. 572.

(b) Effect of breach of condition.

If there is no provision in a policy against other or double insurance, the insured has the right to effect such insurance. Taking out additional insurance does not of itself constitute fraud on the insurer.

Names v. Union Ins. Co., 104 Iowa, 612, 74 N. W. 14; *Uhler v. Farmers' American Fire Ins. Co.*, 4 Leg. Gaz. (Pa.) 854.

. But generally the policy contains a condition making it void in case other insurance is procured without notice to, or consent of,

the insurer. In Georgia such a condition is by statute¹ incorporated into every policy issued in that state. If a policy forbids other insurance, the procurement of the prohibited insurance will prevent a recovery on the policy.

Reference may be made to *Gelb v. International Ins. Co.*, 10 Fed. Cas. 157; *Friemansdorf v. Watertown Ins. Co.* (C. C.) 1 Fed. 68; *Georgia Home Ins. Co. v. Rosenfield*, 95 Fed. 358, 37 C. C. A. 96; *Planters' Mut. Ins. Ass'n v. Green* (Ark.) 80 S. W. 151; *Lackey v. Georgia Home Ins. Co.*, 42 Ga. 456; *Phoenix Ins. Co. v. Gray*, 107 Ga. 110, 32 S. E. 948; *Ben Franklin Ins. Co. v. Weary*, 4 Ill. App. 74; *North British & Mercantile Ins. Co. v. Steiger*, 13 Ill. App. 482; *Havens v. Home Ins. Co.*, 111 Ind. 90, 12 N. E. 137, 60 Am. Rep. 689; *Replogle v. American Ins. Co.*, 182 Ind. 360, 31 N. E. 947; *Bowlus v. Phenix Ins. Co.*, 133 Ind. 106, 32 N. E. 319, 20 L. R. A. 400; *Cleaver v. Traders' Ins. Co.*, 71 Mich. 114, 39 N. W. 571, 15 Am. St. Rep. 275; *Whitwell v. Putnam Fire Ins. Co.*, 6 Lana. (N. Y.) 166; *Landers v. Watertown Fire Ins. Co.*, 19 Hun (N. Y.) 174; *Selbel v. Lebanon Mut. Ins. Co.*, 16 Lanc. Law Rev. (Pa.) 356.

The rule as thus stated in general terms is modified in various manners by the authorities. Thus, in some jurisdictions the procurement of other insurance in violation of the conditions of a policy will render the policy ipso facto void.

Such is the rule announced in *New York Cent. Ins. Co. v. Watson*, 23 Mich. 486; *Robinson v. Fire Ass'n*, 63 Mich. 90, 29 N. W. 521; *A. M. Todd Co. v. Farmers' Mut. Fire Ins. Co.* (Mich.) 100 N. W. 442; *Johnson v. American Ins. Co.*, 41 Minn. 396, 43 N. W. 59; *Buffalo Steam Engine Works v. Sun Mut. Ins. Co.*, 17 N. Y. 401; *Hand v. Williamsburg City Fire Ins. Co.*, 57 N. Y. 41; *Gilbert v. Phoenix Ins. Co.* (N. Y.) 36 Barb. 372; *Stacey v. The Franklin Fire Ins. Co.*, 2 Watts & S. (Pa.) 506; *Marshall v. Insurance Co. of North America*, 10 Pa. Co. Ct. R. 87.

In other jurisdictions a policy merely becomes voidable on the procurement of other insurance in violation of a stipulation.

This is asserted in *Turner v. Meridan Fire Ins. Co.* (C. C.) 16 Fed. 454; *Hubbard v. Hartford Fire Ins. Co.*, 33 Iowa, 325, 11 Am. Rep. 125; *Saville v. Aetna Ins. Co.*, 8 Mont. 419, 20 Pac. 646, 8 L. R. A. 542; *Farmers' Mut. Ins. Co. v. Home Fire Ins. Co.*, 54 Neb. 740, 74 N. W. 1101; *Home Fire Ins. Co. v. Wood*, 50 Neb. 381, 69 N. W. 941; *Fisher v. Niagara Fire Ins. Co.*, 58 Hun, 605, 12 N. Y. Supp. 254.

If a policy which provides that it shall cease and be of no effect if insured shall make other insurance, and shall not with diligence

¹ Code Ga. 1895, § 2107.

give notice thereof and have such other insurance indorsed on the policy, also provides for a ratable contribution in case of other insurance, the insurer must elect to terminate the policy on notice of other insurance; until such election is made the policy remains in force (*Potter v. Ontario & L. Mut. Ins. Co.*, 5 Hill [N. Y.] 147). But a stipulation that a policy shall be void if other insurance is procured is not modified by a provision reserving to the insurer the right to cancel the policy in case of overinsurance, so as to prevent a forfeiture unless the right of cancellation is exercised by the insurer (*Kimball v. Howard Fire Ins. Co.*, 8 Gray [Mass.] 33). However, if a policy has a rider attached which permits other "concurrent" insurance, it will not be forfeited by subsequent policies on the property or part thereof (*New Jersey Rubber Co. v. Commercial Union Assurance Co. of London*, 64 N. J. Law, 580, 46 Atl. 777, affirming 64 N. J. Law, 51, 44 Atl. 848).

Though a policy is made payable to a mortgagee as his interest may appear, it will be forfeited by subsequent insurance by the mortgagor if other insurance is prohibited, as a direction in the policy that the money, if it becomes due, is to be paid to a designated person does not alter the agreement of insurance in any respect, except in the one particular of appointing a denominated person to receive such payment. It is still the owner of the premises who is insured, and the continued validity of the policy is dependent upon the performance by him of the conditions embraced in it.

Reference may be made to *Sias v. Roger Williams Ins. Co.* (C. C.) 8 Fed. 187; *Monroe Building & Loan Ass'n v. Liverpool & London & Globe Ins. Co.*, 50 La. Ann. 1243, 24 South. 238; *Warbasse v. Sussex County Mut. Ins. Co.*, 42 N. J. Law, 203; *Guinn v. Phoenix Ins. Co.* (Tex. Civ. App.) 31 S. W. 566; *Melswinkel v. St. Paul Fire & Marine Ins. Co.*, 75 Wis. 147, 48 N. W. 669, 6 L. R. A. 200.

But if a policy issued to a mortgagor contains a union mortgage clause to the effect that the mortgagee's rights shall not be affected by the default of any one save himself, the procuring of other insurance by the mortgagor, in violation of the policy, will not prevent a recovery by the mortgagee.

Breeyear v. Rockingham Farmers' Mut. Fire Ins. Co., 71 N. H. 445, 52 Atl. 860; *Eddy v. London Assur. Corp.*, 143 N. Y. 311, 38 N. E. 307, 25 L. R. A. 686.

A similar rule applies if the insurer consents that the policy "may be assured" to a mortgagee or creditor (*Neve v. Charleston Ins. &*

Trust Co., 2 McM. [S. C.] 237). And if a policy provides that in case an interest exists thereunder, with the insurer's consent, in favor of another than insured, the conditions of the policy shall apply in the manner expressed in the provision relating to such interest written on, attached, or appended to the policy, but the memorandum making the loss payable to another contains none of the conditions of the policy, the securing of additional insurance by the insured will not affect the right of recovery of the one to whom the loss is made payable (*Senor v. Western Millers' Mut. Fire Ins. Co.*, 181 Mo. 104, 79 S. W. 687).

The insurer has the burden of proving a violation of a condition against other insurance (*Fireman's Ins. Co. v. Holt*, 35 Ohio St. 189, 35 Am. Rep. 601), but a statement in the proofs of loss that other insurance existed on the property dispenses with further proof against the insured of such other insurance (*Continental Ins. Co. v. Hulman*, 92 Ill. 145, 34 Am. Rep. 122). Such statement does not, however, estop insured from showing that it was made by mistake, and that as a matter of fact there was no additional insurance on the property (*Mead v. Am. Fire Ins. Co.*, 43 N. Y. Supp. 334, 13 App. Div. 476).

(c) Same—Knowledge and good faith of insured.

A condition against other insurance is not violated by subsequent insurance procured without the insured's knowledge or consent.

Reference may be made to *Phoenix Ins. Co. v. Gray*, 107 Ga. 110, 32 S. E. 948; *Dwelling House Ins. Co. v. Garner*, 56 Ill. App. 199; *Doran v. Franklin Fire Ins. Co.*, 86 N. Y. 635; *Dewitt v. Agricultural Ins. Co.*, 157 N. Y. 353, 51 N. E. 977, affirming 89 Hun, 229, 36 N. Y. Supp. 570; *Nelson v. Atlanta Home Ins. Co.*, 27 S. E. 38, 120 N. C. 302; *Western Ins. Co. v. Carson*, 10 Ohio Dec. 728, 23 Wkly. Law Bul. 224; *West Branch Lumberman's Exchange v. American Central Ins. Co.*, 183 Pa. 366, 38 Atl. 1081, 42 Wkly. Notes Cas. 6; *Home Insurance Co. v. Gwathmey*, 82 Va. 923, 1 S. E. 209.

And in *Dwelling-House Ins. Co. v. Garner*, 56 Ill. App. 199, it was held immaterial that insured ratified the second policy on obtaining knowledge thereof after loss. But this doctrine has been repudiated by later decisions, on the ground that a ratification after loss relates back to the date of issuing the policy.

Hughes v. Insurance Co., 40 Neb. 626, 59 N. W. 112; *German Ins. Co. v. Emporia Mut. Loan & Sav. Ass'n*, 9 Kan. App. 803, 59 Pac. 1092.

This last-stated rule is further modified in *McKelvy v. German-American Ins. Co.*, 161 Pa. 279, 28 Atl. 1115, where it is held that the insured must notify his insurer of the existence of other insurance, taken out by his wife, immediately on discovery thereof, and must disclaim any benefits under the second policy. However, if a policy issued without insured's knowledge or procurement is delivered to him, and he does not intend to accept it, he cannot accept it after loss, and hence the filing of proofs of loss on such a policy will not constitute a ratification (*Nelson v. Atlanta Home Ins. Co.*, 27 S. E. 38, 120 N. C. 302).

Forgetfulness on the part of the insured of the existence of a policy will not excuse a violation of a condition therein against other insurance (*Sugg v. Hartford Fire Insurance Co.*, 98 N. C. 143, 3 S. E. 732). Nor will the belief that a policy is invalid justify the procuring of a second policy in violation of the terms of the first policy (*Pennsylvania Fire Ins. Co. v. Kittle*, 39 Mich. 51). But this rule appears to be modified in *Phoenix Ins. Co. v. Boulden*, 96 Ala. 609, 11 South. 774. In that case the court held that the procuring of insurance in excess of the amount permitted did not forfeit a policy if the insured believed an erroneous statement by an agent that an existing policy had expired.

If a person has commissioned another to procure insurance for him, or has made application for insurance, he cannot procure a second policy without ascertaining whether or not the policy first applied for has been issued (*Arnold v. St. Paul Fire & Marine Ins. Co.*, 106 Tenn. 529, 61 S. W. 1032); and a forfeiture of the policy first applied for will not be prevented by a mere intention to return the second policy (*Gale v. Belknap County Ins. Co.*, 41 N. H. 170). A condition against overinsurance is not broken unless the overinsurance is procured with intent to defraud the insurer (*Insurance Co. v. Coombs*, 19 Ind. App. 331, 49 N. E. 471).

(d) Same—Increase of risk.

In many states there are statutes which in effect provide that the breach of a warranty or condition in policy shall not work a forfeiture unless the risk is increased. The courts of Maine and Ohio have construed the application of such statutes² to violations of conditions against double insurance. In Ohio the court comes to the conclusion that the statute does not apply, since additional insur-

² Rev. St. Me. c. 49, §§ 19, 20, and Rev. St. Ohio, § 3643.

ance increases the risk as a matter of law (*Sun Fire Office of London v. Clark*, 53 Ohio St. 414, 42 N. E. 248, 38 L. R. A. 562). But in Maine the court is of the opinion that under the statute additional insurance will not forfeit a policy unless it appears that the risk is thereby increased (*Lindley v. Union Farmers' Mut. Fire Ins. Co.*, 65 Me. 368, 20 Am. Rep. 701). The Ohio doctrine may be said to be followed in *Dolan v. Missouri Town Mutual Fire Ins. Co.*, 88 Mo. App. 666, wherein it was held that a statute^{*} providing that a warranty or condition not materially affecting the risk shall be deemed a mere representation did not apply to a condition against double insurance, as such a condition was material. But in *Burge Bros. v. Greenwich Ins. Co.* (Mo. App.) 80 S. W. 342, it is said that under the law a stipulation against other insurance or limiting the amount of concurrent insurance is not a promissory warranty, but a representation, requiring only substantial compliance.

(e) Same—Termination of additional insurance.

In some jurisdictions the procuring of other insurance in violation of the stipulation in a policy does not render the policy void or voidable, but merely suspends the risk, so that there may be a recovery on the primary insurance if the secondary has either expired or been canceled.

This is asserted in *Western Assurance Co. v. Mason*, 5 Ill. App. 141; *Phenix Ins. Co. v. Johnston*, 42 Ill. App. 66; *Shurtleff v. Phenix Ins. Co.*, 57 Me. 137; *Obermeyer v. Globe Mut. Ins. Co.*, 43 Mo. 573. In the *Obermeyer* case the court says: "There is an obvious distinction between a concealment or false statement of facts existing at the commencement of the risk and a neglect of duty in regard to the matter occurring afterward. In the one place the policy never takes effect—the risk is never assumed—while in the other it is only interrupted."

This rule also appears to find support in *Wilson v. Queen Ins. Co.* (C. C.) 5 Fed. 674, wherein it was held that a policy obtained under the mistaken belief that no prior insurance existed on the property would not defeat a recovery on the prior policy, if such second policy was canceled after loss, when the second insurer learned of the existence of the prior policy. But a contrary rule is asserted in *Replogle v. American Ins. Co.*, 132 Ind. 360, 31 N. E. 947. It is

^{*} Laws Mo. 1897, p. 180.

there said that a policy containing a condition making it void in case of other insurance without consent is rendered void by the obtaining of additional insurance without consent, though such other insurance may not be in force at the time of loss.

(f) Sufficiency of notice of additional insurance.

A condition in a policy requiring notice and indorsement of subsequent insurance is sufficiently complied with if the insured notifies the insurer of the subsequent insurance, and offers to have an indorsement made (*Madison Ins. Co. v. Fellowes*, 1 Disn. [Ohio] 217). But mere notice of the additional insurance, unaccompanied by any request for an indorsement, is insufficient.

Hutchinson v. The Western Ins. Co., 21 Mo. 97, 64 Am. Dec. 218;
Meyers v. Germania Ins. Co., 27 La. Ann. 63.

However, if no policy has actually been issued a notice of additional insurance is sufficient to avoid a forfeiture, though the policies usually issued by the insurer required an indorsement of other insurance in addition to a notice thereof (*Eureka Ins. Co. v. Robinson*, 56 Pa. 256, 94 Am. Dec. 65).

It is obvious that if a condition prohibiting additional insurance merely requires notice in case other insurance is effected on the property a notice to the insurer of such additional insurance will be a sufficient compliance with the condition. Such notice may, before delivery of the policy, be given to the agent of the insurer who effected the insurance, and with whom the policy is intrusted for delivery (*Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345, 15 Am. Rep. 612). But it must be given to one who is at the time of notice authorized to act for the insurer.

Illinois Mut. Fire Ins. Co. v. Malloy, 50 Ill. 419; *Boatmen's Fire & Marine Ins. Co. v. James*, 10 Ky. Law Rep. 816.

It may be observed that the insured has the burden of proving this notice (*Harris v. Ohio Ins. Co.*, *Wright* [Ohio] 544), unless he relies on a waiver (*Grubbs v. North Carolina Home Ins. Co.*, 108 N. C. 472, 13 S. E. 236, 23 Am. St. Rep. 62). Hence his omission to testify positively to the giving of a notice warrants the inference that no notice was given (*Illinois Mut. Fire Ins. Co. v. Malloy*, 50 Ill. 419). This burden is not met by a showing that a notice was mailed to the insurer (*Fairfield Packing Co. v. Southern Mut.*

Fire Ins. Co., 44 Atl. 317, 193 Pa. 184, 44 Wkly. Notes. Cas. 533), or that it was left at the agent's office with an unidentified person (Sun Ins. Co. v. Earle, 29 Mich. 406), if the insurer denies having received the notice. And the declaration of the insured, on the day after other insurance was taken out, that he advised the insurer's agent of such fact, is not admissible to show notice, as it is a self-serving declaration (Ætna Ins. Co. v. Eastman, 95 Tex. 34, 64 S. W. 863). No one can swear to having given notice unless he recollects it, for if he does so without such recollection he commits perjury (Carroll v. Charter Oak Ins. Co. [N. Y.] 10 Abb. Prac. [N. S.] 166).

If no particular form of notice or manner of service is specified, a verbal notice to an agent authorized to solicit risks and negotiate contracts is sufficient (Schenck v. Mercer County Mut. Fire Ins. Co., 24 N. J. Law, 447). And this notice may be given to the insurer's agent by the agent of the company writing the additional insurance (Union Ins. Co. v. Murphy [Pa.] 4 Atl. 352, 17 Wkly. Notes Cas. 243). On the other hand, a requirement that notice be given in writing to the company's secretary is not complied with by a verbal notice to a director, as the insurer has the right to require the notice to be in writing to avoid disputes, and to be given to an executive officer charged with the details of the business (Bard v. Penn Mut. Fire Ins. Co., 153 Pa. 257, 25 Atl. 1124, 32 Wkly. Notes Cas. 86, 34 Am. St. Rep. 704).

A condition requiring notice of additional insurance is not complied with by a notice after loss which in fact is a mere notice of loss (Philbrook v. New England Mut. Fire Ins. Co., 37 Me. 137). Nor is the condition complied with by a notice of a mere intention to take out other insurance in the future.

Reference may be made to *Kimball v. Howard Fire Ins. Co.*, 8 Gray (Mass.) 33; *Eagle Fire Co. v. Globe Loan & Trust Co.*, 44 Neb. 380, 62 N. W. 895; *Home Fire Ins. Co. v. Wood*, 50 Neb. 381, 69 N. W. 941; *Healey v. Imperial Fire Ins. Co.*, 5 Nev. 268; *New Orleans Ins. Ass'n v. Griffin*, 66 Tex. 232, 18 S. W. 505.

Where the policy requires notice of additional insurance to be given with reasonable diligence, this is not complied with by a notice seven months after other insurance was effected (*Kimball v. Howard Fire Ins. Co.*, 8 Gray [Mass.] 33); nor by a notice accompanying the proofs of loss more than a month after the other insurance was taken out (*Mellen v. Hamilton Fire Ins. Co.*, 17 N.

Y. 609, affirming 12 N. Y. Super. Ct. 101). The facts as to notice being undisputed, it is for the court to determine whether the insured acted with reasonable diligence in giving notice (*Kimball v. Howard Fire Ins. Co.*, 8 Gray [Mass.] 33). But if it is not shown that any notice was given before or after loss, the question of what is reasonable time does not arise, though the loss occurred only ten days after the additional insurance was procured (*Inland Ins. & Deposit Co. v. Stauffer*, 33 Pa. 397). However, if the policy allows a period of ten days within which notice may be given, it is incumbent on the insurer to show that other insurance was procured at least ten days prior to loss (*Cumberland Mut. Fire Ins. Co. v. Giltinan*, 48 N. J. Law, 495, 7 Atl. 424, 57 Am. Rep. 586).

If a policy which provides for a forfeiture in case of additional insurance without notice also provides for a pro rata contribution, a notice stating the amount of additional insurance is sufficient without giving the name of the insurer taking it (*Benjamin v. Saratoga County Mut. Fire Ins. Co.*, 17 N. Y. 415).

(g) Sufficiency of consent to additional insurance.

If a policy requires the indorsement thereon of consent to additional insurance, such requirement must, as a general rule, be complied with in order to prevent a forfeiture.

Sisk v. Citizens' Ins. Co., 16 Ind. App. 565, 45 N. E. 804; *O'Leary v. Merchants' & Bankers' Mut. Ins. Co.*, 100 Iowa, 173, 66 N. W. 175, 69 N. W. 420, 62 Am. St. Rep. 555; *Security Ins. Co. v. Fay*, 22 Mich. 467, 7 Am. Rep. 670.

But this strict rule was modified in *Insurance Co. of North America v. McDowell*, 50 Ill. 120, 99 Am. Dec. 497, wherein it was held that such a requirement was sufficiently complied with by an indorsement on the insurer's books, made by the same agent that wrote the original policy. If the policy merely requires written consent to additional insurance, such consent need not be indorsed or written on the policy, but is good if written on a separate paper (*Schaetzel v. Germantown Farmers' Mut. Ins. Co.*, 22 Wis. 412). Still the consent must be in writing, and it is not sufficient that the insured obtains the oral consent of the insurer to subsequent insurance.

German Ins. Co. v. Heiduk, 80 Neb. 288, 46 N. W. 481, 27 Am. St. Rep. 402; *Hale v. Mechanics' Mut. Fire Ins. Co.*, 6 Gray (Mass.) 169, 66 Am. Dec. 410.

Where a policy which requires an indorsement of consent to other insurance also provides that it shall not be valid unless countersigned by a specified general agent, the consent thus required must be given by the person who is to countersign the policy, in the absence of other provisions to the contrary (*Security Ins. Co. v. Fay*, 22 Mich. 467, 7 Am. Rep. 670). However, if a policy only requires the insurer's consent to additional insurance, without specifying that such consent must be in writing, an oral statement of the company's agent that it consents to additional insurance is sufficient (*Minnock v. Eureka Fire & Marine Ins. Co. of Cincinnati*, 90 Mich. 236, 51 N. W. 367); and though a policy requires an indorsement to be by the insurer's secretary, still it may be made by an agent who is authorized to grant licenses for additional insurance (*Peck v. New London County Mut. Ins. Co.*, 22 Conn. 575). So under a charter requirement that, if any other insurance should be obtained on any property insured in the company, notice thereof should be given to the secretary and the consent of the directors obtained, evidence showing that the secretary knew of and suggested the second insurance, and that two of the directors actually consented to the same, and the others stood by and saw what was going on, was competent to show both notice and consent, within the requirements of the charter (*Goodall v. New England Mut. Fire Ins. Co.*, 25 N. H. 169). But a promise by an agent long before additional insurance is secured that consent to such insurance will be given is not sufficient (*East Texas Fire Ins. Co. v. Blum*, 76 Tex. 653, 13 S. W. 572); nor is an agent's expression of willingness to write insurance which the insured informs him he intends to take out sufficient (*New Orleans Ins. Ass'n v. Griffin*, 66 Tex. 232, 18 S. W. 505). The insured cannot prove consent to other insurance unless such fact is specially pleaded (*Guerin v. St. Paul Fire & Marine Ins. Co.*, 44 Minn. 20, 46 N. W. 138).

(h) What constitutes other insurance in general.

As a general proposition, it may be said that double insurance exists when the same person is insured by several insurers separately in respect to the same subject-matter and the same interest.

This definition is supported by *Westchester Fire Ins. Co. v. Foster*, 90 Ill. 121; *American Ins. Co. v. Griswold*, 14 Wend. (N. Y.) 399; *Lowell Mfg. Co. v. Safeguard Fire Ins. Co.*, 88 N. Y. 591; *Gough v. Davis*, 52 N. Y. Supp. 947, 24 Misc. Rep. 245; *Sloat v. Royal Ins. Co.*, 49 Pa. 14, 88 Am. Dec. 477; *Lebanon Mut. Insurance Co.*

v. Kepler, 106 Pa. 28; *Clarke v. Western Assur. Co.*, 146 Pa. 561, 23 Atl. 248, 15 L. R. A. 127, 28 Am. St. Rep. 821; *West Branch Lumberman's Exchange v. American Cent. Ins. Co.*, 183 Pa. 366, 38 Atl. 1081; *Meigs v. Insurance Co. of North America*, 205 Pa. 378, 54 Atl. 1053; *Civ. Code Cal.* 1903, § 2641; *Civ. Code Mont.* 1895, § 3520; *Rev. Codes N. D.* 1899, § 4531; *Civ. Code S. D.* 1903, § 1877.

In addition to this, it may be said that to constitute double insurance the second policy must insure against the same risk as a prior one (*Harris v. Ohio Ins. Co.*, 5 Ohio, 466). Generally policies constituting double insurance are made in the name of the person whose interest is insured. But this is immaterial. Double insurance will exist where the same person has insurance made on the full value of his interest in different policies, whether made in his own name or in the name of others, if he is to have the benefit of both policies. (*Wells v. Philadelphia Ins. Co.*, 9 Serg. & R. [Pa.] 103.)

An insured will have other insurance within the meaning of a condition in a policy if, subsequent to the execution of the policy, he accepts another one previously applied for (*Cutler v. Royal Ins. Co.*, 70 Conn. 566, 40 Atl. 529, 41 L. R. A. 159), or if he revives a policy previously canceled (*Halliday v. St. Paul Fire & Marine Ins. Co.*, 31 Ill. App. 398). But the acceptance of a second policy executed after loss will not make the insured liable for double insurance, though the second policy is antedated (*Taylor v. State Ins. Co.*, 107 Iowa, 275, 77 N. W. 1032). Where the execution of a second policy is in issue the conversation of the agent of the second insurer as to the issuance of such policy is admissible (*Price v. Home Ins. Co.*, 54 Mo. App. 119).

In the case of policies issued by separate companies at the same time, the presumption is that one of the policies was antecedent to the other, so that all the insurers are entitled to the usual notice in respect to prior and additional insurance, even though the risk insured against by the different policies commences at the same time.

United Firemen's Ins. Co. v. Thomas, 92 Fed. 127, 84 O. C. A. 240, 47 L. R. A. 450; *Manhattan Ins. Co. v. Stein*, 5 Bush (Ky.) 652.

A different rule was announced in *Washington Fire Ins. Co. v. Davison*, 30 Md. 91. It was there held that policies issued on the same day and taking effect at the same time were not within a con-

dition against prior or subsequent insurance. But this ruling was expressly repudiated in the Thomas Case.

(1) Identity of subject-matter.

In order that subsequent insurance shall constitute double insurance, within the meaning of a policy, the subject-matter covered by both policies must be the same.

Reference may be made to *Royster v. Roanoke, N. & B. Steamboat Co.* (O. C.) 26 Fed. 492; *Home Fire Ins. Co. v. Deets*, 54 Neb. 620, 74 N. W. 1088; *Roots v. Cincinnati Ins. Co.*, 1 Disn. 138, 12 Ohio Dec. 535; *Franklin Fire Ins. Co. v. Updegraff*, 48 Pa. 350; *Home Insurance Co. v. Gwathmey*, 82 Va. 923, 1 S. E. 209.

The burden of proving that a subsequent policy covers the same property as a prior one is on the insurer (*Clark v. Hamilton Mut. Ins. Co.*, 75 Mass. [9 Gray] 148), unless this is admitted by the insured (*Phoenix Ins. Co. v. Gray*, 107 Ga. 110, 32 S. E. 948).

It may be said that as a general rule a condition against other insurance is not restricted to forbidding insurance of precisely the same property. The condition will be violated if the insured procures a second policy on the property covered by the first; though the second policy also includes additional property.

New York Central Ins. Co. v. Watson, 23 Mich. 486; *Harris v. Ohio Ins. Co.*, 5 Ohio, 466; *Phoenix Ins. Co. v. Michigan, S. & N. I. R. Co.*, 28 Ohio St. 69.

However, a contrary rule prevails in Pennsylvania. There it is held that a clause against insurance in other companies is not violated if the different policies do not legally cover the same property.

Sloat v. Royal Ins. Co., 49 Pa. 14, 88 Am. Dec. 477; *Boatman's Fire & Marine Ins. Co. v. Hocking*, 8 Atl. 417.

A rule similar to the one governing in Pennsylvania was asserted in the early case of *Howard Ins. Co. v. Scribner*, 5 Hill (N. Y.) 298, wherein it was said that a policy on a stock of goods, fixtures, and utensils, without any distribution of the amount among the various classes of articles insured, did not constitute other insurance as to a policy on the same property, but with a separate valuation for each class. Aside from the question as to whether or not a contract of insurance is entire or divisible, which is fully discussed in a subsequent brief,⁴ there are a few cases which hold

⁴ See post, p. 1894.

that a policy prohibiting other insurance is rendered void by a subsequent policy on only a part of the property.

Such cases are *Allen v. Merchants' Mut. Ins. Co.*, 30 La. Ann. 1886, 81 Am. Rep. 243; *Associated Firemen's Ins. Co. v. Assum*, 5 Md. 165; *Kimball v. Howard Fire Ins. Co.*, 8 Gray (Mass.) 83.

A rule analogous to the one asserted in the cases just cited is laid down in *Davis v. Northwestern Mut. Ins. Co.*, 12 Ky. Law Rep. 844, where it is said that insurance on an addition made to an insured building after the issuing of a policy is as much a violation of a condition against other insurance as other insurance on the same building would be. So a provision against other insurance in a policy covering "farm implements" is violated by the taking out of a policy covering "mowing machines and binders," although the latter implements have been purchased after the first policy was taken out, as they are within the provisions of the first policy, and protected by it (*Johnson v. Farmers' Ins. Co.* [Iowa] 102 N. W. 502). But an insurance on goods in a store is not within a rule of an insurance company making a policy on a store void in case insured procures insurance on the same, or "any other property connected with it," in another company (*Jones v. Maine Mut. Fire Ins. Co.*, 18 Me. 155).

A rider permitting "concurrent insurance," attached to a policy excluding other insurance, is not transcended by other insurance that covers only some of said items, provided such other insurance is effected on terms which require it to bear proportionally with the primary insurance whatever loss occurs within the range of their common operation (*New Jersey Rubber Co. v. Commercial Union Assurance Co.*, 64 N. J. Law, 580, 46 Atl. 777, affirming 64 N. J. Law, 51, 44 Atl. 848).

If an insurer in issuing a policy on property, not covered by other insurance, for its own convenience, includes in one policy other property already insured by it, but the insured pays premiums and expenses as on separate policies, a subsequent placing of insurance on the first-mentioned property without the consent of the company will not defeat a recovery for the loss of the other property (*Mutual Fire Ins. Co. v. Ward*, 95 Va. 231, 28 S. E. 209). And the fact that a company, through mistake, has paid for a loss not included in its policy, will not permit another company, having a policy on the property for the loss of which said payment was

made, to claim a forfeiture of its policy because of double insurance on said property (*Home Fire Ins. Co. v. Deets*, 54 Neb. 620, 74 N. W. 1088). Likewise a recovery on a policy covering a "carpenter's shop and carpenter's tools" will not be defeated by a mere showing that another policy had been issued to insured on "four chests of carpenter's tools in wood shop," described as situated in the same street as in the first policy, and that there were in the shop several tool chests belonging to insured and his workmen (*Clark v. Hamilton Mut. Ins. Co.*, 9 Gray [Mass.] 148).

(j) Same—Commingle insured goods with goods otherwise insured.

If goods insured by a policy excluding other insurance are, by removal or otherwise, mingled with other goods so insured as to cover the addition, this will vitiate the policy (*Walton v. Louisiana State Marine & Fire Ins. Co.*, 2 Rob. [La.] 563); and this is true even though the insurer gives its consent to the removal (*Washington Ins. Co. v. Hayes*, 17 Ohio St. 432, 93 Am. Dec. 628), unless it at the time of consenting knows of the insurance on the other goods (*London Assur. Corp. v. Saxton*, 55 Ill. App. 664).

This rule applies particularly to insurance on merchandise kept for sale. As an insurance on such a stock covers not only the goods actually insured, but also the goods of the same description which are substituted after sales, an insurance on the goods so substituted is within a condition against other insurance in a policy on the original stock (*Whitwell v. Putnam Fire Ins. Co.*, 6 Lans. [N. Y.] 166). But the New York courts have been loath to apply these rules with severity. Thus it was said in *Vose v. Hamilton Mut. Ins. Co.*, 39 Barb. 302, that a condition making a policy void in case "any other policy has been or shall be issued" on the whole or any portion of the property was not violated by moving the goods insured, a stock of merchandise, to another place and mingling them with goods already insured by another policy, as the latter policy was not "issued" subsequent to the first-mentioned one, nor was it in existence as to the property moved when the policy thereon was issued. And in *Mead v. American Fire Ins. Co.*, 43 N. Y. Supp. 334, 13 App. Div. 476, the court took the position that a policy on goods was not forfeited by a mingling of the goods insured with goods insured by a second policy, which by operation of law extended to all the property, if the insured, in taking out the second policy, did not intend to secure double insurance.

(k) Insurance of separate interests.

In order that a policy shall constitute double insurance as to a prior policy, it must be on the same interest covered by the prior policy.

Ætna Fire Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90; *Tallman v. Atlantic Fire & Marine Ins. Co.*, *42 N. Y. 87, 4 Abb. Dec. 345, 38 How. Prac. 400; *Acer v. Merchants' Ins. Co.*, 57 Barb. (N. Y.) 68; *West Branch Lumberman's Exchange v. American Cent. Ins. Co.*, 183 Pa. 366, 38 Atl. 1081, 42 Wkly. Notes Cas. 6.

This being the rule, owners of different interests in the same property may respectively insure their interests without violating provisions in their policies prohibiting other insurance (*Home Insurance Co. v. Gwathmey*, 82 Va. 923, 1 S. E. 209). Thus a policy by a lessee on his fixtures will not vitiate a policy held by the lessor (*Western Ins. Co. v. Carson*, 10 Ohio Dec. 728, 23 Wkly. Law Bul. 224). And the fact that a tenant who moves into an insured dwelling house takes out insurance on his personal property therein does not show an increase of hazard under a policy on the house, in the absence of fraud or overinsurance of the personal property (*Nicholas v. Iowa Merchants' Mut. Ins. Co.* [Iowa] 101 N. W. 115). Likewise a policy obtained by a widow on her husband's property for the benefit of his heirs will not be forfeited by a subsequent policy on her dower interest in the same property (*Haire v. Ohio Farmers' Ins. Co.*, 93 Mich. 481, 53 N. W. 623, 32 Am. St. Rep. 516).

In *Burbank v. Rockingham Mut. Fire Ins. Co.*, 24 N. H. 550, 57 Am. Dec. 300, it is said that an agreement by a vendee of a part interest in property with his vendor that the latter may procure insurance on the vendee's interest as security for the unpaid purchase money will not constitute double insurance as to a policy previously taken out by the vendor on the whole property. And insurance procured by a vendee in possession under an executory contract to purchase the insured property will not defeat a prior policy held by the vendor (*De Witt v. Agricultural Ins. Co.*, 157 N. Y. 353, 51 N. E. 977).

A policy by a mother as trustee for her minor children on their interest will not vitiate a prior policy on the interest of a married daughter (*Franklin Marine & Fire Ins. Co. v. Drake*, 2 B. Mon.

[Ky.] 47). Similarly insurance by one creditor on his debtor's stock of merchandise is not double insurance as to insurance on the same stock by another creditor (*Roos v. Merchants' Mut. Ins. Co.*, 27 La. Ann. 409). Insurance on a joint interest in property is not terminated by further insurance by one of the joint owners on his interest (*Pitney v. Glens Falls Ins. Co.*, 61 Barb. [N. Y.] 335); nor is insurance on the interest of one joint owner affected by insurance on the interest of another joint owner (*Hall v. Concordia Fire Ins. Co.*, 90 Mich. 403, 51 N. W. 524). A policy issued to a husband and wife and conditioned to be void if "the assured" procure other insurance without consent of the company, is forfeited by the wife's procuring insurance in another company in her name alone (*Continental Ins. Co. v. Hulman*, 92 Ill. 145, 34 Am. Rep. 122). And a policy issued to an owner will be vitiated by a subsequent policy executed to a vendee under a contract to purchase, if the second policy is procured by authority of the holder of the legal title (*Barnard v. National Fire Ins. Co.*, 27 Mo. App. 26).

(1) Same—Interests of mortgagor and mortgagee.

A policy held by a mortgagor is not vitiated by a policy subsequently taken out by the mortgagee, though it prohibits "other insurance," as the interest thus insured by the second policy is distinct from the mortgagor's interest, so that the insurance of that interest does not constitute "other insurance" within the meaning of the policy.

This principle is supported by *Niagara Fire Ins. Co. v. Scammon*, 144 Ill. 490, 32 N. E. 914, 19 L. R. A. 114, affirming 28 N. E. 919; *Commercial Union Assur. Co. v. Same*, 144 Ill. 506, 32 N. E. 916; *Home Ins. Co. v. Koob*, 68 S. W. 453, 113 Ky. 860, 24 Ky. Law Rep. 223, 58 L. R. A. 58; *Jackson v. Massachusetts Mut. Fire Ins. Co.*, 23 Pick. (Mass.) 418, 34 Am. Dec. 69; *Carpenter v. Continental Ins. Co.*, 61 Mich. 635, 28 N. W. 749; *Guest v. New Hampshire Fire Ins. Co.*, 66 Mich. 98, 33 N. W. 81; *Tallman v. Atlantic Fire & Marine Ins. Co.*, *42 N. Y. 87, 4 Abb. Dec. 345, 83 How. Prac. 400, reversing 29 How. Prac. 71; *Titus v. The Glens Falls Ins. Co.*, 81 N. Y. 410; *Doran v. Franklin Fire Ins. Co.*, 86 N. Y. 635.

This rule applies even though the policy procured by the mortgagee is made out in the name of the mortgagor, if this is done without his knowledge (*Cannon v. Home Ins. Co.*, 49 La. Ann. 1367, 22 South. 387). And in *Church of St. George v. Sun Fire Office*

Ins. Co., 54 Minn. 162, 55 N. W. 909, it was considered immaterial that the mortgagor was to stand the expense of the mortgagee's policy. But a contrary rule was announced in the early case of *Holbrook v. American Ins. Co.*, 12 Fed. Cas. 319. However, the mere fact that a policy in the name of a mortgagor is made payable to the mortgagee will not prevent a forfeiture of a prior policy issued to the mortgagor (*Cloud County Bank v. German Ins. Co.*, 6 Kan. App. 219, 49 Pac. 688).

The converse of the rule stated is true. Insurance on a mortgagee's interest will not be affected by subsequent insurance taken out by the mortgagor.

Mutual Fire Ins. Co. v. Alvord, 61 Fed. 752, 9 C. C. A. 623; *Woodbury Sav. Bank & Bldg. Ass'n v. Charter Oak Fire & Marine Ins. Co.*, 81 Conn. 517.

But if a policy held by a mortgagee runs to the mortgagor, it will be defeated by a subsequent policy taken out by the latter (*Gillett v. Liverpool & L. & G. Ins. Co.*, 73 Wis. 203, 41 N. W. 78, 9 Am. St. Rep. 784). A mere indorsement on a policy making it payable to the mortgagee will not prevent it from being defeated by a subsequent policy taken out by the mortgagor.

Reference may be made to *Sias v. Roger Williams Ins. Co.* (C. C.) 8 Fed. 187; *Holbrook v. Balotse Fire Ins. Co.*, 117 Cal. 561, 49 Pac. 555; *Monroe Bldg. & Loan Ass'n v. Liverpool & London & Globe Ins. Co.*, 50 La. Ann. 1243, 24 South. 238; *Warbasse v. Sussex County Mut. Ins. Co.*, 42 N. J. Law, 208; *Guinn v. Phoenix Ins. Co.* (Tex. Civ. App.) 31 S. W. 586; *Gillett v. Liverpool & London & Globe Ins. Co.*, 73 Wis. 203, 41 N. W. 78, 9 Am. St. Rep. 784; *Melswinkel v. St. Paul Fire & Marine Ins. Co.*, 75 Wis. 147, 43 N. W. 669, 6 L. R. A. 200. A contrary rule appears to be asserted in *Fisher v. Niagara Fire Ins. Co.*, 58 Hun, 605, 12 N. Y. Supp. 254.

But if a policy issued to a mortgagor contains a union mortgage clause, a recovery by the mortgagee will not be defeated by a second policy procured by the mortgagor.

Breeyear v. Rockingham Farmers' Mut. Fire Ins. Co., 52 Atl. 860, 71 N. H. 445; *Eddy v. London Assur. Corp.*, 143 N. Y. 311, 38 N. E. 307, 25 L. R. A. 686; *Senor v. Western Millers' Mut. Fire Ins. Co.*, 181 Mo. 104, 79 S. W. 687.

In *Foster v. Equitable Mut. Fire Ins. Co.*, 2 Gray (Mass.) 216, it was said that if a mortgagor assigns his policy to the mortgagee

with the consent of the insurer this creates a new contract, which is not affected by subsequent insurance by the mortgagor; and this rule was followed in *Traders' Ins. Co. v. Robert*, 9 Wend. (N. Y.) 404; but was afterwards overruled in *Grosvenor v. Atlantic Fire Ins. Co.*, 17 N. Y. 391, wherein it was held that as an assignee takes a policy with knowledge that it will be forfeited by procuring other insurance he is affected by the acts of the assignor in securing other insurance.

(m) Renewal of existing insurance in same or other company.

It appears to be a quite generally accepted rule that the taking of a policy of insurance in renewal of prior insurance mentioned in the application for a policy is not within the terms of a provision in the latter policy requiring notice in case of taking other insurance.

Proprietors of Meeting House of First Baptist Society in Dunstable v. Hillsborough Mut. Fire Ins. Co., 19 N. H. 580; *Brown v. Chat-taraugus County Mut. Ins. Co.*, 18 N. Y. 385; *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6; *Lewis v. Guardian Fire & Life Assur. Co.*, 98 App. Div. 157, 87 N. Y. Supp. 525.

This rule applies even though the insurance existing at the time of an application is subsequently renewed by another policy, instead of by a renewal certificate, and in another company.

Stage v. Home Ins. Co., 76 App. Div. 509, 78 N. Y. Supp. 555; *Lewis v. Guardian Fire & Life Assur. Co.*, 87 N. Y. Supp. 525, 98 App. Div. 157; *New Orleans Ins. Ass'n v. Holberg*, 64 Miss. 51, 8 South. 175.

A contrary rule appears to prevail in Louisiana (*Duclos v. Citizens' Mutual Ins. Co.*, 23 La. Ann. 332), and Nevada (*Healey v. Imperial Fire Ins. Co.*, 5 Nev. 268). In the *Healey* Case it was squarely held that a stipulation against other insurance without notice was violated by a renewal of a former policy in another company without the notice stipulated; but in the *Duclos* Case it is probable that insured's failure to notify the insurer of the existence of a prior policy was the reason for the court's holding that he could not recover. The principle announced in the two preceding cases also seems to find support in the early cases of *Burt v. People's Mut. Fire Ins. Co.*, 2 Gray (Mass.) 397, and *Deitz v. Mound City Mut. Fire & Life Ins. Co.*, 38 Mo. 85. But it is to be

noted that the defendant in the Burt Case was a mutual company, and that the policy procured was for a less amount than the existing one, and that in the Deitz Case it appeared that the application stated that the existing policy would not be renewed.

(a) Assignment of policy to person holding other insurance.

If a policy conditioned to be void in case of other insurance without notice is assigned to a third person, who already has insurance on the same property, it will be vitiated unless the assignee informs the insurer of the other insurance at the time the assignment is made (*Leavitt v. Western Marine & Fire Insurance Co.*, 7 Rob. [La.] 351). But an assignment of a policy on machinery in a building as collateral security to the owner of the building and other machinery therein will not forfeit the policy, though the assignee has a policy on the building and his machinery (*Planters' Mut. Ins. Co. v. Rowland*, 66 Md. 236, 7 Atl. 257). And a recovery on a claim under a policy, assigned after loss, will not be barred by the fact that the assignee had other insurance on the same property (*Tallman v. Atlantic Fire & Marine Ins. Co.*, 42 N. Y. 87, 4 Abb. Dec. 345, 33 How. Prac. 400). Likewise a policy held by a mortgagee is not defeated by the fact that the mortgagee, without the knowledge of the mortgagor or his vendee, procures an indorsement on the policy that the vendee, who previously has procured insurance on the property, is the owner of the policy and the property insured thereunder (*De Witt v. Agricultural Ins. Co.*, 51 N. E. 977, 157 N. Y. 353, affirming 89 Hun, 229, 36 N. Y. Supp. 570).

(c) Void or inoperative policies.

The weight of authority supports the proposition that a condition making a policy void in case the insured makes other insurance on the property without the consent of the company written thereon, etc., means other valid insurance, and the making of a void policy does not create a forfeiture of the first policy. "A contract of insurance is a contract of indemnity, and if there be no indemnity by its terms, and the contract is void, then there is no insurance, though there may be a policy of insurance in form; and, there being no insurance in reality, such void policy is not included in the words 'make other insurance.'"

This rule is supported by *Allison v. Phoenix Ins. Co.*, 1 Fed. Cas. 530; *Germania Fire Ins. Co. v. Klewer*, 129 Ill. 590, 22 N. E. 489, reversing 27 Ill. App. 590; *Rising Sun Ins. Co. v. Slaughter*, 20

Ind. 520; *Behrens v. Germania Fire Ins. Co.*, 64 Iowa, 19, 19 N. W. 838; *Philbrook v. New England Mut. Fire Ins. Co.*, 37 Me. 187; *Jackson v. Massachusetts Mut. Fire Ins. Co.*, 23 Pick. (Mass.) 418, 84 Am. Dec. 69; *Clark v. New England Mut. Fire Ins. Co.*, 6 Cush. (Mass.) 342, 53 Am. Dec. 44; *Kimball v. Howard Fire Ins. Co.*, 8 Gray (Mass.) 33; *Hardy v. Union Mut. Fire Ins. Co.*, 4 Allen (Mass.) 217; *Wheeler v. Watertown Fire Ins. Co.*, 131 Mass. 1; *Hayes v. Milford Mut. Fire Ins. Co.*, 170 Mass. 492, 49 N. E. 754; *Cassity v. New Orleans Ins. Ass'n*, 65 Miss. 49, 3 South. 188; *Dahlberg v. St. Louis Mutual Fire & Marine Ins. Co.*, 6 Mo. App. 121; *Gale v. Belknap County Ins. Co.*, 41 N. H. 170; *Schenck v. Mercer County Mut. Fire Ins. Co.*, 24 N. J. Law, 447; *Jersey City Ins. Co. v. Nichol*, 35 N. J. Eq. 291, 40 Am. St. Rep. 625; *Stacey v. Franklin Fire Ins. Co.*, 2 Watts & S. (Pa.) 506; *Mitchell v. Lycoming Mut. Ins. Co.*, 51 Pa. 402; *Sutherland v. Old Dominion Ins. Co.*, 31 Grat. (Va.) 176.

This rule applies even though the second insurer, after loss, pays the insured either a whole or part of his claim under the second policy, as such payment is a gratuity rather than an indemnity.

Lindley v. Union Farmers' Mut. Fire Ins. Co., 65 Me. 368, 20 Am. Rep. 701; *Thomas v. Builders' Mut. Fire Ins. Co.*, 119 Mass. 121, 20 Am. Rep. 317; *Knapp v. North Wales Mut. Live Stock Ins. Co.*, 11 Montg. Co. Law Rep'r (Pa.) 119.

But if a second policy is merely voidable or requires evidence aliunde to establish its invalidity, the authorities generally regard such policy as violating a condition in a prior policy against other insurance.

Voidable policy defeats prior insurance. *Turner v. Meridan Fire Ins. Co.* (C. C.) 16 Fed. 454; *Behler v. German Mut. Fire Ins. Co.*, 68 Ind. 847; *Boatman's Fire & Marine Ins. Co. v. James*, 10 Ky. Law Rep. 816; *Stevenson v. Phoenix Ins. Co.*, 88 Ky. 7, 6 Ky. Law Rep. 196, 4 Am. St. Rep. 120; *Mitchell v. Lycoming Mut. Ins. Co.*, 51 Pa. 402.

Policy requiring testimony aliunde to establish its invalidity vitiates prior policy. *Turner v. Meridan Fire Ins. Co.* (C. C.) 16 Fed. 454, 459; *Lackey v. Georgia Home Ins. Co.*, 42 Ga. 456; *David v. Hartford Ins. Co.*, 18 Iowa, 69; *Replogle v. American Ins. Co.*, 132 Ind. 360, 31 N. E. 947, affirming *American Ins. Co. v. Replogle*, 114 Ind. 1, 15 N. E. 810; *Bigler v. New York Cent. Ins. Co.*, 22 N. Y. 402, affirming 20 Barb. 635.

There are even a few cases which go to the extent of holding that a second policy, even though void, will vitiate a prior policy which contains a provision that it shall be void in case other in-

surance is procured. In those cases it is reasoned that the object of the condition against other insurance is to prevent the insured from taking out other insurance which he supposes is valid. If such insurance is procured the moral hazard is increased, and it is immaterial whether the second policy is void or merely voidable.

See *Suggs v. Liverpool & London & Globe Ins. Co.*, 9 Ins. Law J. (Ky.) 657; *Funke v. Minnesota Farmers' Mut. Fire Ins. Ass'n*, 29 Minn. 347, 18 N. W. 164, 43 Am. Rep. 216; *Somerfield v. State Ins. Co.*, 8 Lea (Tenn.) 547, 41 Am. Rep. 662.

On the other hand, a few cases support the principle that even a voidable policy will not constitute a breach of a stipulation against other insurance. Thus it is said in *Sweeting v. Mutual Fire Ins. Co.*, 83 Md. 63, 34 Atl. 826, 32 L. R. A. 570: "Other insurance does not mean a void policy, which obviously affords no insurance at all. Nor does it mean a policy which may, at the option of the underwriter, be canceled; for that is, at least, but conditional insurance. But it means a binding, available insurance—one upon which the insured can rely for protection in case of loss, and which he can enforce by law, and which cannot be repudiated with impunity at the arbitrary election of the insurer."

This rule is further supported by *Allen v. Merchants' Mut. Ins. Co.*, 80 La. Ann. 1386, 31 Am. Rep. 243; *Dahlberg v. St. Louis Mut. Fire & Marine Ins. Co.*, 6 Mo. App. 121; *Fireman's Ins. Co. v. Holt*, 35 Ohio St. 189, 35 Am. Rep. 601; *Woolpert v. Franklin Ins. Co.*, 42 W. Va. 647, 26 S. E. 521.

To meet the principle that a policy will not be forfeited by subsequent insurance which is void, the insurers often insert in these policies a condition making them void in case of other insurance, whether such insurance is "valid or not." Though the validity of such a condition was questioned in the early case of *Gee v. Cheshire County Mut. Fire Ins. Co.*, 55 N. H. 65, 20 Am. Rep. 171, it is now conceded that the condition is valid and enforceable. Therefore, if a policy contains a condition of that nature, it will be vitiated by a subsequent policy, even though the latter is void.

Continental Ins. Co. v. Hulman, 92 Ill. 145, 34 Am. Rep. 122; *Donogh v. Farmers' Fire Ins. Co.*, 104 Mich. 503, 62 N. W. 721; *Hughes v. Insurance Co. of North America*, 40 Neb. 626, 59 N. W. 112; *Sugg v. Hartford Fire Ins. Co.*, 98 N. C. 143, 3 S. E. 732; *Wilson v. Aetna Ins. Co.*, 12 Tex. Civ. App. 512, 33 S. W. 1085.

(p) Same—Estoppel of insured to assert invalidity.

The receipt of payment on subsequent void policies does not estop insured, in an action on a prior policy, from asserting the invalidity of the subsequent policies, so as to avoid forfeiture of the prior policy, under a provision avoiding it in case of additional insurance. The rights of the parties, under the policy, become fixed at the time the loss occurs, and cannot be affected by what is subsequently done between the insured and third parties.

Lindley v. Union Farmers' Mut. Fire Ins. Co., 65 Me. 368, 20 Am. Rep. 701; *Fireman's Ins. Co. v. Holt*, 35 Ohio St. 189, 35 Am. Rep. 601; *Knapp v. North Wales Mut. Live Stock Ins. Co.*, 11 Montg. Co. Law Rep'r (Pa.) 119.

An estoppel will not arise because the insured made a claim under the second policy, if the claim is not allowed (*Jersey City Ins. Co. v. Nichol*, 35 N. J. Eq. 291, 40 Am. St. Rep. 625); or included the second policy in the proofs of loss (*Hubbard v. Hartford Fire Ins. Co.*, 33 Iowa, 325, 11 Am. Rep. 125). The fact that he had consent to the second policy indorsed on another policy after loss does not create an estoppel (*Hardy v. Union Mut. Fire Ins. Co.*, 4 Allen [Mass.] 217); nor is he estopped because on a former trial he conceded that the second policy was valid (*Taylor v. State Ins. Co.*, 107 Iowa, 275, 77 N. W. 1032). It does not affect his rights that he brought suit on the second policy, and procured a compromise, if the policy was clearly void (*Taylor v. State Ins. Co.*, 107 Iowa, 275, 77 N. W. 1032). A rule contrary to that announced in the Taylor Case appears to be asserted in *Bigler v. New York Cent. Ins. Co.*, 20 Barb. (N. Y.) 635. But it is apparent that, as the second policy in that case was at best only voidable, the court considered the prior policy forfeited, irrespective of insured's action in affirming the validity of the second policy.

(q) Insurance in excess of stipulated amount.

In some instances policies contain agreements that the aggregate amount of insurance shall not exceed a certain per cent. of the estimated cash value of the property insured. In Pennsylvania such agreements are considered as covenants not to take out insurance in excess of the amount stipulated (*Lycoming Ins. Co. v. Mitchell*, 48 Pa. 367; *Mitchell v. Lycoming Mut. Ins. Co.*, 51 Pa. 402). But in Iowa it is said that such agreement is not a warranty (*O'Leary v. German-American Ins. Co.*, 100 Iowa, 390, 69

N. W. 686). Under the Pennsylvania doctrine a breach of the agreement by procuring insurance in excess of the per cent. agreed on will work a forfeiture of the policy.

Lycoming Ins. Co. v. Mitchell, 48 Pa. 367; *Mitchell v. Lycoming Mut. Ins. Co.*, 51 Pa. 402; *Elliott v. Lycoming County Mut. Ins. Co.*, 66 Pa. 22, 5 Am. Rep. 323; *Bahner v. Stone Valley Mut. Fire Ins. Co.*, 127 Pa. 464, 17 Atl. 983.

But under the Iowa doctrine a violation of the agreement will not defeat a recovery without proof that insured acted fraudulently or that he knowingly exceeded the limit fixed in the policy (*O'Leary v. German American Ins. Co. of New York*, 100 Iowa, 390, 69 N. W. 686).

The value that is to be used as a basis in determining the amount of insurance permitted under a clause limiting the insurance to a certain per cent. of the value of the property is the estimated value mentioned in the policy (*Elliott v. Lycoming County Mut. Ins. Co.*, 66 Pa. 22, 5 Am. Rep. 323). And if a policy is issued under a law prohibiting insurance companies from writing insurance on property in excess of a certain per cent. of its value, and providing that when taken its value shall not be questioned in any proceeding, the insurer is precluded from denying the estimated value of the property when the policy was written (*Burge Bros. v. Greenwich Ins. Co.*, 106 Mo. App. 244, 80 S. W. 342). But in this case it was said that an insurer may show that a reduction of value has occurred prior to loss, reducing the amount payable by insurer to the value of the property at the time of its destruction.

Frequently policies containing stipulations making them void in case of other insurance have indorsed on them permits for additional insurance. The construction of such permits or clauses is largely dependent on their wording. A clause permitting "additional insurance" refers to prior as well as subsequent insurance (*Behrens v. Germania Ins. Co.*, 58 Iowa, 26, 11 N. W. 719). So an 80 per cent. average or co-insurance clause refers to both prior and subsequent insurance (*Nestler v. Germania Fire Ins. Co.*, 91 N. Y. Supp. 29, affirming 44 Misc. Rep. 97, 89 N. Y. Supp. 782). And a clause permitting "double concurrent insurance" in a certain amount includes not only prior and subsequent policies, but also the policy on which the permit is indorsed (*East Texas Fire Ins. Co. v. Blum*, 13 S. W. 572, 76 Tex. 653). This is also true of an indorsement permitting a "total concurrent insurance" in a certain amount

(*Senor v. The Western Millers' Mutual Fire Ins. Co.*, 181 Mo. 104, 79 S. W. 687).

A violation of these permits by procuring insurance in excess of the amount stipulated will defeat a recovery for a loss.

Reference may be made to *North British & Mercantile Ins. Co. v. Steiger*, 19 Ill. App. 653; *Commercial Union Assur. Co. v. Norwood*, 57 Kan. 610, 47 Pac. 529; *Dolan v. Missouri Town Mut. Fire Ins. Co.*, 88 Mo. App. 606; *Teutonia Ins. Co. v. Bussell* (Tenn. Ch. App.) 48 S. W. 703; *Lycoming Mut. Ins. Co. v. Slockbower*, 26 Pa. 199; *Works, Pritchett & May v. Springfield Fire & Marine Ins. Co.* (Tex. Civ. App.) 79 S. W. 42; *Nestler v. Germania Fire Ins. Co.*, 91 N. Y. Supp. 29; *Id.*, 44 Misc. Rep. 97, 89 N. Y. Supp. 782.

A breach occurs when the prima facie valid insurance exceeds the amount stipulated, and it is immaterial that the policy creating the excess causes a forfeiture of other policies so as to bring the total insurance within the amount permitted.

Royal Ins. Co. v. McCrea, 8 Lea (Tenn.) 531, 41 Am. Rep. 656; *Equitable Ins. Co. v. McCrea*, 8 Lea (Tenn.) 541.

If an insured reserves the right to take out additional insurance as soon as she makes additions to her stock of goods, the right to take out such insurance depends upon the additions to the stock of goods, and the policy will be forfeited if additional insurance is taken out before such condition is fulfilled (*Powell v. Phoenix Ins. Co.*, 10 Ky. Law Rep. 80). In order to prove that insurance in excess of the stipulated amount has been procured, other policies on the property are admissible, if their execution is shown by the agent countersigning them (*Rivara v. Queen's Ins. Co.*, 62 Miss. 720).

(r) Concurrent insurance.

In order that other insurance shall come within a permit to carry "concurrent" insurance, it is not necessary that such other insurance shall cover exactly the same property as that embraced by the policy containing the permit. The term "concurrent" insurance includes policies running with the primary policy, and sharing its risk, and embraces not only those covering the same property, but also those insuring part of the property or including additional property.

Reference may be made to *Corkery v. Security Fire Ins. Co.*, 99 Iowa, 382, 68 N. W. 792; *Gough v. Davis*, 52 N. Y. Supp. 947, 24 Misc.

Rep. 245; Washburn-Halligan Coffee Co. v. Merchants' Brick Mut. Fire Insurance Co., 81 N. W. 707, 110 Iowa, 423, 80 Am. St. Rep. 311.

But if other insurance, covering only some of the property, is not distributed among the items within the primary policy in the same proportion as in that policy, it will not constitute "concurrent insurance," as it is the quality of sharing proportionately in the loss that distinguishes concurrent insurance from double insurance (New Jersey Rubber Co. v. Commercial Union Assur. Co., 64 N. J. Law, 580, 46 Atl. 777). However, the mere fact that a primary policy is made payable to another than insured does not require that a second policy also be made payable to the same person in order to make it concurrent (Caraher v. Royal Ins. Co., 63 Hun, 82, 17 N. Y. Supp. 858).

(a) Necessity of maintaining other insurance to amount stipulated.

If a policy contains a memorandum stating that there is other insurance on the property, and a stipulation that such insurance is to be continued during the life of the policy, the insured will be bound to maintain such insurance on pain of forfeiture (Lattomus v. Farmers' Mutual Fire Ins. Co., 3 Houst. [Del.] 404). But a provision that the insured shall recover such portion of the loss only as the sum insured bears to the whole amount of insurance refers to the amount of insurance at the time of loss, and does not impliedly require insured to maintain other insurance which existed when the policy was issued.

Lattan v. Royal Ins. Co., 45 N. J. Law, 453; Hand v. Williamsburg City Fire Ins. Co., 57 N. Y. 41; Quarrier v. Peabody Ins. Co., 10 W. Va. 507, 27 Am. Rep. 582.

Likewise a statement in a letter in which application for insurance is made that a certain amount of insurance will be maintained will not require insured to maintain such amount, if the policy contains no stipulation to that effect, or does not refer to the application (Citizens' Ins. Co. v. Hoffman, 128 Ind. 370, 27 N. E. 745). Now it is provided by statute in Indiana ⁵ that it shall be unlawful for any fire insurance company doing business in the state to issue any policy covering property therein which shall require

⁵ Horner's Ann. St. Ind. 1901, §§ 3774y, 3774z (Laws 1895, p. 137, as amended Laws 1901, p. 580).

the assured to take out or maintain a larger amount of insurance than that expressed in the policy, except that it may be lawful for the company to issue a policy containing the co-insurance clause when a reduction in the rate is the consideration named. But this statute does not apply to railroad or marine insurance.

In *Insurance Co. of North America v. Hibernia Ins. Co.*, 140 U. S. 565, 11 Sup. Ct. 909, 35 L. Ed. 517, it was contended by a reinsurer that as the original policy on property in part reinsured provided that reinsurance should apply to the amount the reinsured should have in excess of a certain amount, this meant that the reinsured should retain insurance in this amount and only reinsure the excess. But the court did not sustain this contention. The court said that while the provision meant that the reinsuring company should not carry any risk except that in excess of the named amount, it did not mean that the reinsured could not reinsure the remainder elsewhere.

21. UNAUTHORIZED ASSIGNMENT OF POLICY AS GROUND OF FORFEITURE.

- (a) Restrictions on assignment in general.
- (b) Consent to assignment.
- (c) What is a breach of condition.
- (d) Same—Assignment or pledge as collateral security.
- (e) Effect of breach of condition.

(a) Restrictions on assignment in general.

Policies of insurance against fire contain, usually in conjunction with the condition against transfer of interest, a stipulation providing that the policy shall be void if it be assigned without notice to and consent by the insurer. This is a material part of the contract, and is designed for the protection of the insurer (*State Mut. Fire Ins. Co. v. Roberts*, 31 Pa. 438). The contract of insurance is a personal contract, in which the character of the insured is taken into consideration as affecting the moral hazard (*New v. German Ins. Co.*, 5 Ind. App. 82, 31 N. E. 475). The company has a right to choose whom it will insure (*Waterhouse v. Gloucester Fire Ins. Co.*, 69 Me. 409); and it is the privilege of the underwriter to preserve during the continuance of the risk the safeguards which existed at its inception. The stipulation imposing forfeiture for an

unauthorized assignment of the policy before loss is, therefore, valid and enforceable.

Spare v. Home Ins. Co. (C. C.) 17 Fed. 568; *Waterhouse v. Gloucester Fire Ins. Co.*, 69 Me. 409; *Stolle v. Aetna Fire & Marine Ins. Co.*, 10 W. Va. 546, 27 Am. Rep. 593.

The stipulation does not apply to assignments after loss, nor would such a stipulation be enforced, as it is regarded as contrary to public policy.

Spare v. Home Ins. Co. (C. C.) 17 Fed. 568; *West Branch Ins. Co. v. Helfenstein*, 40 Pa. 289, 80 Am. Dec. 573; *Stolle v. Aetna Fire & Marine Ins. Co.*, 10 W. Va. 546, 27 Am. Rep. 593; *Nease v. Aetna Ins. Co.*, 32 W. Va. 283, 9 S. E. 233.

A condition that if the policy be assigned, either before or after loss, without the consent of the insurer, "the assured" shall not be entitled to recover, does not, in view of the use of the words "the assured," prevent a recovery by the assignee (*Mershon v. National Ins. Co.*, 34 Iowa, 87). Moreover, under the provisions of the statute (Revision 1860, § 1798), though the assignment of an instrument is prohibited, the assignment may be valid, and the maker of the instrument limited to his right to set up against the assignee the defenses he might have pleaded against the assignor.

Where the policy provided that "the interest of the assured in this policy is not assignable without the consent of the company in writing; and in case of any transfer or termination of the interest of the assured, either by sale or otherwise, without such consent, this policy shall thenceforth be void and of no effect" (*Smith v. Saratoga County Mutual Fire Ins. Co.*, 1 Hill [N. Y.] 497), the court held that the first part of the sentence could not very well be separated from the last part, and that therefore an assignment of the policy without the consent of the company was prohibited on pain of forfeiture.

(b) Consent to assignment.

Under the terms of the stipulation, mere notice of the assignment is not sufficient; but it is necessary to the continued validity of the policy that the insurer should give its consent thereto.

New v. German Ins. Co., 5 Ind. App. 82, 31 N. E. 475; *Ferree v. Oxford Fire & Life Ins. Co.*, 67 Pa. 373, 5 Am. Rep. 436; *Girard Fire & Marine Ins. Co. v. Hebard*, 95 Pa. 45.

So, when the insured in his application stated his wish and intent to assign the policy, the issuing of the policy did not amount to a consent to the assignment (*Smith v. Saratoga County Mut. Fire Ins. Co.*, 3 Hill [N. Y.] 508). Where a risk is reinsured without any stipulation in the contract of reinsurance as to assignment of the policy, but the original policy provides in effect that an assignment may be made with the consent of the insurer, the insurer may give such permission to the insured without the consent of the reinsurer (*Faneuil Hall Ins. Co. v. Liverpool & London & Globe Ins. Co.*, 153 Mass. 63, 26 N. E. 244, 10 L. R. A. 423).

Notwithstanding a condition in a policy that there should be no transfer thereof without the consent of the company indorsed on it, such transfer is valid where the company's agent knew of it and consented thereto. *Fire Ins. Ass'n v. Miller*, 2 Willson, Civ. Cas. Ct. App. (Tex.) § 333.

An agent, authorized to issue policies, has authority to consent to an assignment (*German Ins. Co. v. Penrod*, 35 Neb. 273, 53 N. W. 74); but a mere soliciting agent has not such authority necessarily (*Strickland v. Council Bluffs Ins. Co.*, 66 Iowa, 466, 23 N. W. 926), and the burden is on the insured to show the agent's authority. Authority to consent to an assignment of a policy is not to be inferred from the fact that such agent was authorized to purchase the necessary books for the record of his business on behalf of the company, in which books his record of such assignment was made (*Stringham v. St. Nicholas Ins. Co.*, *42 N. Y. 280, 4 Abb. Dec. 315, 5 Abb. Prac. [N. S.] 80). But, where the secretary of an insurance company receives notice of an assignment, and indorses the same upon the policy, and subscribes the consent thereto at the usual place of business of the company, his authority to do so will be presumed (*Conover v. Mutual Ins. Co.* 1 N. Y. 290, affirming 3 Denio, 254).

An approval of an assignment of a policy by the agent, "for secretary," immediately reported in addition to his monthly reports, is a sufficient compliance with a stipulation that the policy shall be void if assigned without the written approval of the secretary. *Farmers' Mut. Ins. Co. v. Taylor*, 73 Pa. 342.

The approval of and consent to an assignment, written and signed by the president, on a separate piece of paper and attached to the policy by a wafer, is a sufficient indorsement within the meaning of a condition requiring consent to be indorsed on the policy (*Penn-*

sylvania Ins. Co. v. Bowman, 44 Pa. 89). It is sufficient if consent is indorsed on the policy after the assignment is made (*Gould v. Dwelling-House Ins. Co.*, 134 Pa. 570, 19 Atl. 793, 19 Am. St. Rep. 717); and, if the time for which premium was paid for a policy had not expired when consent to transfer thereof was given, there was a sufficient consideration for the company's consent to the transfer (*North British & Mercantile Ins. Co. v. Gunter*, 12 Tex. Civ. App. 598, 35 S. W. 715).

Where a policy contains a provision that it shall be void in case of its being assigned without the previous consent in writing of the insurers, the assent of the insurers to an assignment cannot be shown by oral evidence. *Minturn v. Manufacturers' Ins. Co.*, 10 Gray (Mass.) 501.

An assignment of the policy with the consent of the insurer, accompanying a transfer of the subject of the insurance, is in the nature of a new contract.

Perry v. Mechanics' Mut. Ins. Co. (C. C.) 11 Fed. 478; *Bullman v. North British & Mercantile Ins. Co.*, 159 Mass. 118, 34 N. E. 169.

It is therefore usually considered essential that the nature of the assignee's interest in the property should be fairly and fully disclosed.

Home Insurance Co. v. Allen, 93 Ky. 270, 19 S. W. 743; *Wall v. Commercial Ins. Co.*, 2 Wkly. Law Bul. (Ohio) 113; *Wall v. Amazon Ins. Co.*, 2 Wkly. Law Bul. 333, 7 Ohio Dec. 408; *Phenix Ins. Co. v. Willis*, 70 Tex. 12, 8 S. W. 825, 8 Am. St. Rep. 566.

On the other hand, in Pennsylvania it has been held that such disclosure is not necessary, in the absence of any provision in the policy calling for a disclosure of the assignee's interest.

Lycoming Ins. Co. v. Mitchell, 48 Pa. 367; *Cumberland Valley Mut. Protection Co. v. Mitchell*, 48 Pa. 374.

An insurer, having consented to an assignment by the agent of the insured, cannot afterwards object that the agent had no authority to assign the policy (*Manchester Fire Assur. Co. v. Feibelman*, 118 Ala. 308, 23 South. 759).

(c) What is a breach of condition.

The assignment of the claim of the insured after loss is not a breach of the condition prohibiting the assignment of the policy

without the consent of the insurer, as the rights of the parties are fixed by the loss.

Spare v. Home Mut. Ins. Co. (C. C.) 17 Fed. 568; *Brichta v. New York Lafayette Ins. Co.*, 2 Hall (N. Y.) 403; *Rogers v. Traders' Ins. Co.*, 6 Paige (N. Y.) 583; *Golt v. National Protection Ins. Co.*, 25 Barb. (N. Y.) 189; *Courtney v. New York City Ins. Co.*, 28 Barb. (N. Y.) 116; *Prows v. Ohio Valley Ins. Co.*, 2 Cin. R. 14, 13 Ohio Dec. 739; *Merchants' Ins. Co. v. Scott*, 1 Posey, Unrep. Cas. (Tex.) 534; *Stolle v. Aetna Fire & Marine Ins. Co.*, 10 W. Va. 546, 27 Am. Rep. 593; *Nease v. Aetna Ins. Co.*, 32 W. Va. 283, 9 S. E. 233; *Alkan v. New Hampshire Ins. Co.*, 53 Wis. 136, 10 N. W. 91; *Russ v. Waldo Mut. Ins. Co.*, 52 Me. 187.

And this is true, though the condition prohibits assignments both before and after loss.

Mershon v. National Ins. Co., 34 Iowa, 87; *West Branch Ins. Co. v. Helfenstein*, 40 Pa. 289, 80 Am. Dec. 573.

It is, however, intimated in *Carroll v. Charter Oak Ins. Co.*, 40 Barb. (N. Y.) 292, that the rule applies only when there has been a total loss, and that an assignment after a partial loss would violate the condition.

In *Dey v. Poughkeepsie Mut. Ins. Co.*, 23 Barb. (N. Y.) 623, the stipulation forbade any assignment of the policy or any claim thereunder, and it was held that an assignment after loss would forfeit the policy; but the case has been regarded as overruled by the other New York cases cited.

An assignment of certificates under an open policy, without an assignment of the policy, may be considered as made merely for the purpose of enabling the assignee to claim the insurance, and not as an assignment of the policy (*Delahunt v. Aetna Ins. Co.*, 97 N. Y. 537).

An agreement that a carrier shall have the benefit of any insurance on the goods shipped is not a violation of the stipulation forbidding the assignment of the policy (*Jackson Co. v. Boylston Mut. Ins. Co.*, 2 N. E. 103, 139 Mass. 508, 52 Am. Rep. 728). Such an agreement may be ground of forfeiture when there is an express stipulation covering such act (*Insurance Co. of North America v. Easton*, 73 Tex. 167, 11 S. W. 180, 3 L. R. A. 424). But, even then, the loss must be one for which the carrier is liable (*Pennsylvania R. Co. v. Manheim Ins. Co.* [D. C.] 56 Fed. 301).

An agreement to assign the policy is not a breach of the condition.

Washington Fire Ins. Co. v. Kelly, 32 Md. 421, 3 Am. Rep. 149; *Prows v. Ohio Valley Ins. Co.*, 2 Cin. R. 14, 13 Ohio Dec. 739; *Fire & Marine Ins. Co. v. Morrison*, 11 Leigh (Va.) 354, 38 Am. Dec. 885.

So an assignment that is to be ineffective until consent is obtained is not a breach (*Manley v. Insurance Co. of North America*, 1 Lans. [N. Y.] 20). Consequently an assignment to be delivered after consent has been obtained, but not delivered because consent was withheld is not a breach (*Smith v. Monmouth Mut. Fire Ins. Co.*, 50 Me. 96). Where, on the death of the insured, the policy, at the request of the heirs, is indorsed: "It is understood that the property herein insured is owned by [the heirs], and loss, if any, is payable to them as their interest may appear" (*Sauner v. Phoenix Ins. Co. of Brooklyn*, N. Y., 41 Mo. App. 480), such indorsement may be regarded as an assignment. An agreement that a third person should receive from the insured any unearned premium on the policy which might be received, and that if a loss should occur prior to the cancellation the insured should pay to such third person any amount which might be received on the policies, does not constitute an assignment of the policy within the condition (*Crawford v. Aachen & Munich Fire Ins. Co.*, 100 Ill. App. 454). An assignment indorsed on the policy by the agent before delivery, for the purpose of correcting a mistake in the name of the policy holder, will not avoid the policy (*Universal Fire Ins. Co. v. Swartz*, 2 Walk. [Pa.] 34).

Though it was held in *Shuggart v. Lycoming Fire Ins. Co.*, 55 Cal. 408, that the assignment by one member of a firm of his interest in the policy to his copartner forfeited the policy as to such interest, the better rule is that such a transfer is not a breach of the condition.

Dermani v. Home Mut. Ins. Co., 26 La. Ann. 69, 21 Am. Rep. 544;
Texas Banking & Ins. Co. v. Cohen, 47 Tex. 406, 28 Am. Rep. 298.

In *Fayette County Mut. Fire Ins. Co. v. Neel*, 6 Wkly. Notes Cas. 233, it was said that an assignment in bankruptcy was not within the condition. The same rule was asserted in *Starkweather v. Cleveland Ins. Co.*, 22 Fed. Cas. 1091; and, though the judgment in this case was afterwards reversed (22 Fed. Cas. 1093), it was apparently on other grounds. In *Appleton Iron Co. v. British America Assur. Co.*, 46 Wis. 23, 50 N. W. 1100, it was said that, though a

petition in bankruptcy specifically describes a policy of fire insurance as part of the bankrupt's assets, and under an order of the court he assigns all his property generally to a trustee, if he does not deliver the policy to the trustee or actually assign it, there is no breach of the condition. An assignment for benefit of creditors, according to the New York doctrine, does not violate the condition, as it transfers only the property, and does not carry with it a policy as incident thereto (*People v. Beigler*, *Lalor's Supp.* 133). On the other hand, it has been held in New Hampshire (*Dube v. Mascoma Mut. Fire Ins. Co.*, 64 N. H. 527, 15 Atl. 141, 1 L. R. A. 57) that a policy of insurance passes by an assignment of the debtor's property as an integral part thereof, and not merely as an incident, and that such assignment is a violation of the condition.

Where the policy is payable to a mortgagee as his interest may appear, an assignment by the mortgagee of his interest in the policy to the assignee of the note or mortgage is not a breach of the condition.

Sun Fire Office v. Fraser, 5 Kan. App. 63, 47 Pac. 327; *Whiting v. Burkhardt*, 60 N. E. 1, 178 Mass. 535, 52 L. R. A. 788, 86 Am. St. Rep. 508; *Key v. Continental Ins. Co.*, 74 S. W. 162, 101 Mo. App. 344; *Breeyear v. Rockingham Farmers' Mut. Fire Ins. Co.*, 71 N. H. 445, 52 Atl. 860.

When a policy was, to secure a claim, made payable in case of loss to the creditor, a subsequent assignment of the policy by the insured to such creditor, of all his right, title, and interest therein, and all benefits and advantages to be derived therefrom, being unnecessary and ineffectual, did not invalidate the policy (*Newman v. Springfield Fire & Marine Ins. Co.*, 17 Minn. 123 [Gil. 98]).

Where the answer alleged that plaintiff had duly assigned the policy to one A. before the action was brought, and no longer had a claim under it against defendant, and the referee for trial found that "no sufficient assignment under the terms and conditions prescribed by said policy was ever made and delivered to said" A., the finding was defective, not determining the issue made. *Dogge v. Northwestern Nat. Ins. Co.*, 49 Wis. 501, 5 N. W. 889.

(d) Same—Assignment or pledge as collateral security.

An assignment or pledge of the policy merely as collateral security for a debt is not such an assignment as is contemplated by the condition, and therefore is not a breach.

Bibend v. Liverpool & London Fire & Life Ins. Co., 30 Cal. 78; *Dickey v. Pocomoke City Nat. Bank*, 43 Atl. 33, 89 Md. 280; *Key v. Con-*

tinental Ins. Co., 101 Mo. App. 344, 74 S. W. 162; Breeyear v. Rockingham Farmers' Mut. Fire Ins. Co., 71 N. H. 445, 52 Atl. 860; Hodges v. Tennessee Marine & Fire Ins. Co., 8 N. Y. 416; Griffey v. New York Cent. Ins. Co., 100 N. Y. 417, 3 N. E. 309, 53 Am. Rep. 202, affirming 30 Hun, 299; Mahr v. Bartlett, 53 Hun, 388, 7 N. Y. Supp. 143, 23 Abb. N. C. 436.

But, where the condition prohibited the assignment of the policy "or any interest therein," an assignment as collateral security was a violation of the condition. Ferree v. Oxford Fire & Life Ins. Co., 67 Pa. 373, 5 Am. Rep. 436, affirming 8 Phila. 512.

Since an assignment of a policy merely to secure a loan is not one which is forbidden in the usual prohibition against assignments, where such assignment is made with the company's consent, the reassignment, upon payment of the loan, without consent, does not work a forfeiture (True v. Manhattan Fire Ins. Co. [C. C.] 26 Fed. 83). A condition that the policy shall not be assignable for collateral security, but should be made payable, in case of loss, to the party to be secured, does not apply where the property insured is actually transferred, and the policy assigned along with the transfer (Hoyt v. Hartford Fire Ins. Co., 26 Hun [N. Y.] 416).

In analogy to the rule that the condition does not refer to assignments after loss, it has been held that an equitable assignment, as security, of the fund payable in case of loss, is not a breach of the condition. Cromwell v. Brooklyn Fire Ins. Co., 39 Barb. (N. Y.) 227; Insurance Co. of Pennsylvania v. Phoenix Ins. Co., 71 Pa. 81.

(e) Effect of breach of condition.

As a general proposition, it may be said that a breach of the condition prohibiting the assignment of the policy without the consent of the insurer forfeits the insurance.

Green v. Kenton Ins. Co., 12 Ky. Law Rep. 750; Smith v. Saratoga County Mut. Fire Ins. Co., 1 Hill (N. Y.) 497; Buchanan v. Westchester County Mut. Ins. Co., 61 N. Y. 611; Olyphant Lumber Co. v. Peoples' Mut. Live Stock Ins. Co., 4 Pa. Super. Ct. 100; Sabotta v. St. Paul Fire & Marine Ins. Co., 54 Wis. 687, 12 N. W. 18, 381.

It does not affect the result that the breach was not willful (Wartertown Fire Ins. Co. v. Cherry, 84 Va. 72, 3 S. E. 876), or that the insurer was not prejudiced thereby (Dundee Chemical Works v. New York Mut. Ins. Co., 12 Misc. Rep. 353, 33 N. Y. Supp. 628). It has been held, in Waterhouse v. Gloucester Fire Ins. Co., 69 Me. 409, that a breach of the condition is not affected by the provisions

of Rev. St. c. 49, § 19, declaring that a change in the property insured, its use or occupation, or a breach of any of the terms of the policy by the insured shall not affect the policy, unless they materially increase the risk.

Though it was held, in *Stolle v. Ætna Fire & Marine Ins. Co.*, 10 W. Va. 546, 27 Am. Rep. 593, that a breach of the stipulation rendered the policy voidable only, the better rule seems to be that the policy becomes absolutely void.

Jackson v. Millspaugh, 108 Ala. 175, 15 South. 576; *New v. German Ins. Co.*, 5 Ind. App. 82, 31 N. E. 475; *Smith v. Saratoga County Mut. Fire Ins. Co.*, 3 Hill (N. Y.) 508; *Girard Fire & Marine Ins. Co. v. Hebard*, 95 Pa. 45.

A by-law providing that "when any property insured in this corporation shall be alienated, by sale or otherwise, the policy shall thereupon be void, and be surrendered to the officers of said company to be canceled, and a ratable proportion of the unearned premium be returned," does not limit the condition prohibiting assignments, so as to prevent the policy from becoming void on an assignment of the policy until the unearned premium has been returned (*Buchanan v. Westchester County Mut. Ins. Co.*, 61 N. Y. 611).

Though the policy becomes absolutely void, the forfeiture may be waived; and consequently it cannot be taken advantage of by a creditor of the original insured. *Insurance Co. of Pennsylvania v. Trask*, 8 Phila. (Pa.) 32.

22. NONPAYMENT OF PREMIUMS OR ASSESSMENTS AS GROUND OF FORFEITURE.

- (a) Default as ground of forfeiture in general.
- (b) Same—Mutual companies.
- (c) Absolute forfeiture or suspension of risk.
- (d) Proceedings to effect forfeiture—Notice.
- (e) Same—Mutual companies.
- (f) Excuses for nonpayment.
- (g) Rights of insured after default.

(a) Default as ground of forfeiture in general.

Policies of insurance usually contain a condition that a failure to pay any premium or note given therefor when due, or within a specified time thereafter, shall render the policy void. Such condi-

tion is reasonable and valid, and consequently binding on the insured.

Palmer v. Continental Ins. Co. (Cal.) 61 Pac. 784; *St. Paul Fire & Marine Ins. Co. v. Coleman*, 6 Dak. 458, 43 N. W. 693, 6 L. R. A. 87; *Continental Ins. Co. v. Chew*, 11 Ind. App. 330, 38 N. E. 417, 54 Am. St. Rep. 506; *Shakey v. Hawkeye Ins. Co.*, 44 Iowa, 540; *Harle v. Council Bluffs Ins. Co.*, 71 Iowa, 401, 32 N. W. 396; *Blakeley v. Continental Ins. Co.*, 5 Ky. Law Rep. 423; *Hodge v. Continental Ins. Co.*, 12 Ky. Law Rep. 138; *Barnes v. Continental Ins. Co.*, 30 Mo. App. 539; *Mooney v. Home Ins. Co.*, 80 Mo. App. 192; *Home Fire Ins. Co. v. Garbacz*, 48 Neb. 827, 67 N. W. 864; *Redfield v. Patterson Fire Ins. Co.*, 6 Abb. N. C. (N. Y.) 456; *Whipple v. United States Fire Ins. Co.*, 20 R. I. 260, 38 Atl. 498.

It therefore follows that, where such a condition exists, a default within the terms thereof is a ground of forfeiture of the policy.

Reference may be made to *Bergson v. Builders' Ins. Co.*, 38 Cal. 541; *New Zealand Ins. Co. v. Maaz*, 13 Colo. App. 493, 59 Pac. 213; *Continental Ins. Co. v. Dorman*, 125 Ind. 189, 25 N. E. 213; *Hodge v. Continental Ins. Co.*, 12 Ky. Law Rep. 138; *Louisville Underwriters v. Pence*, 14 Ky. Law Rep. 21, 19 S. W. 10; *Id.*, 93 Ky. 96, 19 S. W. 10, 40 Am. St. Rep. 176; *Barnes v. Continental Ins. Co.*, 30 Mo. App. 539; *Dircks v. German Ins. Co.*, 34 Mo. App. 31; *Phenix Ins. Co. v. Bachelder*, 32 Neb. 490, 49 N. W. 217, 29 Am. St. Rep. 443; *Home Fire Ins. Co. v. Garbacz*, 48 Neb. 827, 67 N. W. 864; *Antes v. State Ins. Co.*, 61 Neb. 55, 84 N. W. 412; *Houston v. Farmers' & Merchants' Ins. Co.*, 64 Neb. 138, 89 N. W. 635; *Wall v. Home Ins. Co.*, 36 N. Y. 157; *Redfield v. Patterson Fire Ins. Co.*, 6 Abb. N. C. (N. Y.) 456; *Wilson v. Home Ins. Co.*, 6 Ohio Dec. 708; *Continental Ins. Co. v. Busby*, 3 Willson. Civ. Cas. Ct. App. (Tex.) § 103; *East Texas Fire Ins. Co. v. Perky*, 5 Tex. Civ. App. 698, 24 S. W. 1080; *Muhleman v. National Ins. Co.*, 6 W. Va. 508.

The fact that the premium is a debt which the insurer may collect and remain liable on the policy does not affect the result (*Boatman's Fire & Marine Ins. Co. v. James*, 10 Ky. Law Rep. 816). And where the policy was for a term of five years from March 25, 1884, the premium note being made payable in installments on March 1st of each year thereafter, the court held that the contract was clearly one for five years, subject to lapse on nonpayment of any installment on the day due, and not one from year to year, with power in the insured to renew it by payment of the installment on the anniversary of the commencement of the policy (*Barnes v. Continental Ins. Co.*, 30 Mo. App. 539). Where the

terms of a policy are so conflicting and ambiguous as to leave it uncertain whether premiums must be paid upon a given day in a month, or may be paid at any time during that month, the company will be bound by a practical construction given for a considerable period by its notices, and acted upon in accepting payments (*People v. Commercial Alliance Ins. Co.*, 48 N. Y. Supp. 389, 21 App. Div. 533).

The mere fact that the note is unpaid at the time of the loss is not sufficient ground of forfeiture, if the note is not yet due (*Farmers' & Merchants' Ins. Co. v. Wiard*, 81 N. W. 312, 59 Neb. 451). Though the giving of a note for the cash payment of premium will not prevent a forfeiture for the nonpayment of the note (*Mooney v. Home Ins. Co.*, 72 Mo. App. 92), forfeiture cannot be based on the nonpayment of a note payable to the agent, if the latter has paid the amount to the company and holds the note as a personal claim (*Mooney v. Home Ins. Co.*, 80 Mo. App. 192). But the fact that the note is payable to the agent will not affect the question, if it is in fact held by the company in lieu of the cash premium (*Hooker v. Continental Insurance Co.* [Neb.] 96 N. W. 663).

If the policy covers several different species of property, and the premium has been severed and paid as to one species, the nonpayment as to the other kinds of property will not prevent a recovery as to the one on which the premium was paid (*Farmers' & Merchants' Ins. Co. v. Dobney*, 62 Neb. 213, 86 N. W. 1070, 97 Am. St. Rep. 624).

On the other hand, in the absence of a condition to that effect in the policy, default in the payment of a premium cannot be made the basis of a claim of forfeiture.

The Natchez (D. C.) 42 Fed. 169; *Continental Ins. Co. v. Miller*, 4 Ind. App. 553, 30 N. E. 718; *Ohio Farmers' Ins. Co. v. Stowman*, 16 Ind. App. 205, 44 N. E. 558, 940; *Trade Ins. Co. v. Barraciff*, 45 N. J. Law, 543, 46 Am. Rep. 792; *Woodfin v. Asheville Mut. Ins. Co.*, 51 N. C. 558.

It is not sufficient that the condition is in the application for the policy, if it is not embodied in the policy (*Kollitz v. Equitable Mut. Fire Ins. Co.* [Minn.] 99 N. W. 892). And it has been held in Kansas (*Dwelling House Ins. Co. v. Hardie*, 37 Kan. 674, 16 Pac. 92) that a condition in the note that nonpayment shall terminate the insurance is not equivalent to a condition in the policy. A

different rule seems to have been upheld in *New Zealand Ins. Co. v. Maaz*, 13 Colo. App. 493, 59 Pac. 213; but there is nothing in the report to show whether or not the condition was contained in the policy as well as the note. An Iowa statute (Acts 18th Gen. Assem. c. 211, § 2) requires a copy of the premium note to be attached to the policy. It has been held that, where one of the defenses to an action on a tornado policy is that a premium note was unpaid at maturity, whereby the policy, under its express conditions, was suspended, the fact that such note was attached to a fire policy issued at the same time as, and referred to in, the policy in suit, is not a sufficient compliance with the statute (*Lewis v. Burlington Ins. Co.*, 80 Iowa, 259, 45 N. W. 749).

An insurer who, under the contract, has forfeited the policy for non-payment of premium, is entitled to recover premiums earned during the time the risk was carried. *Hibernia Ins. Co. v. Blanks*, 35 La. Ann. 1175.

(b) Same—Mutual companies.

In the case of mutual companies, the condition providing for forfeiture on default in the payment of assessments may be in the policy, or it may be a provision of the by-laws. In either case the condition is valid and binding on the insured.

Douville v. Farmers' Mut. Fire Ins. Co., 113 Mich. 158, 71 N. W. 517; *Farmers' Mutual Ins. Co. v. Kinney*, 64 Neb. 808, 90 N. W. 926; *Blanchard v. Atlantic Mut. Fire Ins. Co.*, 33 N. H. 9; *Beadle v. Chenango County Mut. Ins. Co.*, 3 Hill (N. Y.) 161; *Fogle v. Lycoming Mut. Ins. Co.*, 3 Grant, Cas. (Pa.) 77.

But such a condition will not be valid if it is inconsistent with the provisions of the charter (*MacKinnon v. Mut. Fire Ins. Co.*, 83 Wis. 12, 53 N. W. 19), or of a statute (*Hurst Home Ins. Co. v. Muir*, 107 Ky. 148, 53 S. W. 3).

If, however, the policy or by-laws contain a valid condition to that effect, default in the payment of assessments levied in accordance with the laws of the company is a ground of forfeiture.

Lenz v. German Fire Ins. Co., 74 Ill. App. 341; *Coles v. Iowa State Mut. Ins. Co.*, 18 Iowa, 425; *Supple v. Iowa State Ins. Co.*, 58 Iowa, 29, 11 N. W. 716; *Hill v. Farmers' Mut. Fire Ins. Co.*, 129 Mich. 141, 88 N. W. 392; *Graham v. Mercantile Town Mut. Ins. Co.* (Mo. App.) 84 S. W. 93; *Beadle v. Chenango County Mut. Ins. Co.*, 3 Hill (N. Y.) 161; *Perry v. Farmers' Mut. Fire Ins. Co.*, 132 N. C. 283, 43 S. E. 837; *Columbia Ins. Co. v. Buckley*, 83 Pa. 298; *Crawford Co. Mut. Ins. Co. v. Cochran*, 88 Pa. 230; *Old v. Farmer's*

Fire Ins. Co., 2 Walk. (Pa.) 110; *Gonder v. Lancaster Co. Mut. Fire Ins. Co.*, 17 Pa. Super. Ct. 110; *Southern Mut. Ins. Co. v. Taylor*, 88 Grat. (Va.) 743.

But see *Rix v. Mutual Ins. Co.*, 20 N. H. 198, where the charter provided that a failure to pay an annual assessment would forfeit the policy, and the by-laws provided that the insured might give a note covering the first payment and annual assessments covering the period of risk, and that a failure to pay an assessment on the note should cause the whole note to become due and payable with costs. The court held that the latter penalty was the only one that could be imposed on a failure to pay an assessment on the note.

As in the case of ordinary policies, this result is not affected by the right of the company to sue for and recover the amount of the delinquent assessment (*Hill v. Farmers' Mut. Fire Ins. Co.*, 129 Mich. 141, 88 N. W. 392).

The ground of the decisions declaring that failure to pay assessments is cause for forfeiture seems to be that the consideration on which a member's own insurance is based is the payment of his share of the losses of other members (*Washington Mut. Fire Ins. Co. v. Rosenberger*, 33 Leg. Int. [Pa.] 338).

It is, however, axiomatic that forfeiture cannot be declared for failure to pay an assessment which is illegal and not levied in accordance with the provisions of the charter.

In re *People's Mut. Equitable Fire Ins. Co.*, 9 Allen (Mass.) 319; *Baker v. Citizens' Mut. Fire Ins. Co.*, 51 Mich. 243, 16 N. W. 391; *Planters' Ins. Co. v. Comfort*, 50 Miss. 662; *Rosenberger v. Washington Fire Ins. Co.*, 87 Pa. 207.

The theory of the cases is that the mere existence of the unpaid assessment is not sufficient. It must be such as to fix the liability of the insured.

McMahan v. Sewickly Mut. Fire Ins. Co., 179 Pa. 52, 36 Atl. 174; *Seyk v. Millers' Nat. Ins. Co.*, 74 Wis. 67, 41 N. W. 443, 3 L. R. A. 523.

Therefore an assessment which is illegal, because willfully too large and made so for the purpose of providing a fund for the payment of future losses, cannot be made a basis for forfeiture (*Rosenberger v. Washington Fire Ins. Co.*, 87 Pa. 207), though a mere mistake as to the actual amount necessary would not affect the validity. So a forfeiture cannot be based on an assessment which shows on its face that it is largely to meet losses which occurred before insured became a member (*Susquehanna Mut. Fire Ins. Co.*

v. Tunkhannock Toy Co., 15 Wkly. Notes Cas. [Pa.] 306); nor on an assessment levied after the death of the animal insured (Weikel v. Lower Providence Live Stock Ins. Co., 3 Montg. Co. Law Rep'r [Pa.] 207, 211).

An interesting case is *Brannin v. Mercer County Mut. Fire Ins. Co.*, 28 N. J. Law, 92. The policy was assigned to the purchaser of the insured premises; he giving his own premium note in lieu of the one given by the insured, which was returned. There was at that time a liability for an assessment on such note, but notice of the assessment was not given until some time after the assignment; the notice being sent to both the original insured and the assignee. The policy provided that "any member" who failed to pay an assessment within the specified time after notice should forfeit his policy. It was held, however, that as the original insured had ceased to be a member before notice was given of the assessment, and the assignee was not a member when the loss occurred, there was no ground on which the policy could be forfeited.

Where forfeiture for nonpayment is pleaded as a defense to an action on the policy, the burden of proof is on the company to show that the assessment did not cover losses incurred prior to the time when plaintiff became a member of the association. *Susquehanna Mut. Fire Ins. Co. v. Tunkhannock Toy Co.*, 15 Wkly. Notes Cas. (Pa.) 306.

The contracts of mutual companies sometimes provide that a failure to pay the interest on deposit notes shall prevent a recovery for any loss occurring while such interest is unpaid. Under such a condition a default in the payment of interest is, of course, a ground of forfeiture.

Mutual Fire Ins. Co. v. Miller Lodge, I. O. O. F., 58 Md. 463; *Webb v. Mutual Fire Ins. Co.*, 63 Md. 213.

Such a penalty for the failure to pay interest when due cannot, however, be imposed by a by-law passed after the insured became a member and without his consent (*Fire Ins. Co. v. Connor*, 17 Pa. 136).

As in the case of ordinary policies, if there is no condition to that effect in the policy or by-laws, default in the payment of an assessment cannot be made a ground of forfeiture.

Sanford v. California Farmers' Mut. Fire Ins. Ass'n, 63 Cal. 547; *Merchants' & Manufacturers' Mut. Ins. Co. v. Baker* (Neb.) 94 N. W. 627; *Woodfin v. Asheville Mut. Ins. Co.*, 51 N. C. 558.

So it has been held in Maine (*New England Mut. Fire Ins. Co. v. Butler*, 34 Me. 451) that a vote by a mutual insurance company that if assessments upon the premium notes are not paid punctually the insurance previously made will be suspended is of no validity unless assented to by the assured. The member will not be bound by such subsequent by-laws providing for suspension, though he agreed to be governed by the articles of incorporation and by-laws, the former of which expressly conferred power to enact by-laws on the directors (*Farmers' Mut. Hail Ins. Ass'n v. Slattery*, 115 Iowa, 410, 88 N. W. 949).

In view of the Pennsylvania act of May 11, 1881 (P. L. 20), providing that, when a policy contains any reference to the by-laws of the company as forming a part of the contract, a copy of such by-laws must be attached to the policy or made a part thereof, to render the defense of nonpayment available, the policy must contain a copy of the by-law (*Shoemaker v. Whitehall Mut. Fire Ass'n* 23 Pa. Co. Ct. R. 174, 9 Pa. Dist. R. 579).

(c) Absolute forfeiture or suspension of risk.

It has been held in some jurisdictions that where the policy contains an unqualified condition that, on a failure to pay any premium or premium note, the insurance shall terminate, the policy, on default, becomes void ipso facto.

Ohio Farmers' Ins. Co. v. Wilson, 70 Ohio St. 354, 71 N. E. 715; *Continental Ins. Co. v. Busby*, 3 Willson, Civ. Cas. Ct. App. (Tex.) § 103; *Muhleman v. National Ins. Co.*, 6 W. Va. 508.

On the other hand, it has been held in Kentucky (*Louisville Underwriters v. Pence*, 93 Ky. 96, 19 S. W. 10, 40 Am. St. Rep. 176) that the default rendered the policy voidable only at the option of the insurer. So, in Ohio (*Wilson v. Home Ins. Co.*, 7 Am. Law Rec. 480, 6 Ohio Dec. 708), it has been held that, where a note given for a premium provides that if it is not paid at maturity, the policy shall be void, the failure to pay does not of itself avoid the policy, but gives the company the option of declaring a forfeiture. This case is to be distinguished from *Ohio Farmers' Ins. Co. v. Willson*, 70 Ohio St. 354, 71 N. E. 715, cited above, as in that case the condition was in the policy itself.

Generally the condition is not absolute in its terms, but provides that the policy shall be void so long as the premium or note given therefor remains due and unpaid, or that the insurer shall not be

liable for any loss so long as the premium or note is past due and unpaid. Where such is the condition, the default in payment operates only to suspend the risk.

This is the rule laid down in *New Zealand Ins. Co. v. Maaz*, 13 Colo. App. 493, 59 Pac. 213; *Lenz v. German Fire Ins. Co.*, 74 Ill. App. 341; *American Ins. Co. v. Henley*, 60 Ind. 515; *Continental Ins. Co. v. Miller*, 4 Ind. App. 553, 30 N. E. 718; *Garlick v. Mississippi Val. Ins. Co.*, 44 Iowa, 553; *Williams v. Albany City Ins. Co.*, 19 Mich. 451, 2 Am. Rep. 95; *Same v. Republic Ins. Co.*, Id. 469; *Dircks v. German Ins. Co.*, 34 Mo. App. 31; *German-American Ins. Co. v. Divilbiss*, 67 Mo. App. 500; *American Ins. Co. v. Klink*, 65 Mo. 78; *Houston v. Farmers' & Merchants' Ins. Co.*, 64 Neb. 138, 89 N. W. 635; *Hooker v. Continental Ins. Co. (Neb.)* 96 N. W. 663; *Equitable Ins. Co. v. Harvey*, 98 Tenn. 636, 40 S. W. 1092; *East Texas Fire Ins. Co. v. Perky*, 5 Tex. Civ. App. 698, 24 S. W. 1080.

The principles illustrated by the foregoing cases have also been applied where mutual companies have attempted to assert a forfeiture for default in the payment of assessments.

Reference may be made to *Hollister v. Quincy Mut. Fire Ins. Co.*, 118 Mass. 478; *Hill v. Farmers' Mut. Fire Ins. Co.*, 129 Mich. 141, 88 N. W. 392; *Blanchard v. Atlantic Mut. Fire Ins. Co.*, 33 N. H. 9; *Appeal of Hummel*, 78 Pa. 320; *Columbia Ins. Co. v. Buckley*, 83 Pa. 293, 24 Am. Rep. 172; *Washington Mut. Fire Ins. Co. v. Rosenberger*, 84 Pa. 373; *Crawford County Mut. Ins. Co. v. Cochran*, 88 Pa. 230; *Lycoming Fire Ins. Co. v. Rought*, 97 Pa. 415; *Gorton v. Dodge County Mut. Ins. Co.*, 39 Wis. 121.

(d) Proceedings to effect forfeiture—Notice.

In the absence of any contractual or statutory provision to that effect, demand of payment of a note given for a premium, or notice of intention to insist on forfeiture if payment is not made, is not necessary.

Continental Ins. Co. v. Dorman, 125 Ind. 189, 25 N. E. 213; *Redfield v. Paterson Fire Ins. Co.*, 6 Abb. N. C. (N. Y.) 456; *Ohio Farmers' Ins. Co. v. Wilson*, 70 Ohio St. 354, 71 N. E. 715; *Continental Ins. Co. v. Busby*, 3 Willson, Civ. Cas. Ct. App. (Tex.) § 103; *Muhleman v. National Ins. Co.*, 6 W. Va. 508.

It is, however, provided by statute in Iowa (Acts 18th Gen. Assem. c. 210) that the insurer shall give notice to the insured of the maturity of a premium or note given therefor, which shall state the amount due and the amount required to pay the customary short rate on cancellation. The validity of this statute has been

recognized directly in *Morrow v. Des Moines Ins. Co.*, 84 Iowa, 256, 51 N. W. 3, and *Ross v. Hawkeye Ins. Co.*, 93 Iowa, 222, 61 N. W. 852, 34 L. R. A. 466. The provisions of this statute do not apply where forfeiture is claimed because of the nonpayment of an assessment due a mutual company (*Beeman v. Farmers' Pioneer Mut. Ins. Ass'n*, 104 Iowa, 83, 73 N. W. 597, 65 Am. St. Rep. 424). But the provisions must be complied with where a note was taken for a premium, though the company is organized under the statute relating to assessment companies and has no right to charge a premium or take a note therefor (*Bradford v. Mutual Fire Ins. Co.*, 112 Iowa, 495, 84 N. W. 693). While the statute will not be applicable when the policy of an Iowa company is issued in another state on property in that state (*Antes v. State Ins. Co.*, 61 Neb. 55, 84 N. W. 412), it will be enforced if the policy was issued in Iowa, though the property was situated in another state.

Marden v. Hotel Owners' Ins. Co., 85 Iowa, 584, 52 N. W. 509, 39 Am. St. Rep. 316; *Dubuque Fire & Marine Ins. Co. v. Oster*, 74 Ill. App. 139.

The notice must state, not only the amount of the premium or the note given therefor, but must also state the intent to cancel the policy if the premium is not paid.

Morrow v. Des Moines Ins. Co., 84 Iowa, 256, 51 N. W. 3; *Marden v. Hotel Owners' Ins. Co.*, 85 Iowa, 584, 52 N. W. 509, 39 Am. St. Rep. 316; *Finster v. Merchants' & Bankers' Ins. Co.*, 97 Iowa, 9, 65 N. W. 1004.

To give effect to this declaration of intent, the insurer must also state in the notice the amount necessary to pay the usual short rate in event of cancellation; this duty being an absolute one, if cancellation is intended, notwithstanding the use of the word "may" in the statute (*Boyd v. Cedar Rapids Ins. Co.*, 70 Iowa, 325, 30 N. W. 585). Moreover, as the statute authorizes a forfeiture, it must be strictly construed and literally complied with. Consequently a notice stating the short rate to be \$15, when in fact the rate fixed by the state auditor under the provisions of the statute is \$14 is not sufficient (*McDonald v. Anchor Mut. Ins. Co.*, 116 Iowa, 371, 89 N. W. 1091). So, too, where two policies had been issued to one person, a notice stating the aggregate amounts required to cancel both policies and the amount of premiums due under the note given for the unpaid premiums on both policies, but not stating the

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amount for canceling each, etc., was insufficient to suspend one of them.

Smith v. Continental Ins. Co., 108 Iowa, 382, 79 N. W. 126; *Born v. Home Ins. Co.*, 110 Iowa, 379, 81 N. W. 676, 80 Am. St. Rep. 300.

A South Dakota statute (Comp. Laws, § 3104) declares that no policy of insurance shall be forfeited by nonpayment of any premium note unless the insurer shall, not less than 30 days prior to its maturity, mail the insured a notice, informing the insured of his right, at his own election, to pay in full and keep the policy in force, or to terminate the insurance by surrendering the policy and paying the part of the premium earned. On December 10, 1895, the company sent insured a notice that his certain note for insurance would be due on January 2, 1896, and that payment would be duly receipted, and adding, "Do not fail to be prompt, as you cannot recover in case of loss after the note becomes due until the same is paid." It was held that the notice was insufficient, as it was not given within the time required and its contents did not meet the provisions of the statute (*Epiphany Roman Catholic Church v. German Ins. Co.*, 91 N. W. 332, 16 S. D. 17).

The Iowa statute further provides that the notice required may be served personally "or by registered letter addressed to the assured at his post office address named in or on the policy, and no policy of insurance shall be suspended for nonpayment of such amount until 30 days after such notice has been served." It has been held that under this provision the service is complete, and the 30 days begin to run, as soon as the letter is mailed as provided by law.

McKenna v. State Ins. Co., 73 Iowa, 453, 35 N. W. 519; *Ross v. Hawkeye Ins. Co.*, 93 Iowa, 222, 61 N. W. 852, 34 L. R. A. 466.

So, as the postal laws (section 1056) provide that a letter becomes registered only after a receipt has been given therefor and the letter has been numbered as prescribed in preceding sections, the 30-day period does not run from the date that the letter was deposited in the post office to be mailed and registered, but from the date that the registration was completed by making the proper entries in the books of the post office, and the procuring of a receipt by the sender, as provided in the postal regulations.

Holbrook v. Mill Owners' Mut. Ins. Co., 86 Iowa, 255, 53 N. W. 229; *Ross v. Hawkeye Ins. Co.*, 93 Iowa, 222, 61 N. W. 852, 34 L. R. A. 466.

And where the insurer mailed the notice in an envelope on which he requested a return if not delivered within 15 days, and because of its return insured did not receive it, the policy was not suspended, though, in returning it, the postmaster violated a regulation requiring registered letters to be kept at the delivery post office 30 days (*Smith v. Continental Ins. Co.*, 79 N. W. 126, 108 Iowa, 382).

Proof of the sending of a notice calling for a premium, without showing the date for payment written thereon, does not authorize a forfeiture of the policy for failure to pay "within thirty days from the date written on the notice" (*Williams v. Reserve Fund Live-Stock Ins. Co.*, 43 N. Y. Supp. 1083, 19 Misc. Rep. 515).

(c) Same—Mutual companies.

In the case of mutual companies, the by-laws generally provide that notice shall be given of all assessments levied for the payment of losses. Such a notice is, of course, absolutely necessary to fix the liability of the insured for the assessment (*McMahan v. Sewickly Mut. Fire Ins. Co.*, 36 Atl. 174, 179 Pa. 52). Consequently the burden is on the insurer to show that proper notice was given (*Vandalia Mut. County Fire Ins. Co. v. Peasley*, 84 Ill. App. 138). If the property has been conveyed and the policy assigned, the assignee is the person entitled to the notice (*Bragg v. New England Mut. Fire Ins. Co.*, 25 N. H. 289). The insurer is not, however, bound to give notice to a voluntary assignee for the benefit of creditors (*Lycoming Fire Ins. Co. v. Storrs*, 97 Pa. 354).

In the absence of any provision to that effect, notice need not be given of the maturity and amount of installments of interest on the deposit notes.

Mutual Fire Ins. Co. v. Miller Lodge, I. O. O. F., 58 Md. 463; *Webb v. Mutual Fire Ins. Co.*, 63 Md. 213.

Where the laws of the association so provide, notice given by publication in a newspaper is sufficient, and actual or personal notice is not required.

Old v. Farmer's Fire Ins. Co., 2 Walk. (Pa.) 110; *Pennsylvania Training School v. Independent Mut. Fire Ins. Co.*, 127 Pa. 559, 18 Atl. 392.

In the absence of any provision for notice by publication, actual notice must be given (*Sinking Springs Ins. Co. v. Hoff's Executors*, 2 Wkly. Notes Cas. [Pa.] 41). It was, however, held, in *Gonder v. Lancaster County Mut. Fire Ins. Co.*, 17 Pa. Super. Ct. 119, that,

if both public and personal notice is provided for, notice given in either way is sufficient. On the other hand, it has been held in Indiana that where the assessments must be paid within 30 days after notice thereof is "received" and a by-law provides for giving notice by publication, forfeiture can be based only on personal notice; the provisions being ambiguous (*Schmidt v. German Mut. Ins. Co.*, 4 Ind. App. 340, 30 N. E. 939).

Though it was held, in *Lothrop v. Greenfield Stock & Mut. Fire Ins. Co.*, 2 Allen (Mass.) 82, where the policy provided for forfeiture if the insured failed to pay an assessment "when requested to do so by mail or otherwise," that a written request for payment, prepaid, duly directed, and deposited by the company in the post office, which in due course of mail would reach the place of insured's residence as set forth in the policy, was sufficient, whether he received such request or not, the decision must be interpreted in connection with the fact that the insured had changed the place of his residence without notice to the company. And it has been held in Michigan (*Castner v. Farmers' Mutual Fire Ins. Co.*, 50 Mich. 273, 15 N. W. 452), forfeiture could not be based on a notice mailed, but not received.

The notice must, of course, comply with the requirements of any statute relating thereto. Thus, under the Wisconsin statute (Rev. St. 1898, § 1935) providing that, when an assessment is made, notice stating when it was levied and when it becomes due shall be published, and notice of the amount of the loss and the sum due from the member as his share thereof shall be mailed to the members, a publication not stating the amount of the assessment, but merely that an assessment was made on a certain day and will be due at a certain time, and a mailed notice not stating the loss for which the assessment was levied, do not constitute "notification," authorizing a forfeiture (*Milwaukee Trust Co. v. Farmers' Mut. Fire Ins. Co.*, 91 N. W. 967, 115 Wis. 371).

The insufficiency of a notice given by the insurer cannot be shown by evidence of a subsequent notice received, different in form from the prior one. *Shuman v. Juniata Farmers' Mut. Fire Ins. Co.*, 55 Atl. 1069, 206 Pa. 417.

Where an application for insurance makes the assessments payable "within forty days after notice, and, if not paid within ninety days from date of notice," the policy is to be void, the date of notice is the actual date on which the notice is received, and not the date appearing at the head of the paper whereby the notice is conveyed

(*Darlington v. Phoenix Mut. Fire Ins. Co.*, 45 Atl. 482, 194 Pa. 650).

On the failure of the insured to pay an assessment after due notice, forfeiture can be declared only in the manner provided for in the policy (*Sanford v. California Farmers' Mut. Fire Ins. Ass'n*, 63 Cal. 547). If forfeiture results from nonpayment only at the option of the company, notice of the election to forfeit must be given to the insured (*Supple v. Iowa State Ins. Co.*, 58 Iowa, 29, 11 N. W. 716). So, where a statute provides a method of terminating the insurance, as in Kentucky (Ky. St. § 712), that method must be followed (*Hurst Home Ins. Co. v. Muir*, 107 Ky. 148, 53 S. W. 3). Of course, if the policy provides that nonpayment shall suspend the risk, no action is necessary (*Hollister v. Quincy Mut. Fire Ins. Co.*, 118 Mass. 478). So, too, it is not necessary that the policy should be formally marked void on the books of the company before the loss (*Gonder v. Lancaster County Mutual Fire Ins. Co.*, 17 Pa. Super. Ct. 119). And, if a forfeiture is prematurely declared before the expiration of the time for payment, it will, of course, be nugatory (*Sinking Springs Insurance Co. v. Hoff's Executors*, 2 Wkly. Notes Cas. [Pa.] 41). Even though annulment at the option of the insurer is provided for in the policy, the insurer may declare a conditional forfeiture, to the effect that the insured should lose all benefit of his insurance for and during the term of his default, but that he should be liable for subsequent assessments made during the continuance of his policy (*Coles v. Iowa State Mut. Ins. Co.*, 18 Iowa, 425). If the charter of a mutual company provides that, upon nonpayment of assessments, the insurance may be suspended or canceled by the board of directors or secretary, and allows an appeal to the board of directors if a forfeiture or suspension is declared by the secretary, such forfeiture cannot be declared by the secretary upon mere default in payment, without giving the assured an opportunity to be heard (*Olmstead v. Farmers' Mut. Fire Ins. Co.*, 50 Mich. 200, 15 N. W. 82).

(2) Excuses for nonpayment.

It is no excuse for nonpayment within the time specified that the notice, which was duly mailed, was not received in time because of insured's absence from the state (*Greeley v. Iowa State Ins. Co.*, 50 Iowa, 86). Nor is it an excuse that the agent of the company had in his hands money of the insured out of which he agreed to pay the premium (*Merchants' & Manufacturers' Mut. Ins. Co. v. Baker* [Neb.] 94 N. W. 627). So it is not a valid excuse that the

company owes insured a sum less than the amount of the assessment, if he does not offer to pay the balance (*Hollister v. Quincy Mut. Fire Ins. Co.*, 118 Mass. 478). Nor can profits accruing on the policy of a member of a mutual company be considered to pay interest due on deposit notes, so as to prevent a forfeiture of the policy; the by-laws providing that such profits could be calculated annually and credited to the member, but that dividends should be declared only every 10 years (*Mutual Fire Ins. Co. of Cecil County v. Miller Lodge, I. O. O. F.*, 58 Md. 463). Had the dividends been declared and not distributed, the company would have had no right to apply them to the payment of the premium.

Sickness of the insured cannot excuse his default (*Home Ins. Co. v. Wood*, 72 S. W. 15, 24 Ky. Law Rep. 1638). And, where the insured died before the note became due, the property, which was exempt, vesting in his widow and children, the failure of the widow to pay the note cannot be excused on the ground that as administratrix she had no right to pay the note until claim therefor was duly filed (*Continental Ins. Co. v. Daly*, 33 Kan. 601, 7 Pac. 158). Similarly, where insured died a few months before the maturity of the note and the note was not presented to nor paid either by the administrator or heirs, but the latter procured an indorsement to be made thereon that the loss, if any occurred, should be paid to them, it was held that it was the duty of the heirs, to whom the property devolved on the death of the assured, to pay the note, and, not having done so before maturity, the policy was thereby avoided (*Sauner v. Phoenix Ins. Co.*, 41 Mo. App. 480).

Where neither the policy nor the premium note states where the note is to be paid, the failure of the company to notify the insured where payment may be made excuses his default.

Blackerby v. Continental Ins. Co., 83 Ky. 574; *Continental Fire Ins. Co. v. Adams*, 8 Ky. Law Rep. 269.

On the other hand, it has been held in Michigan that, if the note is payable generally, the insured cannot excuse his default on the ground that the note should have been presented at his residence (*McIntyre v. Michigan State Ins. Co.*, 52 Mich. 188, 17 N. W. 781). It was his duty to seek the note under those circumstances. So, in *Robinson v. Continental Ins. Co.*, 76 Mich. 641, 43 N. W. 647, 6 L. R. A. 95, it was said that, though it was the insurer's custom to notify its patrons where their notes could be paid, the insured could not excuse his default on the ground that no notice was

given him. But in a later case (*Baker v. Michigan Mut. Protective Ass'n*, 118 Mich. 431, 76 N. W. 970) the Supreme Court of Michigan laid down the rule that, if the right to make payment at a particular place depends on custom only, good faith requires that this custom should not be discontinued and payment required at a different place, without notice to the insured.

If the agent of the insurer, who actually has the premium note in his possession, tells insured that he has not possession of the note, and thus prevents payment, the insured is excused (*Continental Ins. Co. of New York v. Miller*, 4 Ind. App. 553, 30 N. E. 718). But a voluntary agreement of an agent to bring the note to the insured for payment cannot avail, when a subsequent notice from the company requires payment at its office (*Home Ins. Co. v. Wood*, 72 S. W. 15, 24 Ky. Law Rep. 1638). And, though a note is not, in fact, at the place named therein for payment, that will not avail the insured, unless he also shows that he was ready and willing to pay the note at that place at the time of maturity (*Texas Fire Ins. Co. v. Knights of Tabor Lodge*, 32 Tex. Civ. App. 328, 74 S. W. 809).

While a bona fide extension of time for payment will excuse nonpayment at the maturity of the premium (*Mallory v. Ohio Farmers' Ins. Co.*, 90 Mich. 112, 51 N. W. 188), an extension granted by an agent without authority will not have that effect (*Critchett v. American Ins. Co.*, 53 Iowa, 404, 5 N. W. 543, 36 Am. Rep. 230). An application for extension, not acted on, is not available as an excuse (*Home Ins. Co. v. Karn*, 19 Ky. Law Rep. 273, 39 S. W. 501); nor is it necessary for the insurer to notify the insured that his request has been refused (*East Texas Fire Ins. Co. v. Perkey*, 89 Tex. 604, 35 S. W. 1050). But, where payment of the premium was deferred by agreement with the agent until a certain permit was obtained, the insured was excused, though he received no notice until after the fire that the permit would not be granted until the premium was paid (*Home Ins. Co. v. Holder*, 24 Ky. Law Rep. 2483, 74 S. W. 267).

(g) Rights of insured after default.

Where the result of a default in payment is merely to suspend the policy, it is obvious that a payment of the premium or note will revive the policy.

American Ins. Co. v. Henley, 60 Ind. 515; *Same v. Klink*, 65 Mo. 78; *Washington Mut. Fire Ins. Co. v. Rosenberger*, 84 Pa. 373; *Equitable Ins. Co. v. Harvey*, 98 Tenn. 636, 40 S. W. 1092.

So, too, where it is optional with the insurer to forfeit the policy for nonpayment, the company may accept a subsequent payment without waiving its right to prompt payment thereafter (*Morrow v. Des Moines Ins. Co.*, 84 Iowa, 256, 51 N. W. 3). A policy cannot, however, be revived by a merely conditional promise to pay a past-due note (*Home Ins. Co. v. Karn*, 19 Ky. Law Rep. 273, 39 S. W. 501). Nor will a partial payment have any effect as a revival while the balance is unpaid.

Carlock v. Phoenix Ins. Co., 138 Ill. 210, 28 N. E. 53, affirming 38 Ill. App. 283; *German Ins. Co. v. Denny*, 70 Ill. App. 437.

A tender of payment after the loss has occurred cannot revive the policy, so as to render the company liable for the loss.

Palmer v. Continental Ins. Co. (Cal.) 61 Pac. 784; *Southern Mut. Ins. Co. v. Taylor*, 33 Grat. (Va.) 743.

The company cannot, after the loss, be compelled to accept payment and reinstate the policy.

Firemen's Ins. Co. v. Kuessner, 59 Ill. App. 432; *Merchants' & Manufacturers' Mut. Ins. Co. v. Baker* (Neb.) 94 N. W. 627.

Even a payment accepted after the loss does not relate back, but revives the policy only from the date of the payment (*Williams v. Albany City Ins. Co.*, 19 Mich. 451, 2 Am. Dec. 95). In *Phenix Ins. Co. v. Tomlinson*, 125 Ind. 84, 25 N. E. 126, 9 L. R. A. 317, 21 Am. St. Rep. 203, the policy contained this clause: "In case the assured fails to pay the premium note, this policy shall cease, and remain void during the time said note remains unpaid after its maturity, and no legal action on the part of this company to enforce payment shall be construed as reviving the policy. The payment of the premium, however, revives the policy, and makes it good for the balance of its term." The premium note not being paid at maturity, the company brought suit on it and obtained judgment, which judgment was paid and satisfied after the property had been destroyed by fire. The court held that the acceptance of the payment revived the policy so as to render the company liable for the loss.

23. SUSPENSION OF RISK AND RELATION OF GROUND OF FORFEITURE TO CAUSE OF LOSS.

- (a) Scope of discussion.
- (b) Suspension of risk by temporary breach of warranty or condition.
- (c) Same—Construction of particular conditions.
- (d) Same—Vacancy of premises.
- (e) Same—Change of title or incumbering property.
- (f) Same—Taking out additional insurance.
- (g) Same—Failure to pay premium.
- (h) Effect of breach of condition as dependent on relation to cause of loss.
- (i) Same—Statutory provisions.

(a) Scope of discussion.

Among the interesting problems arising in the event of a breach of promissory warranty or condition subsequent is the question, to what extent will the effect of such a breach be regarded as dependent on its relation to the cause of loss? Does such a breach, if merely temporary, render the policy absolutely void, or does it merely suspend the risk? That the policy is absolutely void, when the alleged breach is directly connected with the cause of loss, is elementary, and calls for no discussion.

Reference may be made to *Gunther v. Liverpool & London & Globe Ins. Co.* (C. C.) 34 Fed. 501; *Northwestern National Ins. Co. v. Davis*, 9 Ky. Law Rep. 933; *United States Fire & Marine Ins. Co. v. Kimberly*, 34 Md. 224, 6 Am. Rep. 325; *Paddock v. Franklin Ins. Co.*, 11 Pick. (Mass.) 227; *Cudworth v. South Carolina Ins. Co.*, 4 Rich. Law (S. C.) 416, 55 Am. Dec. 692.

There is, however, a wide difference of opinion between the several courts, when the alleged breach is merely temporary, or, though permanent, is in no way related to the cause of loss. In a few states the question has been settled by statutory provisions, but in the majority of the jurisdictions it is a matter of judicial construction, in respect of which the law is still in an unsettled and unsatisfactory state.

(b) Suspension of risk by temporary breach of warranty or condition.

It is a principle established by weight of authority that a temporary breach of a stipulation or condition in a policy to which there is not attached a specific forfeiture, and which breach did not

exist at the time of the fire and of the loss, will not defeat a recovery upon the policy.

Reference may be made to *Cady v. Imperial Ins. Co.*, 4 Fed. Cas. 984; *James v. Lycoming Ins. Co.*, 13 Fed. Cas. 309; *Schmidt v. Peoria Marine & Fire Ins. Co.*, 41 Ill. 295; *Insurance Company of North America v. McDowell*, 50 Ill. 120, 99 Am. Dec. 497; *Traders' Ins. Co. v. Catlin*, 45 N. E. 255, 163 Ill. 258, 35 L. R. A. 595, affirming 59 Ill. App. 162; *Phoenix Ins. Co. v. Lawrence*, 4 Metc. (Ky.) 9, 81 Am. Dec. 521; *Organ v. Hibernia Fire Ins. Co.*, 3 Mo. App. 576; *Mutual Fire Ins. Co. v. Coatesville Shoe Factory*, 80 Pa. 407; *Phoenix Assur. Co. of London v. Munger Improved Cotton Mach. Mfg. Co.* (Tex. Civ. App.) 49 S. W. 271.

It was said, in *Hinckley v. Germania Fire Ins. Co.*, 140 Mass. 38, 1 N. E. 737, 54 Am. Rep. 445, that it is not the necessary meaning of the word "void," as used in policies of insurance, that it shall, under all circumstances, imply an absolute and permanent avoidance of a policy which has once begun to run. The meaning of the word is sufficiently satisfied by reading it as void for the time being.

It is, of course, obvious that where the stipulation is in the nature of an exception of risk, as, for instance, a clause limiting the place of risk, a failure to comply therewith merely suspends the policy during such noncompliance, but does not affect the liability of the insurer for a loss occurring subsequently within the limits covered by the policy.

Greenleaf v. St. Louis Ins. Co., 37 Mo. 25; *Hennessey v. Manhattan Fire Ins. Co.*, 28 Hun (N. Y.) 98.

Even where there is a breach of the continuing warranty of seaworthiness, if it is merely temporary, the risk is only suspended during the breach, and, if the defect is cured before loss, the policy re-attaches.

Lapene v. Sun Ins. Co., 8 La. Ann. 1, 58 Am. Dec. 668; *Worthington v. Bearse*, 12 Allen (Mass.) 382, 90 Am. Dec. 152; *Deblois v. Ocean Ins. Co.*, 16 Pick. (Mass.) 303, 28 Am. Dec. 245.

On the other hand, an express provision that in case of an increase of risk, which is consented to or known by the assured and not disclosed, and the assent of the insurer obtained, the policy shall be void, will not be qualified by holding that the policy is only suspended during the continuance of such risk (*Kyte v. Commercial Union Assur. Co.*, 149 Mass. 116, 21 N. E. 361, 3 L. R. A. 508). The court in the *Kyte Case* distinguished the *Hinckley Case*, here-

tofore referred to, on the ground that in the latter case there was no question of increase of risk.

As a necessary corollary to the doctrine of suspension of risk is the additional rule that **on the termination of the increased risk the policy reattaches, with all its original force and effect.**

It is deemed sufficient to refer to *James v. Lycoming Ins. Co.*, 13 Fed. Cas. 309; *New England Fire & Marine Ins. Co. v. Wetmore*, 32 Ill. 221; *Schmidt v. Peoria Fire & Marine Ins. Co.*, 41 Ill. 296; *Traders' Ins. Co. v. Catlin*, 163 Ill. 256, 45 N. E. 255, 35 L. R. A. 595; *Born v. Home Ins. Co.*, 110 Iowa, 379, 81 N. W. 676, 80 Am. St. Rep. 300; *Lapene v. Sun Ins. Co.*, 8 La. Ann. 1, 58 Am. Dec. 668; *Lane v. Maine Mutual Ins. Co.*, 12 Me. 44, 28 Am. Dec. 150; *Worthington v. Bearse*, 12 Allen (Mass.) 382, 90 Am. Dec. 152; *Omaha Fire Ins. Co. v. Dierks*, 43 Neb. 473, 61 N. W. 740; *German Mutual Fire Ins. Co. v. Fox* (Neb.) 96 N. W. 652, 63 L. R. A. 334; *Wolfe v. Security Fire Ins. Co.*, 39 N. Y. 49.

(c) Same—Construction of particular conditions.

While the general principle stated in the foregoing paragraph is undoubtedly supported by the weight of authority, its application to the particular conditions of the policy is difficult, and in many respects unsatisfactory, because such conditions are differently worded in different policies, and the reported cases do not always bring out the differences. This undoubtedly accounts for much of the confusion in the law of suspended risk.

The policy sometimes contains a stipulation that if the property be appropriated or used for certain purposes, regarded as extra-hazardous, the policy shall be void "so long as such premises shall be wholly or in part appropriated or used for any or either of the purposes aforesaid." In a leading case (*New England Fire & Marine Ins. Co. v. Wetmore*, 32 Ill. 221) the court held that under this clause an appropriation of the premises to a use thus prohibited merely operated to suspend the risk during the continuance of such use, and that, if it ceased before the loss, the risk again attached.

Policies containing substantially the same provision were similarly construed in *Lounsbury v. Protection Ins. Co.*, 8 Conn. 459, 21 Am. Dec. 686; *Phoenix Ins. Co. v. Lawrence*, 4 Metc. (Ky.) 9, 81 Am. Dec. 521; *Moore v. Protection Ins. Co.*, 29 Me. 97, 48 Am. Dec. 514; *United States Fire & Mar. Ins. Co. v. Kimberly*, 34 Md. 224, 6 Am. Rep. 325.

It is to be noted that in the *Kimberly Case* the recital in the policy as to the use of the building was regarded as matter of description only, and not as a continuing warranty. The opposite

view was taken in *Mead v. Northwestern Ins. Co.*, 7 N. Y. 530, and a change in use was held to forfeit the policy absolutely, and not merely to suspend the risk, notwithstanding the policy contained a clause similar to that in the *Wetmore Case*.

The Supreme Court of Pennsylvania has laid down the principle that a change in use merely suspends the policy, in the absence of express stipulation (*Mutual Fire Ins. Co. v. Coatesville Shoe Factory*, 80 Pa. 407); but, as pointed out in *Manufacturers' & Merchants' Ins. Co. v. Kunkle*, 6 Wkly. Notes Cas. (Pa.) 234, the use in the former case was not a "business," within the special clause prohibiting the use of the premises for a more hazardous business.

A temporary change in use is regarded as suspending the risk only in *Crete Farmers' Mut. Township Ins. Co. v. Miller*, 70 Ill. App. 599; *Elstner v. Insurance Co.*, 1 Disn. 412, 12 Ohio Dec. 703; *Cumberland Valley Mutual Protection Co. v. Schell*, 29 Pa. 31.

The contrary view was taken in *Adair v. Southern Mut. Ins. Co.*, 107 Ga. 297, 33 S. E. 78, 45 L. R. A. 204, 73 Am. St. Rep. 122.

In Massachusetts (*Hinckley v. Germania Ins. Co.*, 140 Mass. 38, 1 N. E. 737, 54 Am. Rep. 445) it has been held, also, that a temporary illegal use of the insured property operates merely as a suspension of the risk, and not as an actual breach; but, as pointed out in *Kyte v. Commercial Union Assur. Co.*, 149 Mass. 116, 21 N. E. 361, 3 L. R. A. 508, there was no question of increase of risk in the *Hinckley Case*.

The court of appeals of Kansas has regarded an illegal use as effecting an actual breach (*Concordia Fire Ins. Co. v. Johnson*, 4 Kan. App. 7, 45 Pac. 722). This is in harmony with the position taken by the Supreme Court in relation to the vacancy clause.

(d) Same—Vacancy of premises.

The rule is well settled in Illinois, that, under the clause declaring the policy void if the premises become vacant and so remain for a certain period, a temporary vacancy operates as a suspension of the risk only, and not as an absolute forfeiture.

The rule is asserted in *Insurance Co. of North America v. Garland*, 108 Ill. 220; *Niagara Fire Ins. Co. v. Drda*, 19 Ill. App. 70; *Schuermann v. Dwelling-House Ins. Co.*, 57 Ill. App. 200; *Detroit Fire & Marine Ins. Co. v. Chetlain*, 61 Ill. App. 450.

Even where the limit is 10 days and the vacancy extended beyond that period, if forfeiture was not declared, the policy reattached on the termination of the vacancy (*Stephens v. Phoenix Assur. Co.*,

85 Ill. App. 671). If, however, a loss occurs during such temporary vacancy, the insurer is not liable (*Wheeler v. Phoenix Ins. Co.*, 53 Mo. App. 446). Where the policy described the property insured as contained in a dwelling house "occupied all the year," a temporary vacancy merely suspended the policy (*Ring v. Phoenix Assur. Co.*, 145 Mass. 426, 14 N. E. 525).

On the other hand, in Kansas a breach of the vacancy clause is regarded as an actual breach, and not a suspension of risk (*German Ins. Co. v. Russell*, 65 Kan. 373, 69 Pac. 345); the provision limiting the period of vacancy to 12 days.

The doctrine that there is an actual forfeiture is also asserted in *Moore v. Phoenix Ins. Co.*, 62 N. H. 240, 13 Am. St. Rep. 556; *Couch v. Farmers' Fire Ins. Co.*, 72 N. Y. Supp. 95, 64 App. Div. 367; *East Texas Fire Ins. Co. v. Kempner*, 87 Tex. 229, 27 S. W. 122, 47 Am. St. Rep. 99, reversing (Civ. App.) 25 S. W. 990.

(e) Same—Change of title or encumbering property.

In a majority of the jurisdictions in which the issue has been raised, it has been held that a conveyance of property in violation of the restriction in the policy does not create a forfeiture, if the property is reconveyed before loss.

The rule is supported by *Power v. Ocean Ins. Co.*, 19 La. 28, 36 Am. Dec. 685; *Lane v. Maine Mutual Ins. Co.*, 12 Me. 44, 28 Am. Dec. 150; *Worthington v. Bearse*, 12 Allen (Mass.) 382, 90 Am. Dec. 152; *German Mutual Fire Ins. Co. v. Fox* (Neb.) 96 N. W. 652, 63 L. R. A. 334; *Wolfe v. Security Fire Ins. Co.*, 39 N. Y. 49.

So if, after a conveyance, there is a reunion of interests by a valid assignment of the policy, there is no forfeiture (*Shearman v. Niagara Fire Ins. Co.*, 32 N. Y. Super. Ct. 470, 40 How. Prac. 393). On the other hand, it has been held in Iowa (*Davidson v. Hawkeye Ins. Co.*, 71 Iowa, 532, 32 N. W. 514, 60 Am. Rep. 818) that if a policy is forfeited by a sale, or transactions which the court holds amount to a sale, the fact that the transaction and contract were subsequently abandoned would not relieve the insured from the penalty of forfeiture.

The rule that the giving of a mortgage in violation of a condition in the policy merely suspends the risk, which will be revived by the discharge of the incumbrance, is settled in Nebraska.

Reference may be made to *Home Fire Ins. Co. v. Johansen*, 59 Neb. 349, 80 N. W. 1047; *State Ins. Co. v. Schreck*, 27 Neb. 527, 48 N. W. 340, 6 L. R. A. 524, 20 Am. St. Rep. 696; *Omaha Fire Ins. Co. v. Dierks*, 43 Neb. 473, 61 N. W. 740.

The rule has also been asserted in New York (*Tomkins v. Hartford Fire Ins. Co.*, 22 App. Div. 380, 49 N. Y. Supp. 184). So it has been held in Iowa that, so far as the clause in relation to increase of risk is concerned, a mortgage will only forfeit the policy as to the property mortgaged while the mortgage is in existence (*Born v. Home Ins. Co.*, 110 Iowa, 379, 81 N. W. 676, 80 Am. St. Rep. 300). It must be remarked that this does not seem to be in harmony with the decision in the Davidson Case.

The opposite view has been taken in *German-American Ins. Co. v. Humphrey*, 62 Ark. 348, 35 S. W. 428, 54 Am. St. Rep. 297. and *Insurance Company of North America v. Wicker*, 93 Tex. 390, 55 S. W. 740, affirming (Civ. App.) 54 S. W. 300.

(f) Same—Taking out additional insurance.

It has been held in some states that a forfeiture of the policy by the taking out of other insurance merely suspends the risk during the existence of such other insurance.

Such is the rule prevailing in *New England Fire & Marine Ins. Co. v. Schettler*, 38 Ill. 166; *Western Assur. Co. v. Mason*, 5 Ill. App. 141; *Phenix Ins. Co. v. Johnston*, 42 Ill. App. 66; *Obermeyer v. Globe Mutual Ins. Co.*, 43 Mo. 573; *Mitchell v. Lycoming Mutual Ins. Co.*, 51 Pa. 402.

On the other hand, the opposite rule prevails in Indiana (*Replege v. American Ins. Co.*, 132 Ind. 360, 31 N. E. 947), where it is held to be immaterial whether the additional insurance is in force when the loss occurs. This is, too, the doctrine in Tennessee.

Royal Ins. Co. v. McCrea, 8 Lea, 531, 41 Am. Rep. 656; *Equitable Ins. Co. v. McCrea*, 8 Lea, 541.

This question is closely connected with the question whether it affects the forfeiture if the additional insurance is void. It may be of interest to consult the brief where that phase of the question is discussed.¹

(g) Same—Failure to pay premium.

Generally the policy or premium note contains a condition that the policy shall be void so long as the note remains overdue and unpaid. Under such a condition a failure to pay the note when due suspends the insurance.

Such is the rule announced in *New Zealand Ins. Co. v. Maaz*, 13 Colo. App. 493, 59 Pac. 213; *Lenz v. German Fire Ins. Co.*, 74 Ill. App.

¹ See ante, p. 1852.

841; *East Texas Fire Ins. Co. v. Perky*, 5 Tex. Civ. App. 698, 24 S. W. 1080; *Gorton v. Dodge County Mut. Ins. Co.*, 39 Wis. 121.

A similar rule has been announced where there was a default in the payment of an assessment and the provision was merely that on default the policy should be void.

Columbia Ins. Co. v. Buckley, 83 Pa. 293, 24 Am. Rep. 172; *Crawford County Mut. Ins. Co. v. Cochran*, 88 Pa. 230.

To reinstate the policy, however, payment must be made to an authorized agent, and payment to a mere broker is not sufficient (*Firemen's Ins. Co. v. Kuessner*, 59 Ill. App. 432).

(h) Effect of breach of condition as dependent on relation to cause of loss.

From the rule that a temporary breach of warranty or condition merely causes a suspension of the risk may be deduced, as a necessary corollary, the additional principle that a temporary breach of condition will not create a forfeiture, unless it contributed to the loss.

This is the principle asserted in *Billings v. Tolland County Mut. Fire Ins. Co.*, 20 Conn. 139, 50 Am. Dec. 277; *New England Fire & Marine Ins. Co. v. Wetmore*, 82 Ill. 221; *Traders' Ins. Co. v. Catlin*, 163 Ill. 256, 45 N. E. 255, 35 L. R. A. 595, affirming 59 Ill. App. 162; *Orege Farmers' Mut. Township Ins. Co. v. Miller*, 70 Ill. App. 599; *Grant v. Lexington F. L. & M. Ins. Co.*, 5 Ind. 23, 61 Am. Dec. 74; *Lapene v. Sun Ins. Co.*, 8 La. Ann. 1, 58 Am. Dec. 668; *United States Fire & Marine Ins. Co. v. Kimberly*, 84 Md. 224, 6 Am. Rep. 825; *Deblois v. Ocean Ins. Co.*, 16 Pick. (Mass.) 303, 28 Am. Dec. 245; *Hinckley v. Germania Ins. Co.*, 140 Mass. 38, 1 N. E. 737, 54 Am. Rep. 445; *Ring v. Phoenix Assur. Co.*, 145 Mass. 426, 14 N. E. 525; *Phoenix Assur. Co. of London v. Munger Improved Cotton Mach. Mfg. Co.* (Tex. Civ. App.) 49 S. W. 271.

The theory of these decisions probably is that there must be a natural, probable, or actual connection between the breach of condition and the loss (*Boardman v. Merrimack Mut. Fire Ins. Co.*, 8 Cush. [Mass.] 583). On the other hand, it is no less the rule that where the loss occurs by reason of such breach, or while the breach continues, the insured cannot recover.

Such is the rule in *Stephens v. Phoenix Ins. Co.*, 85 Ill. App. 671; *Boardman v. Merrimack Mut. Fire Ins. Co.*, 8 Cush. (Mass.) 583; *Wheeler v. Phoenix Ins. Co.*, 53 Mo. App. 446.

Where the breach of condition is permanent in its nature and continues until the time of loss, a different question is presented. The weight of authority undoubtedly is that in such case the relation of the ground of forfeiture to the cause of loss is wholly immaterial.

This rule is asserted in *Nicoll v. American Ins. Co.*, 18 Fed. Cas. 231; *Leibrandt & McDowell Stove Co. v. Fireman's Ins. Co.* (C. C.) 35 Fed. 30; *Imperial Fire Ins. Co. v. Coos Co.*, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231; *Wood v. Hartford Fire Ins. Co.*, 13 Conn. 533, 35 Am. Dec. 92; *Hoffecker v. Newcastle County Mutual Ins. Co.*, 4 Houst. (Del.) 306; *Norways v. Thuringia Ins. Co.*, 204 Ill. 334, 68 N. E. 551, affirming 104 Ill. App. 390; *Martin v. Capital Ins. Co.*, 85 Iowa, 643, 52 N. W. 534; *Phoenix Ins. Co. v. Lawrence*, 4 Metc. (Ky.) 9, 81 Am. Dec. 521; *Golcochea v. Louisiana State Ins. Co.*, 6 Mart. N. S. (La.) 51, 17 Am. Dec. 175; *Whitney v. Ocean Ins. Co.*, 14 La. 485, 33 Am. Dec. 595; *Gardiner v. Piscataquis Mut. Fire Ins. Co.*, 38 Me. 439; *Turnbull v. Home Fire Ins. Co.*, 83 Md. 312, 34 Atl. 875; *Hill v. Middlesex Mut. Fire Ins. Co.*, 55 N. E. 319, 174 Mass. 542; *Moore v. Phoenix Ins. Co.*, 62 N. H. 240, 13 Am. St. Rep. 556; *Dougherty v. Greenwich Ins. Co.*, 64 N. J. Law, 716, 42 Atl. 485, 46 Atl. 1099; *Mead v. Northwestern Ins. Co.*, 7 N. Y. 530; *Westfall v. Hudson River Fire Ins. Co.*, 12 N. Y. 289; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136, 86 Am. Dec. 362; *First Nat. Bank v. Insurance Co. of North America*, 50 N. Y. 45; *Williams v. People's Fire Ins. Co.*, 57 N. Y. 274; *Cogswell v. Chubb*, 1 App. Div. 93, 36 N. Y. Supp. 1076; *Miller v. Western Farmers' Mut. Ins. Co.*, 1 Handy (Ohio) 208; *Elstner v. Insurance Co.*, 1 Dian. 412, 12 Ohio Dec. 703; *Pennsylvania Fire Ins. Co. v. Faires*, 13 Tex. Civ. App. 111, 35 S. W. 53; *Kircher v. Milwaukee Mechanics' Mut. Ins. Co.*, 74 Wis. 470, 43 N. W. 487, 5 L. R. A. 779; *A. M. Todd Co. v. Farmers' Mut. Fire Ins. Co.* (Mich.) 100 N. W. 442; *Lyman v. State Mut. Fire Ins. Co.*, 14 Allen (Mass.) 329; *Newport Improvement Co. v. Home Ins. Co.*, 163 N. Y. 237, 57 N. E. 475.

So, too, where the breach was a material one and increased the risk, it has been regarded as immaterial that it was not related to the cause of loss.

Merriam v. Middlesex Mut. Fire Ins. Co., 21 Pick. (Mass.) 162, 32 Am. Dec. 252; *Howell v. Baltimore Equitable Soc.*, 16 Md. 377; *Martin v. Capital Ins. Co.*, 85 Iowa, 643, 52 N. W. 534; *Hartford Fire Ins. Co. v. Ross*, 23 Ind. 179, 35 Am. Dec. 452.

When the breach is of such nature that the insurer's right of subrogation is destroyed, the policy is forfeited, though there is no connection with the cause of loss (*Dundee Chemical Works v. New*

York Mutual Ins. Co., 12 Misc. Rep. 353, 33 N. Y. Supp. 628). And it does not affect the result that the loss was alleged to be due to an incendiary fire, as the insurer has the right to litigate the question of liability (*Bloomington v. Columbia Ins. Co.* [Sup.] 84 N. Y. Supp. 572).

It is to be observed, however, that in most of the cases cited the particular provision violated is regarded as an absolute warranty. There are, indeed, other well-considered cases where a different rule has been asserted, and it has been said that a breach of condition or increase in risk must have been directly connected with, or must have contributed to, the loss, in order that a forfeiture may be predicated thereon.

Reference may be made to *State Ins. Co. v. Taylor*, 14 Colo. 499, 24 Pac. 333, 20 Am. St. Rep. 281; *London & Lancashire Fire Ins. Co. v. Gertelsen*, 106 Ky. 815, 51 S. W. 617; *Washington Fire Ins. Co. v. Davison*, 30 Md. 91; *Stebbins v. Globe Ins. Co.*, 2 N. Y. Super. Ct. 675; *Gazzam v. Cincinnati Ins. Co.*, 6 Ohio, 71; *Wilkins v. Tobacco Ins. Co.*, 30 Ohio St. 817, 27 Am. Rep. 455; *Girard Fire & Marine Ins. Co. v. Stephenson*, 37 Pa. 293, 78 Am. Dec. 423.

Thus, where the policy on a mill contained a condition against increase of risk, and the risk was actually increased by a change in process of manufacture, but the loss occurred while the mill was not in operation, the real issue was regarded as being whether the change actually increased the risk at the time of the loss (*North British & Mercantile Ins. Co. v. Steiger*, 13 Ill. App. 482). So it has been said that, where equity has obtained jurisdiction of a suit in which it becomes necessary to determine whether or not there has been a forfeiture on account of a violation of a clause against vacancy, it must be shown, not only that there was a vacancy, but also that it was to some degree the cause of the loss, as equity does not favor forfeitures (*Traders' Insurance Company v. Race*, 142 Ill. 338, 31 N. E. 392).

Where the insured was bound by the terms of his policy to give notice to the company if anything should occur by the acts of others to increase the risk, the company thereupon having the right, at their option, to terminate the insurance, the risk was so increased, and the insured gave the company no notice. The house was subsequently destroyed, but the fire originated from causes in no way connected with the facts by which the risk had been increased. It was held that, as it could not be certainly assumed that the com-

pany, if notified, would have terminated the insurance, the liability of the company upon the policy still continued (*Joyce v. Maine Ins. Co.*, 45 Me. 168, 71 Am. Dec. 536). A condition providing that the insurer shall not be liable for a loss caused by the use of kerosene must be regarded as an exception of risk only, and the insurer will not be exempt from liability unless the loss was caused directly by the use of the kerosene (*Jones v. Howard Ins. Co.*, 117 N. Y. 103, 22 N. E. 578).

A breach of the continuing warranty of seaworthiness subsequent to the commencement of the risk does not discharge the insurer from the payment of an antecedent loss, or of a subsequent loss, unless the loss was in consequence of such unseaworthiness.

The rule is supported by *Union Ins. Co. v. Smith*, 124 U. S. 405, 8 Sup. Ct. 534, 31 L. Ed. 497; *Paddock v. Franklin Ins. Co.*, 11 Pick. (Mass.) 227; *Starbuck v. New England Marine Ins. Co.*, 19 Pick. (Mass.) 198; *American Ins. Co. v. Ogden*, 20 Wend. (N. Y.) 287, affirming 15 Wend. (N. Y.) 582; *Seaman v. Enterprise Fire & Marine Ins. Co.* (C. C.) 21 Fed. 778; *Pointer v. Merchants' Mut. Ins. Co.*, 20 La. Ann. 100.

On the other hand, if a loss succeeds a deviation, it is not necessary to show that the loss was occasioned by it. All that is required in order to discharge the underwriters is evidence that the loss was posterior to the deviation (*Walsh v. Homer*, 10 Mo. 6, 45 Am. Dec. 342). So it has been held, in *Odiorne v. New England Mut. Marine Ins. Co.*, 101 Mass. 551, 3 Am. Rep. 401, that the words, "prohibited from the river and Gulf of St. Lawrence," etc., amount to a warranty that the vessel will not enter such waters, and a breach of such warranty forfeited the policy, so that recovery could not be had for a loss happening several months afterwards.

(1) Same—Statutory provisions.

The general rules deduced in the foregoing paragraphs will, of course, be modified by statutory provisions limiting the effect of breaches of warranties or conditions. A Michigan statute (Comp. Laws 1897, § 5180) provides that no policy shall be declared void by the insurer for the breach of any condition, if the insurer has not been injured by such breach, or if a loss has not occurred during such breach or by reason thereof. This statute covers all policies issued after its passage, irrespective of whether or not they are Michigan standard policies. It is not unconstitutional, as depriv-

ing fire insurance companies of the right to make valid contracts, since, such companies being creatures of the statute, the legislature may prescribe the forms of their contracts and limitations in relation to forfeiture therein; nor is it unconstitutional as impairing the obligation of the contracts. Under the statute, therefore, a failure to have a watchman on the premises on Sunday will not forfeit the policy, if the loss did not occur on that day (*McGannon v. Michigan Millers' Mutual Fire Ins. Co.*, 127 Mich. 636, 87 N. W. 61, 54 L. R. A. 739, 89 Am. St. Rep. 501). The statute does not apply by its terms, however, if the loss occurs during a breach of the conditions of the policy (*Boyer v. Grand Rapids Ins. Co.*, 124 Mich. 455, 83 N. W. 124, 83 Am. St. Rep. 338). Thus it has been held that the statute has no application to a breach consisting in the procurement of additional insurance in violation of the terms of the policy, during the life of which insurance the loss occurs (*A. M. Todd Co. v. Farmers' Mut. Fire Ins. Co.* [Mich.] 100 N. W. 442).

Where the Iowa statute (Code, § 1743), providing that a condition in a policy making it void before the loss occurs shall not prevent a recovery thereon, if it be shown that the failure to observe the condition did not contribute to the loss, was involved, it was held that it could not be applied where the policy was issued and the condition broken long before the statute took effect (*Elliott v. Farmers' Ins. Co.*, 86 N. W. 224, 114 Iowa, 153). It has been held that the iron safe clause, with a provision that on failure to comply therewith the policy shall be void, is not violative of the statutory provision, since the failure of the insured to comply with such provision of the policy by keeping the books does not defeat recovery, but only the failure to produce the required books after the loss (*Rundell & Hough v. Anchor Fire Ins. Co.* [Iowa] 101 N. W. 517).

**24. EFFECT OF BREACH OF WARRANTY OR CONDITION AS TO
PART OF PROPERTY INSURED—ENTIRE AND
DIVISIBLE CONTRACTS.**

- (a) General principles.
- (b) Insurance on separate classes of property separately valued.
- (c) Same—New York.
- (d) Same—Kansas.
- (e) Same—Kentucky.
- (f) Same—Missouri.
- (g) Same—Texas.
- (h) Same—Other states in which the contract is held to be divisible.
- (i) Same—Contrary doctrine.
- (j) Same—Policy covering real and personal property.
- (k) Same—Policy covering several buildings.
- (l) Same—Policy covering different classes of personal property.
- (m) Character of contract determined by entirety of consideration.
- (n) Same—Contrary doctrine.
- (o) Effect of condition that entire policy shall be void.
- (p) Same—Condition cannot control when policy is otherwise divisible.
- (q) Same—Development of the Missouri rule.
- (r) Same—Development of the Texas rule.
- (s) Divisibility of contract dependent on divisibility of risk.
- (t) Same—The Indiana rule.
- (u) Same—Wisconsin.
- (v) Same—Iowa.
- (w) Same—Application of the rule in other states.
- (x) Conclusion.

(a) General principles.

One of the most important, and at the same time interesting, questions connected with the avoidance and forfeiture of policies arises where there is a breach of warranty or condition as to a part only of the property insured, and the courts are called upon to determine whether the entire policy is thereby rendered void, or only such part of the insurance as covers the specific property involved in the breach. Among the earlier cases comparatively few instances occur where the entire or divisible character of the contract was considered. And in some of these cases the question was not as to the effect of a breach of condition. Thus, in *Deidericks v. Commercial Ins. Co.*, 10 Johns. (N. Y.) 234, a case which, in the consideration of this phase of the law, has been given great weight in New York, it was held that where different portions of the cargo were separately valued the contract was divisible, so that there might be an abandonment of one part alone. That a voyage cov-

ered by the policy is divisible, so that a breach of warranty as to one portion will not affect losses occurring during the other portion, of the voyage, was held in *Clark v. Protection Ins. Co.*, 5 Fed. Cas. 909. So, in *Davis v. Boardman*, 12 Mass. 80, an insurance on a vessel and the cargo in different sums was regarded as divisible, so that a breach as to the vessel would not affect the insurance on the cargo.

In some instances the doctrine of the divisibility of the contract has been applied to sustain the policy as to a portion of the interest insured. Thus, where a policy issued to partners contained a provision that the conveyance of the property or the assignment of the policy without the consent of the company indorsed thereon would render the policy void, and one of the partners transferred his interest in the property without the consent of the company (*Shuggart v. Lycoming Fire Ins. Co.*, 55 Cal. 408), it was held that the other partner's interest was not affected by the transfer. The principle of divisibility as to the interest may also have governed *St. Paul Fire & Marine Ins. Co. v. Kelly*, 43 Kan. 741, 23 Pac. 1046, where part of the goods insured was held on commission and there was no disclosure of the fact. On the other hand, in *Ritt v. Washington Marine & Fire Ins. Co.*, 41 Barb. (N. Y.) 353, where the policy was issued to one "on behalf of himself and other owners," the contract was regarded as entire as to the interests covered.

It is also possible that the doctrine of the divisibility of the contract has had some influence in the decision of the cases involving shifting risks, as where merchandise is sold and replaced, or furniture and implements of trade are worn out and replaced.

In this connection it may be of interest to consult *Dwelling House Ins. Co. v. Butterly*, 33 Ill. App. 626, affirmed 133 Ill. 534, 24 N. E. 873; *State Ins. Co. v. Schreck*, 27 Neb. 527, 43 N. W. 340, 20 Am. St. Rep. 696, 6 L. R. A. 524; *Coleman v. Phoenix Ins. Co.*, 3 App. Div. 65, 88 N. Y. Supp. 986.

The important phase of the question as to the divisibility of a contract is, however, presented when there is an actual breach of a warranty, either affirmative or promissory, or a condition, either precedent or subsequent, as to a part of the property covered by the policy, under such circumstances that, had the breach affected all the property, the policy would have been declared void as a whole. Ordinarily the question can arise only when the policy covers different kinds or classes of property, separately described

and separately valued, or insured for separate amounts. In many jurisdictions the character of the contract is determined from these factors. In some cases the fact that the consideration of the contract—the premium—is entire is regarded as the determining factor, while in others the clause declaring the “entire” policy void in event of a breach of warranty or condition is regarded as controlling. Finally, in several jurisdictions the character of the policy as an entire or a divisible contract is regarded as dependent on the character of the risk.

(b) Insurance on separate classes of property separately valued.

In many of the states the character of the policy as an entire or divisible contract is regarded as dependent on the fact that the several classes of property insured are separately valued. The rule laid down by the courts may be stated as follows:

Where the property covered by a policy of insurance consists of different kinds of property, such as realty and personalty, or of different items, such as separate buildings or different articles of personal property, and the different kinds or articles of property are separately valued, or are insured for separate amounts, the contract is divisible, and a breach of warranty or condition as to one kind or class of property will not affect the insurance on the remainder of the property.

This is the rule adopted by the courts of New York, Kentucky, Kansas, Nebraska, Illinois, Missouri, and Texas. It has also been followed in some other states without particular discussion.

(c) Same—New York.

The development of the doctrine that the policy is divisible when it covers several classes of property, separately valued, may be best traced in the New York cases. The rule was announced in that state in the early case of *Trench v. Chenango Mut. Ins. Co.*, 7 Hill, 122. The policy covered a paper mill and stock therein. Annexed to the policy were certain conditions, one of which provided that there should be a disclosure as to the relative situation of other buildings in the vicinity of the building insured. Full disclosure not having been made, the company contended that the policy was avoided. The court, however, held that the condition relied on referred exclusively to insurance on buildings, and was not applicable to insurance on personal property. Therefore, though the pol-

icy might be avoided as to the insurance on the mill by the failure to disclose, it was still valid as to the personal property.

The rule thus laid down in the Trench Case was subsequently reasserted in *Burrill v. Chenango Mut. Ins. Co.*, 1 Edm. Sel. Cas. (N. Y.) 233. From these cases it appears that the rule that separate valuations made the contract divisible had its inception in the theory that the particular conditions as to which a breach was alleged could refer only to real property—the building insured—and did not apply to personal property, though contained in such building.

The doctrine of these cases as to the applicability of the condition to personalty was criticised and disapproved in *Wilson v. Herkimer Co. Mut. Ins. Co.*, 6 N. Y. 53, though the policy in that case covered only personalty. It was, however, held that the condition as to the proximity of other buildings was as important in the case of personal property as where buildings only were insured, in view of the provisions of the by-laws of the company to the effect that personal property should be insured at the same rates as the building in which it was contained. The court thus foreshadowed the doctrine of entirety of risk, to which reference will be made hereafter. On the authority of this case, the principle laid down in the Trench Case was rejected in *Smith v. Empire Ins. Co.*, 25 Barb. (N. Y.) 497.

Whatever view may be taken of the force of the criticism of the Trench Case, that case may be regarded as the foundation of the rule that the separate valuation of separate classes of property renders the policy divisible. Its influence may be traced in several later New York cases. Thus, in *Merrill v. Agricultural Ins. Co.*, 10 Hun, 428, where the policy covered a building and personalty, separately valued, the court based its decision that the policy was divisible on the Trench Case. In affirming this decision the Court of Appeals relied rather on *Deidericks v. Commercial Ins. Co.*, 10 Johns. (N. Y.) 234, where it was held that there might be an abandonment of a portion of a cargo separately valued, without abandonment of the other portions. But it is interesting to note that, in *King v. Tioga County Patron's Fire Relief Ass'n*, 35 App. Div. 58, 54 N. Y. Supp. 1057, a condition similar to the requirement in the Wilson Case—that by the statute under which the association was incorporated, and its by-laws, the association was authorized to insure personal property only in connection with the building in

which it was contained—was regarded as without force, in view of the settled rule in the state.

The rule that a separate valuation renders the policy divisible will prevail, even though the premium is entire, according to *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452, 29 Am. Rep. 184.

This principle has been followed in *Woodward v. Republic Fire Ins. Co.*, 32 Hun (N. Y.) 365; *Smith v. Home Ins. Co.*, 47 Hun (N. Y.) 30; *Schuster v. Dutchess County Mut. Ins. Co.*, 102 N. Y. 280, 6 N. E. 406; *Pratt v. Dwelling House Mut. Fire Ins. Co.*, 130 N. Y. 206, 29 N. E. 117; *King v. Tioga County Patron's Fire Relief Ass'n*, 35 App. Div. 58, 54 N. Y. Supp. 1057; *Kiernan v. Dutchess County Mut. Ins. Co.*, 150 N. Y. 190, 44 N. E. 698.

It is, of course, conceded that the rule may be rendered inapplicable by special provisions of the policy. Thus, in *Smith v. Agricultural Ins. Co.*, 118 N. Y. 522, 23 N. E. 883, where the policy declared that it should be void if the property insured, "or any part thereof," be incumbered, it was recognized that the quoted clause must govern, and the doctrine of divisibility would not apply. Nevertheless a provision that on breach of condition "this entire policy shall become void" will not prevent the application of the rule, if the policy is otherwise divisible by reason of separate valuations.

Such is the principle announced in *American Artistic Gold Stamping Co. v. Glens Falls Ins. Co.*, 1 Misc. Rep. 114, 20 N. Y. Supp. 646; *Knowles v. American Ins. Co.*, 66 Hun, 220, 21 N. Y. Supp. 50, affirmed without opinion 142 N. Y. 641, 37 N. E. 567; *Mott v. Citizens' Ins. Co.*, 69 Hun, 501, 23 N. Y. Supp. 400; *Kiernan v. Agricultural Ins. Co.*, 81 Hun, 373, 30 N. Y. Supp. 892, reversing 72 Hun, 519, 25 N. Y. Supp. 438; *Kiernan v. Dutchess County Mut. Ins. Co.*, 150 N. Y. 190, 44 N. E. 698; *Huff v. Jewett*, 20 Misc. Rep. 35, 44 N. Y. Supp. 811; *Adler v. Germania Fire Ins. Co.*, 17 Misc. Rep. 347, 39 N. Y. Supp. 1070; *Tomkins v. Hartford Fire Ins. Co.*, 22 App. Div. 380, 49 N. Y. Supp. 184.

In *Baley v. Homestead Fire Ins. Co.*, 80 N. Y. 21, 36 Am. Rep. 570, the condition was that the policy should be void if "the property" should become incumbered, and it was held that, as the contract was divisible, an incumbrance, to avoid the policy, must be on the whole property. The condition could not be construed as referring to an incumbrance on part of the property only.

The general rule that separate valuations render the contract divisible has also been asserted in the following cases: *Manley v. Insurance Company of North America*, 1 Lans. (N. Y.) 20; *Holmes v. Drew*, 16 Hun (N. Y.) 491; *Sunderlin v. Aetna Ins. Co.*, 18 Hun

(N. Y.) 522; *Dacey v. Agricultural Ins. Co.*, 21 Hun (N. Y.) 83; *Donley v. Glens Falls Ins. Co.*, 100 App. Div. 69, 91 N. Y. Supp. 802; *Rowley v. Empire Ins. Co.*, *42 N. Y. 557, 4 Abb. Dec. 131; *Herrman v. Adriatic Fire Ins. Co.*, 85 N. Y. 162, 89 Am. Rep. 644.

The converse of the rule as to the effect of separate valuations is obviously true. So, in *Fitzgerald v. Atlanta Home Ins. Co.*, 61 App. Div. 350, 70 N. Y. Supp. 552, where the policy covered fixtures and personalty in a gross sum, it was held that the contract was not divisible, and that a breach of condition as to the personalty forfeited the policy also as to the fixtures.

This case was subsequently affirmed by the Supreme Court without opinion in 76 N. Y. Supp. 1013, 72 App. Div. 629, and by the Court of Appeals in 67 N. E. 1082, 175 N. Y. 494.

Similarly, in *Vucci v. North British & Mercantile Ins. Co.* (Sup.) 88 N. Y. Supp. 986, where a policy covering merchandise and "furniture and fixtures" was involved, it was held that while the policy was divisible as between the merchandise and the "furniture and fixtures," so that a mortgage on a portion of the latter class of property would not affect the insurance on the merchandise, it was entire as to the furniture and fixtures, and a mortgage on a part of the furniture or the fixtures would forfeit the insurance as to the whole of the property of that class.

(d) Same—Kansas.

The rule that separate valuations rendered the contract divisible has been adopted in Kansas, largely on the authority of *Schuster v. Dutchess County Mut. Ins. Co.*, 102 N. Y. 261, 6 N. E. 406. The development of the rule in Kansas will be referred to in connection with its application to policies covering both realty and personalty.

Reference may be made to *Kansas Ins. Co. v. Berry*, 8 Kan. 159; *German Ins. Co. v. York*, 48 Kan. 488, 29 Pac. 586, 80 Am. St. Rep. 313; *Continental Ins. Co. v. Ward*, 50 Kan. 346, 31 Pac. 1079; *Kansas Farmers' Fire Ins. Co. v. Saindon*, 53 Kan. 623, 36 Pac. 983; *Republic Co. Mut. Fire Ins. Co. v. Johnson* (Kan.) 76 Pac. 419.

(e) Same—Kentucky.

The courts of Kentucky have also approved the rule that separate valuations render the policy divisible.

Phoenix Ins. Co. v. Lawrence, 4 Metc. (Ky.) 9, 81 Am. Dec. 521; *Continental Ins. Co. v. Gardner*, 23 Ky. Law Rep. 335, 62 S. W. 886; *Teutonia Ins. Co. v. Howell* (Ky.) 54 S. W. 852; *Speagle v. Dwelling House Ins. Co.*, 97 Ky. 646, 31 S. W. 282.

It is apparent, from the course of reasoning in the Lawrence Case and in the Gardner Case, that the theory of the Kentucky courts is that, when the different items of property are separately valued, there is in effect a separate insurance on each particular class or item of property so valued. It would, of course, follow logically that what might affect one policy of insurance would not necessarily affect the other.

(f) Same—Missouri.

That a policy in which the different kinds of property are separately valued is divisible is also the law in Missouri.

Reference may be made to *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247; *Koontz v. Hannibal Sav. & Ins. Co.*, 42 Mo. 128, 97 Am. Dec. 325; *Trabue v. Dwelling House Ins. Co.*, 121 Mo. 75, 25 S. W. 848, 23 L. R. A. 719, 42 Am. St. Rep. 523; *Baxter v. State Ins. Co.*, 65 Mo. App. 255; *Harness v. National Fire Ins. Co.*, 62 Mo. App. 245; *Stephens v. German Ins. Co.*, 61 Mo. App. 194; *Murphey v. North British & Merc. Ins. Co.*, 61 Mo. App. 323; *Jenkins v. German Ins. Co.*, 58 Mo. App. 210; *Crook v. Phoenix Ins. Co.*, 88 Mo. App. 582.

The theory of the Kentucky cases, that a separate valuation creates in effect separate policies, seems to have influenced the court in *Trabue v. Dwelling House Ins. Co.*, 121 Mo. 75, 25 S. W. 848, 23 L. R. A. 719, 42 Am. St. Rep. 523. But, however that may be, the development of the doctrine in Missouri will be discussed more fully in connection with the consideration of the effect of the clause declaring the "entire policy" void.

(g) Same—Texas.

The rule that a policy covering separate classes of property separately valued is divisible also prevails in Texas.

The rule is asserted in the following cases: *Sun Fire Office v. Hodges*, 3 Willson, Civ. Cas. Ct. App. § 268; *Bills v. Hibernia Ins. Co.*, 87 Tex. 547, 29 S. W. 1063, 29 L. R. A. 706, 47 Am. St. Rep. 121; *Alamo Fire Ins. Co. v. Schmitt*, 30 S. W. 833, 10 Tex. Civ. App. 550; *Home Ins. Co. v. Smith* (Civ. App.) 32 S. W. 240, modifying on rehearing (Civ. App.) 29 S. W. 264; *North British & Mercantile Ins. Co. v. Freeman* (Civ. App.) 33 S. W. 1091; *German Ins. Co. v. Luckett*, 34 S. W. 173, 12 Tex. Civ. App. 139; *Sullivan v. Hartford Fire Ins. Co.* (Civ. App.) 34 S. W. 999; *Roberts, Willis & Taylor Co. v. Sun Mut. Ins. Co.*, 13 Tex. Civ. App. 64, 35 S. W. 955; *Springfield Fire & Marine Ins. Co. v. Green* (Civ. App.) 36 S. W. 143; *Georgia Home Ins. Co. v. McKinley*, 37 S. W. 606, 14 Tex. Civ. App. 7; *Georgia Home Ins. Co. v. Brady* (Civ. App.) 41 S. W. 513; *Sun*

Mut. Ins. Co. v. Tufts, 50 S. W. 180, 20 Tex. Civ. App. 147; Hartford Fire Ins. Co. v. Walker (Civ. App.) 60 S. W. 820; Delaware Ins. Co. v. Harris, 26 Tex. Civ. App. 537, 64 S. W. 867.

Indeed, in some of the cases cited, the report does not show whether the property was separately valued or not, though it did consist of different kinds or classes of property. The rule prevails in Texas, even though the policy declares that "the entire policy" shall be void on breach of condition. The decisions seem to be based on construction of the conditions as to forfeiture, rather than the principle of separate insurances. The development of the doctrine in Texas is discussed in connection with the other cases in which the effect of that clause is considered.

(h) Same—Other states in which the contract is held to be divisible.

The contract is held to be divisible when the property is separately valued in Illinois and Nebraska.

Illinois: Commercial Ins. Co. v. Spankneble, 52 Ill. 53, 4 Am. Rep. 582; Illinois Mut. Fire Ins. Co. v. Fix, 53 Ill. 151, 5 Am. Rep. 38; Hartford Fire Ins. Co. v. Walsh, 54 Ill. 164, 5 Am. Rep. 115; Insurance Co. of North America v. Hofing, 29 Ill. App. 180; German Ins. Co. v. Miller, 39 Ill. App. 633.

Nebraska: State Ins. Co. v. Schreck, 27 Neb. 527, 43 N. W. 840, 20 Am. St. Rep. 696, 6 L. R. A. 524; German Ins. Co. v. Fairbank, 32 Neb. 750, 49 N. W. 711, 29 Am. St. Rep. 459; Phenix Ins. Co. v. Grimes, 33 Neb. 340, 50 N. W. 168; Johansen v. Home Fire Ins. Co., 54 Neb. 548, 74 N. W. 866; Home Fire Ins. Co. v. Bernstein, 55 Neb. 260, 75 N. W. 839.

The rule is also applied in Allison v. Phoenix Ins. Co., 1 Fed. Cas. 530; Manchester Fire Assur. Co. v. Feibelman, 118 Ala. 308, 23 South. 759; Fireman's Fund Ins. Co. v. Barker, 6 Colo. App. 541, 41 Pac. 513; Worley v. State Ins. Co., 91 Iowa, 150, 59 N. W. 16, 51 Am. St. Rep. 334; Clark v. New England Mut. Fire Ins. Co., 6 Cush. (Mass.) 342, 53 Am. Dec. 44; Bullman v. North British & Mercantile Ins. Co., 159 Mass. 118, 34 N. E. 169; Wright v. Fire Ins. Ass'n, 12 Mont. 474, 31 Pac. 87, 19 L. R. A. 211; Phillips v. Ohio Farmers' Ins. Co., 13 Ohio Cir. Ct. R. 679, 6 O. C. D. 266; Coleman v. New Orleans Ins. Co., 49 Ohio St. 310, 81 N. E. 279, 16 L. R. A. 174, 34 Am. St. Rep. 565; Light v. Greenwich Ins. Co., 58 S. W. 851, 105 Tenn. 480; Connecticut Fire Ins. Co. v. Tilley, 88 Va. 1024, 14 S. E. 851, 29 Am. St. Rep. 770; Quarrier v. Peabody Ins. Co., 10 W. Va. 507, 27 Am. Rep. 582.¹

¹ See, also, Rev. Codes N. D. 1899, § 4459; Ann. St. S. D. 1901, § 5301; Civ. Code Mont. 1895, § 3409. These statutes are identical, and provide that

a change in interest in one or more of several distinct things separately insured by one policy does not avoid the insurance as to the others.

In Colorado and Oklahoma, the rule prevails, though the policy contains a clause declaring "the entire policy" void for breach of condition.

Firemen's Fund Ins. Co. v. Barker, 6 Colo. App. 535, 41 Pac. 513;
Miller v. Scottish Union & National Fire Ins. Co. (Okl.) 75 Pac.
 1183; *Miller v. Delaware Ins. Co. (Okl.)* 75 Pac. 1121, 65 L. R. A.
 173.

It is probable that the Iowa rule is qualified, and that the separate valuation will make the contract divisible only when the risk is not entire (*Taylor v. Anchor Mut. Fire Ins. Co.*, 116 Iowa, 625, 88 N. W. 807, 57 L. R. A. 323, 93 Am. St. Rep. 261). So in Washington the rule is approved, subject to the qualification that a breach does not cause an increase of risk as to the other property (*Herzog v. Palatine Ins. Co. [Wash.]* 79 Pac. 287); and if the entire risk is affected the separate valuation is of no avail (*Brehm Lumber Co. v. Svea Ins. Co. [Wash.]* 79 Pac. 34).

(1) **Same—Contrary doctrine.**

The majority of the cases rejecting the rule that separate valuations render the contract divisible may be divided into three classes—those in which the objection is based on the fact that the premium is entire, those in which the "entire policy" is declared void on breach of condition, and those in which the character of the contract is regarded as dependent on the character of the risk as entire or divisible. These cases will be referred to and discussed in subsequent subdivisions. There are, however, a few cases in which the objections to the rule have been based on other and more general grounds. Thus, in *Todd v. State Ins. Co. of Missouri*, 11 Phila. 355, where the contract was regarded as made in New York, and as governed, therefore, by the law of that state, the court held the contract entire, on the authority of *Wilson v. Herkimer Co. Mut. Ins. Co.*, 6 N. Y. 53. In Connecticut the court has adopted the principle that a separate valuation does not constitute a separate insurance (*Essex Sav. Bank v. Meriden Fire Ins. Co.*, 57 Conn. 335, 17 Atl. 930, 18 Atl. 324, 4 L. R. A. 759), and that such separate valuation is in effect merely an apportionment of the whole amount of insurance upon the different classes of property. In *Allen v. Merchants' Mut. Ins. Co.*, 30 La. Ann. 1386, 31 Am. Rep. 243, a policy covering two different lots of personal property, situated in different buildings and separately valued, was nevertheless regard-

ed as entire. So, in *Newlin v. North American Ins. Co.*, 5 Clark (Pa.) 116, a policy insuring cotton described as "104 bales, valued at \$50 per bale," was held to be an entire contract.

In other instances the decision that the contract was entire seems to have been based on the wording of the conditions. Thus, where a policy covering \$700 on books and stationery and \$300 on musical instruments, etc., contained a covenant that, if the insured "shall hereafter make any other insurance on the hereby insured premises, * * * this policy shall cease and be of no effect" (*Associated Firemen's Ins. Co. v. Assum*, 5 Md. 165), it was held that the proper construction of the condition was that, if any part of the goods embraced in the contract was insured in any other company, the whole policy became void. Where the insurance was on a stock of goods "consisting of nonhazardous merchandise" (*Richards v. Protection Ins. Co.*, 30 Me. 273), the policy was regarded as entire, so that the presence of hazardous articles avoided the whole insurance, and not merely the insurance as to such articles.

(j) Same—Policy covering real and personal property.

The rule that the contract is divisible when the policy covers different classes of property separately valued has been applied where real and personal property are insured in one policy, and no distinction seems to have been drawn between the effect of a breach of warranty or condition as to either class of property.

Reference may be made to *Bullman v. North British & Mercantile Ins. Co.*, 159 Mass. 118, 34 N. E. 169; *State Ins. Co. v. Schreck*, 27 Neb. 527, 43 N. W. 340, 20 Am. St. Rep. 696, 6 L. R. A. 524; *Phenix Ins. Co. v. Grimes*, 33 Neb. 340, 50 N. W. 168; *Johansen v. Home Fire Ins. Co.*, 54 Neb. 548, 74 N. W. 866; *Home Fire Ins. Co. v. Bernstein*, 55 Neb. 260, 75 N. W. 839; *Smith v. Home Ins. Co.*, 47 Hun (N. Y.) 30; *Mott v. Citizens' Ins. Co.*, 69 Hun, 501, 23 N. Y. Supp. 400; *Huff v. Jewett*, 20 Misc. Rep. 35, 44 N. Y. Supp. 311; *Baley v. Homestead Fire Ins. Co.*, 80 N. Y. 21, 36 Am. Rep. 570; *Schuster v. Dutchess County Mut. Ins. Co.*, 102 N. Y. 260, 6 N. E. 406; *Pratt v. Dwelling House Mut. Ins. Co.*, 130 N. Y. 206, 29 N. E. 117; *Phillips v. Ohio Farmers' Ins. Co.*, 18 Ohio Cir. Ct. R. 679, 6 O. C. D. 266; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507, 27 Am. Rep. 582; *Bills v. Hibernia Ins. Co.*, 87 Tex. 547, 29 S. W. 1063, 29 L. R. A. 706, 47 Am. St. Rep. 121; *Sullivan v. Hartford Fire Ins. Co.* (Tex. Civ. App.) 34 S. W. 999; *Curlee v. Texas Home Fire Ins. Co.*, 73 S. W. 831, 31 Tex. Civ. App. 471.

The most important phase of the question arises when the policy covers a building and its contents. Such was the fact in the lead-

ing New York cases to which reference has been made. Thus, in *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452, 29 Am. Rep. 184, affirming 10 Hun, 428, the policy covered buildings and their contents, and the breach was as to the building. In *Kiernan v. Agricultural Ins. Co.*, 81 Hun, 373, 30 N. Y. Supp. 892, there was a breach by reason of an incumbrance on the house and on part of the personal property. But it was nevertheless held that this did not affect the insurance on the remainder of the personal property.

Reference may also be made to *Rowley v. Empire Ins. Co.*, *42 N. Y. 557, 4 Abb. Dec. 31; *Kiernan v. Dutchess County Mutual Ins. Co.*, 150 N. Y. 190, 44 N. E. 698; *Holmes v. Drew*, 16 Hun (N. Y.) 491; *Sunderlin v. Aetna Ins. Co.*, 18 Hun (N. Y.) 522; *Dacey v. Agricultural Ins. Co.*, 21 Hun (N. Y.) 83; *Woodward v. Republic Fire Ins. Co.*, 32 Hun (N. Y.) 365; *King v. Tloga County Patrons' Fire Relief Ass'n*, 54 N. Y. Supp. 1057, 35 App. Div. 58; *Donley v. Glens Falls Ins. Co.*, 91 N. Y. Supp. 302, 100 App. Div. 69.

It is obvious that, if the policy provides that a breach as to "any part" of the property will render the policy void (*Smith v. Agricultural Ins. Co.*, 118 N. Y. 522, 23 N. E. 883), the rule will not apply.

In view of the decisions in the New York cases, we may formulate the rule that where the insurance covers a building and the contents thereof, if the items are separately valued, the contract is divisible, and a breach of warranty or condition as to the building will not affect the insurance on the personalty. Conversely, a breach as to the personalty will not affect the insurance on the building.

This rule also prevails in Kansas. It was first laid down in *Kansas Ins. Co. v. Berry*, 8 Kan. 159, where there were two policies, one covering the building and the other a stock of goods therein, but both issued apparently on one application. The rule in Kansas, however, rests on *German Ins. Co. v. York*, 48 Kan. 488, 29 Pac. 586, 30 Am. St. Rep. 313, where the breach was as to the personalty, and it was held, relying on *Schuster v. Dutchess County Mut. Ins. Co.*, 102 N. Y. 261, 6 N. E. 406, that the separate valuation rendered the contract divisible, though the premium was entire, as the premium could be easily apportioned.

The rule laid down in the York Case was followed in *Continental Ins. Co. v. Ward*, 50 Kan. 346, 31 Pac. 1079; *Kansas Farmers' Fire Ins. Co. v. Saindon*, 53 Kan. 623, 36 Pac. 983.

The leading case in Missouri, asserting the principle that a policy void as to the building may be valid as to the personal property

therein, is *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247, where it was also said that, though the premium was entire, it was easily apportionable on the separately valued items. Stress was, however, also laid on the fact that there were no express words declaring the whole contract void.

The rule laid down in the *Loehner* Case was followed in *Koontz v. Hannibal Savings & Ins. Co.*, 42 Mo. 126, 97 Am. Dec. 325. Reference may also be made to *Crook v. Phoenix Ins. Co.*, 38 Mo. App. 582; *Jenkins v. German Ins. Co.*, 58 Mo. App. 210; *Stephens v. German Ins. Co.*, 61 Mo. App. 194; *Harness v. National Fire Ins. Co.*, 62 Mo. App. 245; *Baxter v. State Ins. Co.*, 65 Mo. App. 255; and to the leading case of *Trabue v. Dwelling House Ins. Co.*, 121 Mo. 75, 25 S. W. 848, 23 L. R. A. 719, 42 Am. St. Rep. 523.

In Texas the rule has been followed in a long series of cases, resting on the authority of *Bills v. Hibernia Ins. Co.*, 87 Tex. 547, 29 S. W. 1063, 29 L. R. A. 706, 47 Am. St. Rep. 121.

The following cases may be referred to: *Home Ins. Co. v. Smith* (Civ. App.) 32 S. W. 240, modifying (Civ. App.) 29 S. W. 264; *Alamo Fire Ins. Co. v. Schmitt*, 10 Tex. Civ. App. 550, 30 S. W. 833; *Roberts, Willis & Taylor Co. v. Sun Mut. Ins. Co.*, 13 Tex. Civ. App. 64, 35 S. W. 955; *Springfield Fire & Marine Ins. Co. v. Green* (Civ. App.) 36 S. W. 143; *Georgia Home Ins. Co. v. McKinley*, 37 S. W. 606, 14 Tex. Civ. App. 7; *Georgia Home Ins. Co. v. Brady* (Civ. App.) 41 S. W. 513; *Hartford Fire Ins. Co. v. Walker* (Civ. App.) 60 S. W. 820.

The rule was also followed in *Insurance Company of North America v. Hofing*, 29 Ill. App. 180, where the breach was as to the building; but it is to be observed that the condition in this case was that a breach would forfeit the policy as to "such property," and this the court held to be controlling. Nevertheless the rule has been approved in other Illinois cases.

Commercial Ins. Co. v. Spankneble, 52 Ill. 53, 4 Am. Rep. 582; *Illinois Mut. Fire Ins. Co. v. Fix*, 53 Ill. 151, 5 Am. Rep. 38; *German Ins. Co. v. Miller*, 39 Ill. App. 633.

For further illustrations of the application of the rule reference may be made to *Phoenix Ins. Co. v. Lawrence*, 4 Metc. (Ky.) 9, 81 Am. Dec. 521; *Continental Ins. Co. v. Gardner*, 62 S. W. 886, 23 Ky. Law Rep. 835; *Teutonia Ins. Co. v. Howell* (Ky.) 54 S. W. 852; *Coleman v. New Orleans Ins. Co.*, 49 Ohio St. 310, 81 N. E. 279; *Miller v. Delaware Ins. Co.* (Okla.) 75 Pac. 1121, 65 L. R. A. 173; *Miller v. Scottish Union & National Fire Ins. Co.* (Okla.) 75 Pac. 1135; *Herzog v. Palatine Ins. Co.* (Wash.) 79 Pac. 287.

The rule was also applied in *Royal Ins. Co. v. Martin*, 192 U. S. 149, 24 Sup. Ct. 247, 48 L. Ed. 385, where it was held that a policy under which a building and a stock in trade contained therein are separately insured for distinct and definite amounts is not void as respects an insurance on the building by a change in the ownership of such stock in trade, though it is to be noted that the policy provided that it should cease to be in force as to any property thereby insured which should pass from the insured to any other person, otherwise than by due operation of law, unless notice thereof was given to the company.

A Delaware statute (Act March 29, 1889) provides that every policy on real property shall have indorsed across its face an agreed valuation of the insured property, and that, "if any owner shall effect any subsequent insurance upon any larger value than so agreed, all insurance, as well that then existing as that subsequently obtained, shall become void." It was held, in *Thurber v. Royal Ins. Co.*, 1 Marv. (Del.) 251, 40 Atl. 1111, that inasmuch as the statute is a quasi penal one, and expressly confines the forfeiture to the realty, a policy which covers both real and personal property will be forfeited only as to the realty by a violation of the statute.

(k) Same—Policy covering several buildings.

Where the policy covers several buildings, each valued separately, the contract is divisible, and a breach of condition as to one of the buildings will not affect the insurance on the other buildings.

This rule is asserted in *Worley v. State Ins. Co.*, 91 Iowa, 150, 59 N. W. 16, 51 Am. St. Rep. 334; *Speagle v. Dwelling House Ins. Co.*, 97 Ky. 646, 81 S. W. 282; *Hartford Fire Ins. Co. v. Walsh*, 54 Ill. 164, 5 Am. Rep. 115; *Clark v. New England Mut. Fire Ins. Co.*, 6 Cush. (Mass.) 342, 53 Am. Dec. 44; *Manley v. Insurance Company of North America*, 1 Lans. (N. Y.) 20; *Connecticut Fire Ins. Co. v. Tilley*, 88 Va. 1024, 14 S. E. 851, 29 Am. St. Rep. 770; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507, 27 Am. Rep. 582.

From the reasoning in the *Worley Case* it may be inferred that the theory of that case is that the risk was not entire. The policy covered a house and a barn, and was conditioned to be void if "the premises" insured became vacant. The condition was regarded as applying only to the whole premises, and consequently not to be broken, so as to forfeit the policy, by the vacancy of one of the buildings. So, in *Connecticut Fire Ins. Co. v. Tilley*, 88 Va. 1024, 14 S. E. 851, 29 Am. St. Rep. 770, it was said that, while a vacancy of several of the houses beyond the prescribed time did not render the policy void as to the occupied houses, the occupancy of a por-

tion of the houses did not exempt the unoccupied houses from the operation of the condition as to vacancy. In a recent case (*Republic County Mut. Fire Ins. Co. v. Johnson* [Kan.] 76 Pac. 419) the Supreme Court of Kansas said that, though a policy written so as to place separate valuations upon separate buildings will ordinarily be severable, it will not be so if the risk intended to be excluded by the condition which is violated—the vacancy clause—affects the particular building for the destruction of which recovery is sought.

A breach of the vacancy clause was involved in *Hartford Fire Ins. Co. v. Walsh*, 54 Ill. 164, 5 Am. Rep. 115; *Speagle v. Dwelling House Ins. Co.*, 97 Ky. 648, 31 S. W. 282; *Sun Fire Office v. Hodges*, 3 Willson, Civ. Cas. Ct. App. (Tex.) § 268; *Bryan v. Peabody Ins. Co.*, 8 W. Va. 605. And see *Halpin v. Insurance Company of North America*, 10 N. Y. St. Rep. 345, where it was held that a policy covering machinery apart from the building is a divisible contract, so that the breach of a condition as to the occupancy of the building will not affect the insurance on the machinery.

Following the usual rule in Missouri, it was held, in *Murphey v. North British & Mercantile Ins. Co.*, 61 Mo. App. 323, that, where separate buildings are insured and separately valued, the policy will be regarded as divisible, though the premium is entire.

On the other hand, the rule that an entire premium makes the contract entire was applied, in *Central Montana Mines Co. v. Fireman's Fund Ins. Co.* (Minn.) 99 N. W. 1120, 100 N. W. 3, to relieve the insured from a forfeiture claimed because one of several buildings insured as an entire system was vacant.

The rule that a policy covering several buildings is divisible may operate for the benefit of the insurer. Thus, in *Herrman v. Adriatic Fire Ins. Co.*, 85 N. Y. 162, 39 Am. Rep. 644, reversing 45 N. Y. Super. Ct. 394, it was held that, where a policy covers a dwelling and appurtenant outbuildings, a farmhouse, barn, etc., the contract being divisible, a compliance with the conditions of the policy as to the farmhouse and other buildings will not save the policy as to a dwelling, in regard to which there was a breach of conditions.

(1) Same—Policy covering different classes of personal property.

Where the policy covers separate items of personal property separately valued, the contract is divisible, and a breach of warranty or condition as to one class of personalty will not affect the insurance on the remainder of the property. A leading case is *Knowles*

v. American Ins. Co., 66 Hun, 220, 21 N. Y. Supp. 50, affirmed without opinion in 142 N. Y. 641, 37 N. E. 567, where it was held that a policy insuring two crops of hops in separate amounts is divisible, so that a breach of condition as to one crop will not affect the insurance on the other. So, where horses and cattle are insured by the same policy, a breach as to the horses does not affect the insurance as to the cattle (*German Ins. Co. v. Fairbank*, 32 Neb. 750, 49 N. W. 711, 29 Am. St. Rep. 459).

This rule is applied in *Manchester Fire Assur. Co. v. Feibelman*, 118 Ala. 308, 23 South. 759; *Fireman's Fund Ins. Co. v. Barker*, 6 Colo. App. 535, 41 Pac. 513; *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53, 4 Am. Rep. 582; *Dwelling House Ins. Co. v. Butterly*, 33 Ill. App. 626, affirmed 133 Ill. 534, 24 N. E. 873; *St. Paul Fire & Marine Ins. Co. v. Kelly*, 43 Kan. 741, 23 Pac. 1046; *Wright v. Fire Ins. Ass'n*, 12 Mont. 474, 31 Pac. 87, 19 L. R. A. 211; *American Artistic Gold Stamping Co. v. Glens Falls Ins. Co.*, 1 Misc. Rep. 114, 20 N. Y. Supp. 646; *Kiernan v. Agricultural Ins. Co.*, 81 Hun, 373, 80 N. Y. Supp. 892; *Coleman v. Phoenix Ins. Co.*, 3 App. Div. 65, 88 N. Y. Supp. 986; *Adler v. Germania Fire Ins. Co.*, 17 Misc. Rep. 347, 89 N. Y. Supp. 1070; *Tompkins v. Hartford Fire Ins. Co.*, 22 App. Div. 380, 49 N. Y. Supp. 184; *Light v. Greenwich Ins. Co.*, 105 Tenn. 480, 58 S. W. 851; *North British & Mercantile Ins. Co. v. Freeman* (Tex. Civ. App.) 33 S. W. 1091; *German Ins. Co. v. Luckett*, 84 S. W. 173, 12 Tex. Civ. App. 139; *Sun Mut. Ins. Co. v. Tufts*, 50 S. W. 180, 20 Tex. Civ. App. 147; *Delaware Ins. Co. v. Harris*, 28 Tex. Civ. App. 537, 64 S. W. 867.

The rule was regarded as governing in the *Barker Case*, though the policy provided that the entire policy should be void if any material fact was concealed, or if the interest of the insured was not truly stated, and it appeared that a part of the property was incumbered. It seems probable that the theory of all of these cases is that the risk was not entire.

It is obvious that, in the absence of a separate classification and valuation, the policy must be regarded as entire. Thus, where a policy described the property covered as "furniture and fixtures," and provided that the term "furniture and fixtures" should include tools, implements, and utensils used in the business of the insured (*Vucci v. North British & Mercantile Ins. Co.* [Sup.] 88 N. Y. Supp. 986), it was held that a breach by reason of a chattel mortgage covering a portion of the furniture and fixtures invalidated the entire insurance as to such property, though portions thereof were not covered by the mortgage. A converse of the rule is il-

illustrated, also, by *Fitzgerald v. Atlanta Home Ins. Co.*, 70 N. Y. Supp. 552, 61 App. Div. 350,² where it was held that a policy issued in a gross sum on property which was partly fixtures and partly personalty was rendered void as to both kinds of property by the violation of a clause prohibiting the mortgaging of the insured personalty.

(m) Character of contract determined by entirety of consideration.

In several states the principle that, where the insurance covers separate classes or items of property insured for separate amounts, the contract is divisible, has been modified by the qualification that if the consideration—the premium—is entire, the contract is entire. This modification is based on the rule, appertaining to contracts generally, that entirety of consideration renders the contract entire.³ The application of this rule to insurance contracts rests on the authority of *Friesmuth v. Agawam Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 587. The policy covered four separate and distinct classes of property, valued separately, a distinct sum being insured on each, and the insured contended that a false statement as to incumbrances on a portion of the property did not avoid the insurance as to property of another class not incumbered. The court, however, held that this contention rested on a mistaken view of the nature of the contract and the respective rights and liabilities of the parties. The contract of insurance is not distinct and separate on each class or subject embraced in the policy. It is separate and distinct only so far as to limit the extent of the risk assumed on each kind of property. In all other respects it is an entire contract. This is manifest from the fact that the premium and deposit are designated as entire sums, without any reference to the different kinds of property covered by the policy on the separate sums insured on each. There is nothing in the application or policy from which it can be ascertained how much of the deposit note was made up of the rate of insurance charged on the real estate and how much of that on the personal property. The consideration of the contract was regarded by the parties as an entirety, of which they did not contemplate a separation or apportionment. It was in consideration of the entire sum for which the deposit note was given, and the liability of the assured to assessments on that

² See, also, 76 N. Y. Supp. 1013, 72 App. Div. 629, and 67 N. E. 1082, 175 N. Y. 494.

³ See *Parsons on Contracts* (7th Ed.) vol. 2, p. 650.

amount in case of losses, that the insurers assumed all the risks contained in the policy. They have the right to look to their lien on each and all of the different kinds of property insured by them for the security of the whole amount of the deposit note. This is not a case, therefore, of an insurance of different kinds or species of property to a specific amount, with a separate premium and deposit charged and designated as belonging to each, for which a distinct lien can be asserted; but it is an insurance for an entire consideration, when the lien attaches to the whole property to secure the full amount of the deposit note.

The doctrine thus laid down in the Friesmuth Case was reasserted in *Brown v. People's Mut. Ins. Co.*, 11 Cush. (Mass.) 280, and was approved and adopted by the Supreme Judicial Court of Maine in *Lovejoy v. Augusta Mut. Fire Ins. Co.*, 45 Me. 472.

The rule has been applied by the courts of Maine and Massachusetts in *Gould v. York County Mut. Fire Ins. Co.*, 47 Me. 403, 74 Am. Dec. 494; *Day v. Charter Oak F. & M. Ins. Co.*, 51 Me. 91; *Barnes v. Union Mut. Fire Ins. Co.*, 51 Me. 110, 81 Am. Dec. 562; *Lee v. Howard Fire Ins. Co.*, 8 Gray (Mass.) 583; *Kimball v. Howard Fire Ins. Co.*, 8 Gray (Mass.) 83; *Bennett v. Commercial Assur. Co.*, 162 Mass. 29, 87 N. E. 672.

It is to be observed, however, that in the Friesmuth Case stress was laid on the fact that the company was a mutual one and relied on its lien on the property as a whole. In the Brown Case, and also in the Maine cases, with the exception of the Day Case, the companies involved were mutual companies. To what extent this fact influenced the courts in the earlier decisions it is difficult to determine, but any distinction between mutual and stock companies in this regard is ignored in the subsequent cases.

The rule that a separate valuation renders the contract divisible was denied in *Newlin v. North American Ins. Co.*, 5 Clark (Pa.) 116, without particular discussion. But in *Fire Ass'n v. Williamson*, 26 Pa. 196, the fact that the consideration was entire was regarded as an important factor, though stress was also laid on the entirety of the risk. The leading case in Pennsylvania is, however, *Gottzman v. Pennsylvania Ins. Co.*, 56 Pa. 210, 94 Am. Dec. 55,⁴ where the court, after a discussion of the Maine and Massachusetts cases, comes to the conclusion that the entirety of the consideration must be regarded as the controlling factor, and that, when the con-

⁴ For prior report, see 48 Pa. 151.

sideration or premium is entire, the contract cannot be divisible, though it covers separate classes of property separately valued.

The rule has been reasserted in *Todd v. State Ins. Co.*, 33 Leg. Int. (Pa.) 239; *Kelly v. Humboldt Fire Ins. Co.* (Pa.) 6 Atl. 740, 44 Leg. Int. 17.

The Supreme Court of Minnesota adopted the rule in *Plath v. Minnesota Farmers' Mut. Fire Ins. Ass'n*, 23 Minn. 479, 23 Am. Rep. 697, basing its decision on the authority of the *Maine*, *Massachusetts*, and *Pennsylvania Cases*. In a recent case (*Central Montana Mines Co. v. Fireman's Fund Ins. Co.* [Minn.] 99 N. W. 1120, 100 N. W. 3) the court applied the rule to uphold the right of the insured to recover. The policy covered several buildings, which were part of the plant of a mining corporation. As the consideration was entire, the court held that the policy must be regarded as entire, so that a vacancy of one of the buildings constituting the system or plant of the mine did not affect the validity of the policy.

The rule that the contract is entire when the consideration or premium is entire governed in the following cases: *Phoenix Ins. Co. v. Gray*, 107 Ga. 110, 32 S. E. 948; *Southern Fire Ins. Co. v. Knight*, 111 Ga. 622, 36 S. E. 821, 52 L. R. A. 70, 78 Am. St. Rep. 216; *Bowman v. Franklin Fire Ins. Co.*, 40 Md. 620; *Agricultural Ins. Co. v. Hamilton*, 82 Md. 88, 33 Atl. 429, 30 L. R. A. 633, 51 Am. St. Rep. 457; *Sun Ins. Office v. Merz*, 63 N. J. Law, 385, 43 Atl. 693; *Briggs v. North Carolina Home Ins. Co.*, 88 N. C. 141; *McGowan v. People's Mut. Fire Ins. Co.*, 54 Vt. 211, 41 Am. Rep. 843. In *Arkansas* the character of the risk as entire or divisible seems to have been taken into consideration, as well as the entirety of the consideration: *McQueeney v. Phoenix Ins. Co.*, 52 Ark. 257, 12 S. W. 498, 20 Am. St. Rep. 179, 5 L. R. A. 744; *Phoenix Ins. Co. v. Public Parks Amusement Co.*, 68 Ark. 187, 37 S. W. 959.

The Supreme Court of Iowa, in *Garver v. Hawkeye Ins. Co.*, 69 Iowa, 202, 28 N. W. 555, made the somewhat remarkable statement that "there is no conflict in the authorities" as to whether the contract is entire or divisible, "where the premium is a single or gross sum." The rule that under such circumstances the contract is entire was followed in *Kahler v. Iowa State Ins. Co.*, 106 Iowa, 380, 76 N. W. 734. In both of these cases conditions existed which indicated that the risk was entire. This led the court, in *Taylor v. Anchor Mut. Fire Ins. Co.*, 116 Iowa, 625, 88 N. W. 807, 57 L. R. A. 328, 93 Am. St. Rep. 261, to reject the doctrine of the former cases, and to lay down the principle that entirety of premium does not

necessarily render the contract indivisible, but that the character of the contract is to be determined by the character of the risk.

(2) Same—Contrary doctrine.

Reference has been made to the Taylor Case, in which the Supreme Court of Iowa rejected the doctrine, previously announced in that court, that the entirety of the consideration rendered the contract indivisible. Though all cases supporting the rule that separate valuations make the contract divisible may also be said to reject the doctrine based on entirety of consideration, special reference thereto has been made in several cases, and the reasons for their rejection of the doctrine are worthy of some attention. The Supreme Court of Wisconsin has taken a position in regard to the doctrine similar to that taken by the Iowa court in the Taylor Case, and has held that the fact that the premium is entire will not control when the risk is divisible, as when separate buildings are insured and the premium is apportionable between them.

Loomis v. Rockford Ins. Co., 77 Wis. 87, 45 N. W. 813, 20 Am. St. Rep. 93, 8 L. R. A. 834, reaffirmed in 81 Wis. 366, 51 N. W. 564.

That the premium, though stated in a gross sum, may be apportionable, so as not to be in fact an entire consideration, has been commented on in other cases. Thus, in *Wright v. Fire Ins. Ass'n*, 12 Mont. 474, 31 Pac. 87, 19 L. R. A. 211, the court calls attention to the fact that it did not appear but that the total amount of premium was arrived at by adding together the amount required for each separate risk. The premiums might well be stated separately, but for convenience the amount thereof is stated in a gross sum (*Phenix Ins. Co. v. Grimes*, 33 Neb. 340, 50 N. W. 168).

Reference may also be made to *German Ins. Co. v. York*, 48 Kan. 488, 29 Pac. 586, 30 Am. St. Rep. 813; *Continental Ins. Co. v. Ward*, 50 Kan. 340, 31 Pac. 1079; *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247; *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452, 29 Am. Rep. 184, affirming 10 Hun, 428.

The Supreme Court of West Virginia has expressed the opinion in *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507, 27 Am. Rep. 582, that the general rules as to whether a contract is entire or divisible should not be applied to insurance policies. The court regards it as the safer rule to be guided by considerations of equity and the

reasonableness of the construction, bearing in mind that the law leans against forfeitures.

The rule that an entire premium renders the contract entire is also rejected in *Hanover Fire Ins. Co. v. Crawford*, 121 Ala. 258, 25 South. 912, 77 Am. St. Rep. 55; *Murphey v. North British & Mercantile Ins. Co.*, 61 Mo. App. 323, 1 Mo. App. Rep'r, 151; *Woodward v. Republic Fire Ins. Co.*, 32 Hun (N. Y.) 365; *Smith v. Home Ins. Co.*, 47 Hun (N. Y.) 30; *Schuster v. Dutchess Co. Mut. Ins. Co.*, 102 N. Y. 260, 6 N. E. 406; *Pratt v. Dwelling House Mut. Ins. Co.*, 130 N. Y. 206, 29 N. E. 117; *Kiernan v. Dutchess Co. Mut. Ins. Co.*, 150 N. Y. 190, 44 N. E. 698; *King v. Tloga County Patrons' Fire Relief Ass'n*, 54 N. Y. Supp. 1057, 85 App. Div. 58; *Coleman v. New Orleans Ins. Co.*, 49 Ohio St. 310, 31 N. E. 279, 16 L. R. A. 174, 34 Am. St. Rep. 565.

(c) Effect of condition that entire policy shall be void.

Policies of insurance, and especially the more recent forms, often provide that on the breach of a warranty or condition "this entire policy shall be void." That this clause has the effect of rendering the contract entire has been asserted in several well-considered cases; and this, too, even in jurisdictions where the general rule that separate valuations render the contract divisible prevails. Thus, in *Germania Fire Ins. Co. v. Schild*, 68 N. E. 706, 69 Ohio St. 136, 100 Am. St. Rep. 663, the Supreme Court of Ohio regarded this clause as of controlling effect, distinguishing in this regard *Coleman v. New Orleans Ins. Co.*, 49 Ohio St. 310, 31 N. E. 279, 16 L. R. A. 174, 34 Am. St. Rep. 565, where the policy contained no such clause. So, too, in Tennessee, though the general rule as to the effect of separate valuations was approved in *Light v. Greenwich Ins. Co.*, 105 Tenn. 480, 58 S. W. 851, the court regarded a clause declaring the "entire policy" void as controlling the general rule, and held that the policy was not divisible, in *Home Ins. Co. v. Connelly*, 104 Tenn. 93, 56 S. W. 828. In Kentucky, where the general rule as to separate valuations prevails, it was held, in *German Ins. Co. v. Reed*, 9 Ky. Law Rep. 929, that, though the different subjects of the insurance were separately valued and insured, false swearing by the insured would forfeit the entire policy, under a provision declaring that any fraud on the part of the insured should forfeit all claims under the policy.

That the effect of the clause declaring the "entire policy" void is to make the contract indivisible is also asserted in *Dumas v. Northwestern Nat. Ins. Co.*, 12 App. D. C. 245, 40 L. R. A. 358; *Germier*

v. Springfield Fire & Marine Ins. Co., 33 South. 361, 109 La. 341; Agricultural Ins. Co. v. Hamilton, 82 Md. 88, 33 Atl. 429, 30 L. R. A. 633, 51 Am. St. Rep. 457; Martin v. Insurance Co. of North America, 57 N. J. Law, 623, 81 Atl. 213; Elliott v. Teutonia Ins. Co., 20 Pa. Super. Ct. 359; McWilliams v. Cascade Fire & Marine Ins. Co., 7 Wash. 48, 34 Pac. 140.

(p) Same—Condition cannot control when policy is otherwise divisible.

The effect of a condition declaring the entire policy void by breach of a warranty or condition has been considered in the New York courts, and the rule there adopted that such condition cannot control when separate classes of property separately valued are insured.

Reference may be made to American Artistic Gold Stamping Co. v. Glens Falls Ins. Co., 1 Misc. Rep. 114, 20 N. Y. Supp. 646; Knowles v. American Ins. Co., 66 Hun, 220, 21 N. Y. Supp. 50, affirmed without opinion 142 N. Y. 641, 37 N. E. 567; Mott v. Citizens' Ins. Co., 69 Hun, 501, 23 N. Y. Supp. 400; Kiernan v. Agricultural Ins. Co., 81 Hun, 873, 30 N. Y. Supp. 892, reversing 72 Hun, 519, 25 N. Y. Supp. 438; Huff v. Jewett, 44 N. Y. Supp. 311, 20 Misc. Rep. 85; Tompkins v. Hartford Fire Ins. Co., 49 N. Y. Supp. 184, 22 App. Div. 380; Kiernan v. Dutchess County Mut. Ins. Co., 150 N. Y. 190, 44 N. E. 698.

The theory of the New York cases is well stated in Adler v. Germania Fire Ins. Co., 17 Misc. Rep. 347, 39 N. Y. Supp. 1070, where the policy contained a condition that the entire policy should be void if the subject of the insurance became incumbered. In the opinion of the court, the subject of insurance referred to in a policy insuring separate risks means the subject of each separate risk, and the provision that the entire policy shall be void if the subject of insurance becomes incumbered means that the whole insurance on that particular subject or risk will be so affected. Smith v. Agricultural Ins. Co., 118 N. Y. 522, 23 N. E. 883, must be distinguished from other New York cases, as the policy provided that, if there was a breach as to the property "or any part thereof," the entire policy should be void.

The doctrine that the clause declaring the "entire policy" void renders the contract indivisible has also been rejected in Fireman's Fund Ins. Co. v. Barker, 6 Colo. App. 535, 41 Pac. 513; Kansas Farmers' Fire Ins. Co. v. Saindon, 58 Kan. 623, 36 Pac. 983; Miller v. Delaware Ins. Co. (Okl.) 75 Pac. 1121, 65 L. R. A. 173; Miller v. Scottish Union & Nat. Fire Ins. Co. (Okl.) 75 Pac. 1135.

(q) Same—Development of the Missouri rule.

In an early case (*Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247), the Supreme Court of Missouri adopted the rule that a policy covering real and personal property is a divisible contract; and this rule was followed in *Koontz v. Hannibal Sav. & Ins. Co.*, 42 Mo. 126, 97 Am. Dec. 325. Subsequently, in *American Ins. Co. v. Barnett*, 73 Mo. 364, 39 Am. Rep. 517, where the policy covered a dwelling and personal property therein, the court expressed the opinion that, as the policy contained a provision that it should be void if the interest of the insured were not truly stated, and that in such case the insured should not be entitled to recover any loss which might occur to the property insured, "or any part or portion thereof," the policy would be void, not only as to the real estate as to which the breach occurred, but also as to the personalty covered by the same policy, though it was separately valued and insured for a separate amount. This holding was not necessary to the decision of the case, and it is therefore to be regarded as pure dictum, as is pointed out in later cases. So, in *Crook v. Phoenix Ins. Co.*, 38 Mo. App. 582, the Kansas City Court of Appeals unnecessarily recognized the doctrine of the *Barnett Case*, distinguishing it from the preceding cases.

Notwithstanding the character of the expressions in the *Barnett* and *Crook Cases* as dicta, in *Holloway v. Dwelling House Ins. Co.*, 48 Mo. App. 1, where the policy contained the clause declaring the entire policy void in event of a breach of condition, the St. Louis Court of Appeals, regarding the clause as equivalent to the clause in the *Barnett Case*, and as distinguishing the present case from the *Loehner* and *Koontz Cases*, held that its effect was to make the contract entire.

This decision was subsequently followed by the Kansas City Court of Appeals in *Shoup v. Dwelling House Ins. Co.*, 51 Mo. App. 286, and by the St. Louis Court of Appeals in *Maddox v. Dwelling House Ins. Co.*, 56 Mo. App. 343, and *Trabue v. Dwelling House Ins. Co.*, 49 Mo. App. 331.

The *Holloway Case* and the *Trabue Case* were certified to the Supreme Court. In the *Trabue Case*, the Supreme Court (121 Mo. 75, 25 S. W. 848, 23 L. R. A. 719, 42 Am. St. Rep. 523) reaffirmed the doctrine of the *Loehner* and *Koontz Cases*, characterizing the expression in the *Barnett Case* as dictum. The policy, which in-

sured in separate amounts a building and its contents, was regarded as covering in legal effect separate and distinct insurances. It was said that the word "entire," as used in the clause declaring the "entire policy" void, applied only to that insurance or to that portion of the policy as to which breach had occurred, and does not affect the character of the contract as a divisible contract. The Holloway Case was considered as falling within the same principle, and was reversed (121 Mo. 87, 25 S. W. 850).

The principle thus laid down in the Trabue Case is now the settled rule in Missouri, and has been followed in *Jenkins v. German Ins. Co.*, 58 Mo. App. 210; *Stephens v. German Ins. Co.*, 61 Mo. App. 194; *Harness v. National Fire Ins. Co.*, 62 Mo. App. 245; *Baxter v. State Ins. Co.*, 65 Mo. App. 255.

(r) Same—Development of the Texas rule.

The Texas courts seem to have proceeded on a theory entirely different from that on which the courts of other states have reasoned in arriving at the conclusion that the clause declaring the "entire policy" void cannot control, where separate classes of property are insured in one policy. In *Home Ins. Co. v. Smith* (Civ. App.) 29 S. W. 264, it was held without much discussion that such a clause rendered the contract indivisible, so that a policy covering a dwelling and its contents would be wholly void on the breach of a condition declaring the entire policy void if the subject of the insurance is a building on ground not owned by the insured in fee simple. About the same time that this case was decided by the Court of Civil Appeals, the case of *Bills v. Hibernia Ins. Co.*, 87 Tex. 547, 29 S. W. 1063, 47 Am. St. Rep. 121, 29 L. R. A. 706, came before the Supreme Court. The policy covered a building and contents, and provided that the entire policy should be void "if the subject of insurance be a building on ground not owned by the insured in fee simple." The court conceded that, in view of the provision that the "entire policy" should be void, the contract was entire, but held that, as it was entire, it could not be avoided by a breach as to a part of the property. "The subject of insurance" referred to in the condition was the whole property insured, and not a part of it. Consequently a breach as to the building could not affect the insurance on the personalty.

In deference to the decision in the Bills Case, the Court of Civil Appeals (32 S. W. 240) modified its decision in the Smith Case, and held, nevertheless, that the contract might be declared void as to the personalty under a clause providing that the policy should be

void "if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance."

The principle announced in the Bills Case has become the settled rule in Texas, and has been relied on as authority in every case involving the divisibility of the contract since it was decided. It must be conceded that in some of these cases the rule was not applicable, and the approval expressed can be regarded only as pure dictum.

Reference may be made to *Sullivan v. Hartford Fire Ins. Co.* (Tex. Civ. App.) 34 S. W. 999; *Roberts, Willis & Taylor Co. v. Sun Mut. Ins. Co.*, 13 Tex. Civ. App. 64, 35 S. W. 955; *Georgia Home Ins. Co. v. McKinley*, 14 Tex. Civ. App. 7, 37 S. W. 606. Though the Bills Case was not cited, the principle that a breach as to a portion of the property will not avoid the entire policy was asserted in *Alamo Fire Ins. Co. v. Schmitt*, 10 Tex. Civ. App. 550, 30 S. W. 833; *Sun Mut. Ins. Co. v. Tufts*, 20 Tex. Civ. App. 147, 50 S. W. 180.

The rule of the Bills Case has, however, been approved and followed in a series of well-considered cases in which the facts were substantially the same as in the leading case; that is to say, the breach relied on by the insured was of a condition declaring the policy void if "the subject of the insurance" was incumbered, or was not held by a certain title. In all of these cases the theory of the court seems to be that of the Bills Case—that the contract is entire, and consequently the breach, to avoid the whole policy, must be as to the whole of the property covered.

North British & Mercantile Ins. Co. v. Freeman (Tex. Civ. App.) 33 S. W. 1091; *German Ins. Co. v. Lockett*, 12 Tex. Civ. App. 139, 34 S. W. 173; *Georgia Home Ins. Co. v. Brady* (Tex. Civ. App.) 41 S. W. 513; *Hartford Fire Ins. Co. v. Walker* (Tex. Civ. App.) 60 S. W. 820; *Delaware Ins. Co. v. Harris*, 26 Tex. Civ. App. 537, 64 S. W. 867.

Conversely, where the condition is that the policy shall be void if the subject of insurance "or any part thereof" is incumbered, as in *Curlee v. Texas Home Fire Ins. Co.*, 31 Tex. Civ. App. 471, 73 S. W. 831, 986, the entire policy will be declared void, though only a portion of the property is incumbered.

(a) Divisibility of contract dependent on divisibility of risk.

Throughout the discussion of the various principles on which the courts have held contracts of insurance to be entire or divisible, at-

tention has been called to cases in which, though some one of the general rules was relied on as the controlling principle, the court has directly or indirectly intimated that it was influenced to some extent by the character of the risk as entire or divisible; that is to say, it has appeared, from the course of reasoning followed, that in many cases the courts have been more or less influenced to hold the contract entire by the fact that the risk was the same as to all the property, and consequently that a breach of warranty or condition which affected the risk as to part of the property necessarily affected the risk as to the remainder. On the other hand, in other cases it has been apparent that the courts were more or less controlled by the fact that the risk was not the same on all classes of property, and that a breach of warranty or condition which affected the risk on a portion of the property did not, necessarily, affect the risk on the remainder.

Reference may be made to *McQueeney v. Phoenix Ins. Co.*, 52 Ark. 257, 12 S. W. 498, 5 L. R. A. 744, 20 Am. St. Rep. 179; *Worley v. State Ins. Co.*, 91 Iowa, 150, 59 N. W. 16, 51 Am. St. Rep. 334; *Republic County Mut. Fire Ins. Co. v. Johnson* (Kan.) 76 Pac. 419; *German Ins. Co. v. Fairbanks*, 32 Neb. 750, 49 N. W. 711, 29 Am. St. Rep. 459; *Fire Ass'n v. Williamson*, 26 Pa. 196.

(t) **Same—The Indiana rule.**

This method of determining the character of the contract is perhaps best illustrated by the Indiana decisions, and we may therefore designate it as the Indiana rule. The leading case is *Havens v. Home Ins. Co.*, 111 Ind. 90, 12 N. E. 137, 60 Am. Rep. 689, where the Supreme Court of Indiana laid down the principle that where the property covered by a policy, though consisting of separate items, appears to be so situated as to constitute substantially one risk, a matter which renders the policy void as to part of the property affects the risk of the insurer in respect to the other items in the same manner as it affects those items as to which the contract is avoided. Consequently, though there are separate amounts of insurance apportioned to each separate item, the risk being indivisible, the contract must be treated as entire. The question was again considered in *Phenix Ins. Co. v. Pickel*, 119 Ind. 155, 21 N. E. 546, 12 Am. St. Rep. 393, and the court, after an examination of the authorities, concluded that the true rule by which the character of the contract is to be determined is that, where the property is so situated that the risk on one item cannot be affected without affect-

ing the risk on the other items, the policy must be regarded as entire; but where the property is so situated that the risk on each item is separate and distinct from the risk on the other items, so that what affects the risk on one item does not affect the risk on the others, the policy must be regarded as divisible. It was said, too, in the Havens Case, that in order to render the contract entire it is not necessary that the policy should provide that the entire policy shall be void. The rule of the Pickel and Haven Cases was approved in *Manchester Fire Assur. Co. v. Glenn*, 13 Ind. App. 365, 41 N. E. 847, 55 Am. St. Rep. 225; but it was also said that the company might waive the indivisibility of the policy.

In the concrete application of the rule thus laid down the courts of Indiana have been entirely consistent with one possible exception. Thus, where a building and its contents are insured in one policy, a breach as to the building affects the entire risk, and therefore renders the policy void as to the contents, as well as to the building.

Havens v. Home Ins. Co., 111 Ind. 90, 12 N. E. 137, 60 Am. Rep. 689;
Phenix Ins. Co. v. Pickel, 119 Ind. 155, 21 N. E. 546, 12 Am. St. Rep. 393; *Pickel v. Phenix Ins. Co.*, 119 Ind. 291, 21 N. E. 898.

The taking of additional insurance on the building (*Havens v. Home Ins. Co.*, 111 Ind. 90, 12 N. E. 137, 60 Am. Rep. 689), or a change in the title thereof (*Manchester Fire Assur. Co. v. Glenn*, 13 Ind. App. 365, 41 N. E. 847, 55 Am. St. Rep. 225), are recognized as matters affecting the entire risk.

Under the rule as to divisibility of risk, if entirely separate buildings are insured in one policy, a breach as to one building will not affect the insurance on the other buildings, or the insurance on the contents of such other buildings.

Phenix Ins. Co. v. Pickel, 119 Ind. 155, 21 N. E. 546, 12 Am. St. Rep. 393; *Pickel v. Phenix Ins. Co.*, 119 Ind. 291, 21 N. E. 898; *Rogers v. Phenix Ins. Co.*, 121 Ind. 570, 23 N. E. 498.

Though the property insured consists of separate items, if the various classes of property are so situated in respect to each other as to constitute one risk, the contract is entire. Thus, in *Geiss v. Franklin Ins. Co.*, 123 Ind. 172, 24 N. E. 99, 18 Am. St. Rep. 324, the policy covered several different classes of personal property, stock, and fixtures, contained in a store building. As the personalty was all exposed to the same risk, the court held the policy

entire, though the property was separately valued. In *Phoenix Ins. Co. v. Lorenz* (Ind. App.) 29 N. E. 604, the policy contained a provision that, "if the property shall hereafter become mortgaged, this policy shall be void." The appellate court evidently regarded the rule as not applying, for it held that the words "the property" referred only to all the insured property, and that a mortgage of a part thereof was not a violation of the conditions of the policy, relying on *Bailey v. Homestead Fire Ins. Co.*, 16 Hun (N. Y.) 503.

The reasoning on which the decision in the *Lorenz* Case is based is criticised in *Home Fire Ins. Co. v. Bernstein*, 55 Neb. 260, 75 N. W. 839, and it is there pointed out that, while a policy may be regarded as divisible as to separate classes of property separately valued, within any one class the risk must be regarded as entire, so that a breach as to one of the articles of such class would affect the insurance on the whole class.

(u) *Same—Wisconsin.*

In *Hinman v. Hartford Fire Ins. Co.*, 36 Wis. 159, where the policy covered a building and its contents, insured represented that he was the absolute owner of the property. Though he was such owner as to the personalty, he was not absolute owner of the building. The court held, therefore, that the false statement avoided the whole policy. It is evident that the principle underlying this case is the entirety of the risk, though the court did not so state. The case is one of those relied on by the Supreme Court of Indiana in the *Pickel* Case. Again, in *Schumitsch v. American Ins. Co.*, 48 Wis. 26, 3 N. W. 595, the court seems to uphold the principle that the character of the contract depends on the character of the risk. The court laid down the general rule that where a policy covers several classes of personal property, and any property of that description is subsequently mortgaged and placed in the building, so that the risk will attach to it under the general language used, and the insured claims that such mortgaged property is covered by the policy, the mortgage should be deemed a breach of the condition of the policy. If, however, the insured should place subsequently mortgaged property in the building, not claiming that it was covered by the policy, and other personal property in the building which was covered by the policy should be destroyed, the insurance on the unincumbered property would not be affected by the fact that the mortgaged property was in the building at the same time and destroyed with it. So, in *Stevens v. Queen Ins. Co.*, 81 Wis. 335, 51 N. W. 555, 29 Am. St. Rep. 905, where the policy

covered a building and personalty therein, the court held the contract entire, so that a breach as to the building forfeited the insurance as to the personalty.

But, whatever interpretation may be put on these cases, the rule that the construction of the contract as entire or divisible depends on whether the risk is entire or divisible has been established in Wisconsin. In *Carey v. German Ins. Co.*, 84 Wis. 80, 54 N. W. 18, 36 Am. St. Rep. 907, 20 L. R. A. 267, where the property consisted entirely of personal property of one class, a portion of which was taken under a writ of attachment, the court held that the risk was entire, and that the change of title as to a portion of the property forfeited the whole insurance. In the companion case (*Burr v. German Ins. Co.*, 84 Wis. 76, 54 N. W. 22, 36 Am. St. Rep. 905) the insured property included other personalty of a different class, but contained in the same building. As the risk was nevertheless the same on both classes of personalty, the court held the contract was entire.

The converse of the rule has also been illustrated in Wisconsin. In *Loomis v. Rockford Ins. Co.*, 77 Wis. 87, 45 N. W. 813, 20 Am. St. Rep. 96, 8 L. R. A. 834, where the property insured consisted of buildings situated on farms several miles apart, the court held that, as the risk was divisible, the contract was also divisible, and, as a breach of the condition as to the title of one of the buildings could not affect the risk on the other buildings, such a breach would not affect the insurance on such other buildings. This decision was subsequently reaffirmed in 81 Wis. 366, 51 N. W. 564.

An interesting application of the rule was made in *Dohlantry v. Blue Mounds Fire & Lightning Ins. Co.*, 83 Wis. 181, 53 N. W. 448. The policy covered a dwelling house and contents, and, as part of the same premises, a barn and granary and the contents thereof. The dwelling house became and remained vacant, contrary to the provisions of the policy. The court held that, as the vacancy of the building undoubtedly increased the risk, not only as to the house itself, but also as to the other buildings on the same premises, the policy was forfeited as to all the property.

A special variation from the rule is found in *Cooper v. Insurance Co. of Pa.*, 96 Wis. 362, 71 N. W. 606. The policy covered household goods, describing them generally by classes, and recited that it covered "sewing machines." The policy also provided that it should be void if the interest of the insured was other than sole and

unconditional ownership. Among the articles in the house was a sewing machine held under executory contract. The court construed the contract as intended to cover property of the classes named of which the insured would be possessed with proper title. If some articles of the classes named should not be his property, they must be regarded as not intended to be insured. Consequently the fact that some of the property was not his by sole and unconditional ownership would not affect the contract as to other property, of which he had the proper title.

(v) Same—Iowa.

In discussing the construction of the contract when the premium is entire, attention was called to *Garver v. Hawkeye Ins. Co.*, 69 Iowa, 202, 28 N. W. 555, and *Kahler v. Iowa State Ins. Co.*, 106 Iowa, 380, 76 N. W. 734, in both of which the entirety of the consideration was regarded as determining the character of the contract. But, as has been pointed out, the character of the risk apparently influenced the court in *Worley v. State Ins. Co.*, 91 Iowa, 150, 59 N. W. 16, 51 Am. St. Rep. 334. The *Garver* and *Kahler* Cases have been regarded, in *Taylor v. Anchor Mut. Fire Ins. Co.*, 116 Iowa, 625, 88 N. W. 807, 57 L. R. A. 328, 93 Am. St. Rep. 261, as also containing a similar intimation. In that case the policy covered a dwelling and contents, and certain other personal property, including live stock. A breach of the policy was claimed because of the existence of a chattel mortgage on certain of the live stock. Considering the question of the effect of the breach, in view of the fact that the consideration was entire, the court said:

"In *Garver v. Insurance Co.*, 69 Iowa, 202, 28 N. W. 555, the proposition is broadly laid down that, where the premium is in gross, the contract is not divisible, and a breach of warranty as to a part of the property will vitiate the policy as to the whole. But it is to be noticed that there the policy covered a barn and certain horses, and the court might well have held that the risk, so far as the horses were concerned, was involved in any risk affecting the barn; and the conclusion was therefore in accordance with the rule which we think to be the proper one, although we do not regard the reason given as satisfactory. In *Kahler v. Insurance Co.*, 106 Iowa, 380, 76 N. W. 734, the view expressed in the *Garver* Case was qualified, so as to leave the way open for adopting the position which we now take. We therefore hold on this question, as involved in the case before us, that entirety of premium does not nec-

essarily prove that the contract is indivisible, and that, where it appears from the terms of the policy that distinct items or classes of property were separately insured, the policy may be valid as to one item or class, although it is invalid as to another item or class, by reason of breach of conditions of the policy with reference thereto, provided it appears, also, that the risk which it was intended to exclude by the condition which is broken does not apply to the other items or classes of property. In this case a chattel mortgage on the cows and horses could not in any way affect the nature of the risk as to the dwelling house and contents, and therefore we find that a breach of a condition in the policy as to the one class of property did not invalidate the insurance as to the other."

(w) Same—Application of the rule in other states.

Attention has been called to the fact that the character of the risk as entire or divisible has influenced the courts in several cases in which either the separate classification and valuation, or the entirety of the consideration, has been the controlling factor. Thus, where the policy covered separate buildings, the fact that they were more or less closely connected, rendering the risk substantially the same, so that a breach as to one of the buildings affected the whole, has influenced the court to declare the policy an entire contract.

McQueeney v. Phoenix Ins. Co., 52 Ark. 257, 12 S. W. 498, 20 Am. St. Rep. 179, 5 L. R. A. 744; *Republic County Mut. Fire Ins. Co. v. Johnson* (Kan.) 76 Pac. 419; *Hartshorne v. Agricultural Ins. Co.*, 50 N. J. Law, 427, 14 Atl. 615; *Lee v. Howard Fire Ins. Co.*, 3 Gray (Mass.) 583; *Thomas v. Commercial Union Assur. Co.*, 162 Mass. 29, 37 N. E. 672, 44 Am. St. Rep. 323; *Hill v. Middlesex Mut. Fire Ins. Co.*, 55 N. E. 319, 174 Mass. 542; *Brehm Lumber Co. v. Svea Ins. Co.* (Wash.) 79 Pac. 34. But the rule will also be applied to prevent a forfeiture, and, where a block of the tenements constituting one building is covered by the policy, a vacancy of one of the tenements will not render the building vacant, so as to forfeit the policy. *Harrington v. Fitchburg Mut. Fire Ins. Co.*, 124 Mass. 126.

Where the policy covers a building and its contents, such as furniture, merchandise, or machinery, an increase of risk on the building manifestly affects the risk on the contents, and the contract must be regarded as entire, to the extent that a breach as to the building will forfeit also the insurance on the contents. As said in a leading Michigan case (*Ætna Ins. Co. v. Resh*, 44 Mich. 55, 6 N. W. 114, 38 Am. Rep. 228), a policy covering real and personal

property can be regarded as divisible only when the risk on each is different.

This principle is also illustrated in *Western Assur. Co. v. Stoddard*, 88 Ala. 606, 7 South. 379; *Springfield Fire & Marine Ins. Co. v. Phillips*, 16 Ky. Law Rep. 352; *Huck v. Globe Ins. Co.*, 127 Mass. 306, 34 Am. Rep. 373; *McGowan v. People's Mut. Fire Ins. Co.*, 54 Vt. 211, 41 Am. Rep. 843.

On the other hand, it has been held that, where the breach is the procuring of other insurance on the contents (*Jones v. Maine Mut. Fire Ins. Co.*, 18 Me. 155), the risk on the building is not affected, so as to forfeit the insurance thereon.

The rule that, where personal property only is covered by the policy, and is so situated that the risk on one item cannot be increased without affecting the risk on the whole property, the contract is entire, was applied in *McWilliams v. Cascade Fire & Marine Ins. Co.*, 7 Wash. 48, 34 Pac. 140, where the policy covered household goods, including a piano, and it was shown that the insured was not the absolute owner of the piano.

The general principle that, where the different classes of property covered by the policy are so situated that the risk is the same on all of the property, the contract is entire, is illustrated in the following cases: *Phoenix Ins. Co. v. Public Parks Amusement Co.*, 37 S. W. 959, 63 Ark. 187; *Kimball v. Howard Fire Ins. Co.*, 8 Gray (Mass.) 33; *Western Massachusetts Ins. Co. v. Riker*, 10 Mich. 279; *Home Fire Ins. Co. v. Bernstein*, 55 Neb. 260, 75 N. W. 839; *Baldwin v. Hartford Fire Ins. Co.*, 60 N. H. 422, 49 Am. Rep. 324; *Briggs v. Insurance Co.*, 88 N. C. 141; *Cuthbertson v. North Carolina Home Ins. Co.*, 96 N. C. 480, 2 S. E. 258; *Fire Ass'n of Philadelphia v. Williamson*, 26 Pa. 186; *Herzog v. Palatine Ins. Co.* (Wash.) 79 Pac. 287.

Analogous to, and to some extent dependent on, the rule that the construction of the policy as an entire or divisible contract is determined by the character of the risk, is the rule that a breach of the iron safe clause affects only the insurance on the goods, and cannot operate to forfeit the insurance on the building covered by the same policy. As said in *Hanover Fire Ins. Co. v. Crawford*, 121 Ala. 258, 25 South. 912, 77 Am. St. Rep. 55, by such a breach the risk on the building is in no way enhanced, and the contract must be regarded as divisible, though the consideration is entire.

Reference may also be made to *Mitchell v. Mississippi Home Ins. Co.*, 72 Miss. 53, 18 South. 86, 48 Am. St. Rep. 535; *Miller v. Delaware Ins. Co.* (Okla.) 75 Pac. 1121, 65 L. R. A. 173; *Miller v. Scottish*

Union & National Fire Ins. Co. (Okl.) 75 Pac. 1135; Roberts, Willis & Taylor Co. v. Sun Mut. Ins. Co., 13 Tex. Civ. App. 64, 35 S. W. 955; Georgia Home Ins. Co. v. McKinley, 14 Tex. Civ. App. 7, 37 S. W. 606; Sun Mut. Ins. Co. v. Tufts, 20 Tex. Civ. App. 147, 50 S. W. 180.

In Georgia the fact that the consideration is entire is, however, regarded as controlling (Southern Fire Ins. Co. v. Knight, 111 Ga. 622, 36 S. E. 821, 52 L. R. A. 70, 78 Am. St. Rep. 216).

(x) Conclusion.

Though in some jurisdictions the fact that the consideration for the policy is entire has led the courts to declare the contract entire, an examination of the cases justifies the statement that the rule established by the weight of authority is that, if the policy covers separate classes or items of property, separately valued and insured for separate amounts, the contract is divisible, and a breach of warranty or condition which affects only one of the classes or items covered will not avoid the insurance on the other classes or items. The fact that the policy contains a declaration that the entire policy shall be void on a breach of condition does not change the rule. Reason and justice require, however, that the rule should be modified when the various classes of property are so situated in respect to each other that the risk is substantially the same on all, and in such case a breach of condition or warranty which increases the risk on one class or item of the property insured should forfeit the whole insurance.

4 J. L. R.
4/6/11

